



EUROPEAN COMMISSION

DIRECTORATE-GENERAL  
ENVIRONMENT

The Director-General

**Frequently Asked Questions (FAQs) on  
Regulation (EC) 1013/2006 on shipments of waste**

## Notice<sup>1</sup>:

1. The FAQs were elaborated throughout a time frame of more than a year (January 2009 to February 2010).
2. To facilitate a targeted search, directly below each question, keywords are listed.
3. As a basis for each FAQ, the European legislation in the respective version of preparing the document was taken. Note that the cited documents might not be the actual version. For make the FAQs uncomplicated to read, it was to a large extent waived to use footnotes with correct citation of the legal documents referred to.

The FAQ are mostly related to the interpretation of two legal documents,

- the Waste Shipment Regulation  
(Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1), last amended by Directive 2009/31/EC of 23 April 2009 (OJ L 140, p. 114).)

and

- the Waste Framework Directive  
(Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ L 114, 27.4.2006, p. 9); last amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (OJ L 140, 5.6.2009, p. 114). Note that this Directive will be repealed by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ L 312, 22.11.2008, p. 3) by 11 December 2010. Any differences between Directive 2006/12/EC and Directive 2008/98/EC are, where appropriate, outlined and discussed in the text).

For the purpose of conciseness, these two documents are continuously referred to as “WSR” and “WFD”.

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<sup>1</sup> The answers to Questions 4.11, 4.13 and 4.16 were amended in July 2012

## TABLE OF CONTENTS

1.	<b>Classification issues related to single waste streams</b> .....	10
1.1.	When can plastic waste be regarded as plastic waste under the scope of entry B3010 in Annex V, Part 1, List B to Regulation (EC) No 1013/2006, including the fact that it shall have been "prepared to a specification"? <i>Keywords: Classification of plastic waste; prepared to a specification</i> .....	10
1.2.	How should plastic waste containing brominated flame retardants (BFRs) be classified? <i>Keywords: Classification of plastic waste; prepared to a specification</i> ..	11
1.3.	It is perceivable that certain enforceability problems may exist, if a mixture of BFR-rich plastic waste containing penta- and octaBDE above the threshold level of 0,1% are not classified as B3010. Is the existence of a threshold level in wastes enforceable at all? How could associated enforceability problems be dealt with? <i>Keywords: Classification of plastic waste; brominated flame retardants, enforceability problem</i> .....	12
1.4.	What should the correct classification for wastes from "white goods" (large household appliances such as stoves, dishwashers, refrigerators etc,) which have been decontaminated from any hazardous components and are free of any cables, printed circuit cards, capacitors and so on, be? <i>Keywords: Classification; decontaminated white goods</i> .....	13
1.5.	Plastic waste is often contaminated with other wastes (adhering foodstuffs, sterilizing agents, bleaches). Is post-consumer plastic waste excluded from entry B3010 unless it is properly sorted and cleansed, because of the phrase "not mixed with other materials"? <i>Keywords: Classification of post consumer plastic waste; mixing of wastes</i> .....	14
1.6.	How should post-consumer plastic waste be classified? <i>Keywords: Classification of post consumer plastic waste; contamination</i> .....	15
1.7.	How does the wording of entry B3010 relate to some of the other entries, like glass (B2020, which can also be packaging material) and paper (B3020, provided they are not mixed with hazardous wastes), where an explicit requirement such as – not mixed with other wastes – is not set? <i>Keywords: Classification of plastic, glass and paper; entry B3010</i> .....	16
1.8.	If there are indeed stricter standards with regard to plastic waste, are these stricter standards meant to exclude post-consumer plastic waste from entry B3010 unless it is properly sorted from other materials and cleansed? <i>Keywords: Classification of post consumer plastic waste; contamination; prepared to a specification</i> .....	17
1.9.	What is the relationship between the term "mixture" in the sense of the definition of mixture in Article 2 (3) of the WSR and the wording "not mixed with other wastes" in entry B3010, and the term "contamination"? <i>Keywords: Classification; Plastic waste; Definition of mixture and contamination</i> .....	17
1.10.	How should clean, separated beverage cartons with plastic and/or metallic coatings, such as TetraPaks be classified? <i>Keywords: Classification, Laminated Cardboard; TetraPak</i> .....	18

1.11.	In the final process of textile manufacturing, rolls of textiles are edge-trimmed. The resulting edge-trim (weft) is intended for use in the manufacturing of rags. Assuming that this weft meets the conditions of Article 5 (1) [(a) to (d)] of the WFD, what other additional criteria, if any, would need to be met for such textile edge trim to be regarded as a by-product? <i>Keywords: Definition of by-product, waste textiles</i> .....	20
1.12.	Does the code B1120 refer to catalytic converters used in vehicles containing lanthanides or transition metals (e.g. cerium, iron, or manganese)? <i>Keywords: Classification issues related to single waste streams; Catalysts</i> .....	21
1.13.	Does the code B1130 refer also to catalytic converters used in vehicles containing precious metals such as platinum, rhodium, palladium (most common)? <i>Keywords: Classification issues related to single waste streams; Catalysts</i> .....	24
1.14.	Code B1130 is defined as: “Cleaned spent precious-metal-bearing catalysts”. What does the word “cleaned” mean in reference to vehicle catalytic converters? <i>Keywords: Classification; Catalysts</i> .....	25
1.15.	What would be the correct classification of vehicle catalytic converters according to WSR: A2030 or unlisted waste? <i>Keywords: Classification; Catalysts</i> .....	26
1.16.	Basel entry A1190 reads: “Waste metal cables coated or insulated with plastics containing or contaminated with coal tar, PCB, lead, cadmium, other organohalogen compounds or other Annex I constituents, to the extent that they exhibit Annex III characteristics”. Does the word 'containing' refer to the plastic part only, or does it apply to the total cable? <i>Keywords: Classification; Waste metal cables coated or insulated with plastics</i> .....	26
1.17.	If the word 'containing' within Basel entry A1190 refers to the plastic part only, does this mean that old ground cables without plastic coating/insulation are not classified in this entry? <i>Keywords; Classification; Waste metal cables coated or insulated with plastics</i> .....	27
2.	<b>General classification and procedural issues</b> .....	28
2.1.	In order for a waste shipment to fall within a specific waste entry in Annex V of the WSR which has several indentations, shall the shipment contain only one of the specific indentations or may the shipment also contain several of the indentations mixed together? <i>Keywords: Mixing of wastes; indentations; contamination</i> .....	28
2.2.	Competent authorities of some Member States refuse to accept that only one Basel or OECD waste identification code is used in the notification document in case a number of similar codes from the 'European Waste List' (EWL) can be put under the umbrella of one single Basel code. What should the legitimate practice be and under what rules can this practice be used? <i>Keywords: General classification issues; classification in case of several EWC codes under one Basel code</i> .....	29
2.3.	What is the relationship between the term “mixture” in the sense of the definition of mixture in Article 2 (3) of the WSR and the wording "not mixed with other wastes" in entry B3010, and the term "contamination"? <i>Keywords: Classification; Plastic waste; Definition of mixture and contamination</i> .....	30
2.4.	Should an entry of Annex III (green-list) that is contaminated no longer be subject to the general information requirement, if the contamination levels are too high, or should the basic principle be that contaminated waste not be regarded as "green" and	

	only in cases of minor contamination be regarded as such? <i>Keywords: General classification issues; procedure; contamination of waste; ways of evaluation of appropriate procedure</i> .....	32
2.5.	As far as the environmentally sound recovery is concerned, can standards be used to determine that certain waste may not be regarded as "green", or is the decision always dependent on the standard of the recovery facility in the country of destination? <i>Keywords: General classification issues; procedure; contamination of waste; ways of evaluation of appropriate procedure</i> .....	33
2.6.	Considering that for heavily contaminated wastes the recovery in an environmentally sound manner is often possible, should in such cases this waste be only subject to the general information requirements laid down in Article 18? <i>Keywords: General classification issues; procedure; contamination of waste; ways of evaluation of appropriate procedure</i> .....	34
2.7.	Is a shipment of green-listed waste (e.g. metal scrap) where radioactive contamination is detected considered to be legal, illegal, or incomplete? <i>Keywords: General classification issues; scope of WSR; radioactive contamination of waste...</i>	34
2.8.	What is the meaning of the term type of waste in Article 4(6) of the WSR? (Does it refer to waste which can be classified under the same EWC or to a single material which can be assigned different EWC, such as aluminium waste from packaging, or from demolition...?) <i>Keywords: General classification issues; definition "type of waste" in WSR; one/several EWC codes</i> .....	37
2.9.	In the meaning of the WFD what kind of wastes is to be considered as the same type of wastes, when the requirements of Decision 2000/532/EC are to be taken into consideration? <i>Keywords: General classification issues; definition "type of waste" in WSR; one/several EWC codes</i> .....	39
2.10.	Shall waste classification be made in accordance to annexes III, IIIA, IV and IVA of the WSR, if transboundary shipment takes place for the purpose of disposal operations, or is the use of these annexes only relevant for shipments destined for recovery operations? <i>Keywords: General classification issues; procedural requirements; Use of Annexes II, IIA, IV and IVA in case of shipments destined for recovery operations</i> .....	39
3.	<b>Take-back procedure</b> .....	41
3.1.	Who is responsible for cases of damages during transport and combined changes of the composition of the wastes? Who shall bear the costs for transport and alternative treatment? Is it the original dispatcher (notifier) or the carrier, who is the generator of the (new) waste? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i> .....	41
3.2.	Who should be the notifier, if a return of a waste which has changed composition to the state of dispatch is required? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i> .....	43
3.3.	Is a duly reasoned request by the state, where the accident happened (e.g. also a transit state) sufficient for a take-back procedure? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i> .....	43

3.4.	If the original dispatcher, who might simultaneously be the carrier went bankrupt or entered into liquidation after having received the transport insurance payment, is there liability of the state, where the waste was generated (e.g. a transit state, when the accident happened on its territory)? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i> .....	44
3.5.	The consignee of Member State B simultaneously acts as a carrier and picks up hazardous wastes at a collector's site in the state of dispatch A. The consignee of the Member State B is an authorized collector and conditioner for the wastes in question, showed the appropriate license for collection of hazardous wastes and pretended to have all necessary permits for the transfrontier shipment of these wastes, although this is not the case in reality. Is the consignee of Member State B the main responsible person for the illegal shipment in this case or the waste collector in Member State A? <i>Keywords: Take-back-procedure; costs; shared responsibility</i> ..	44
3.6.	As regards the shipment of green-listed waste with notification to EU-Member States with a transitional period, would it be correct ex lege, there would only be a moral obligation for the dispatcher or state of dispatch to take back illegal shipments of falsely declared green-listed waste? <i>Keywords: Take-back-procedure; transitional periods for new Member States</i> .....	46
3.7.	Is the take back obligation also applicable in cases of bankruptcy of the consignee? <i>Keywords: Take-back-procedure; bankrupt of consignee; destiny of waste unclear</i>	47
3.8.	Is the take back obligation still applicable after the 180-day period (Article 8(6) of the old Regulation 259/93/EEC) and after the one year period (Article 16(e) of the WSR? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i>	49
3.9.	Given that the consignee in country B got bankrupt after the 180-day period expired (under the old Regulation 259/93/EEC), is the notifier still obliged to take back the waste? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i>	50
3.10.	In case waste got irreversibly mixed with other waste, taking into account the second paragraph of Article 22(3) of WSR that the take-back obligations shall not apply, how does this relate to Article 23 on the costs for take-back? Who bears the costs for such a treatment, the notifier or, if impracticable, the competent authority of dispatch? <i>Keywords: Take-back-procedure; costs; damage of waste during transport</i> .....	51
4.	<b>General procedural issues - Treatment operations</b> .....	52
4.1.	If a waste shipment is destined for interim recovery operations R12-R13, does the WSR require that information is provided about the final recovery operation, i.e. in the sense that the competent authority of dispatch may demand that the final recovery operation is mentioned on the notification form (in case of prior written notification and consent-procedure) or on the Annex VII-document (in case of Article 18-procedure) or is it allowed to provide such information at a later stage? Is it allowed under the WSR to arrange a shipment destined for storage even if the final recovery is still unclear? <i>Keywords: Procedure; Treatment operations; Article 18 procedure; Interim recovery</i> .....	52
4.2.	Is a shipment destined for 'R12' and 'R13' always destined for interim recovery or can it also be recovery? <i>Keywords: Procedure; Treatment operations; Article 18 procedure; Interim recovery</i> .....	54

4.3.	Is interim recovery limited to the notification procedure? <i>Keywords: Procedure; Treatment operations; Article 18 procedure; Interim recovery</i> .....	56
4.4.	Is R 12 / R 13 interim recovery (article 2 (7)) coupled with the notification procedure and R 12 / R 13 recovery (article 2 (6)) with the information procedure of Article 18 of the EU WSR? <i>Keywords: Procedure; Treatment operations; basic definitions; Article 18 procedure; Interim recovery; term "recovery" of Waste Framework Directive</i> .....	57
4.5.	How should proof of a notification contract concluded between the notifier and consignee be provided to the relevant authorities? How should proof of a contract concluded between the producer, new producer or collector and the broker or dealer, in the event that the broker or dealer acts as notifier be provided to the relevant authorities? <i>Keywords: Procedure, Proof of contracts</i> .....	57
4.6.	Annex II, Part 1, No. 14 of WSR indicates the possibility to provide information in possible alternative routings. Are there any restrictions in describing more than one transport route in a notification dossier, as long as the starting point and the final destination stay the same? <i>Keywords: Procedural requirements; notification procedure; request for one route and no alternative</i> .....	58
4.7.	According to Annex II, Part 3, No. 2 of WSR, competent authorities can request a copy of the permit issued in accordance with the IPPC Directive. What should this practically mean taking into account that permits of operation facilities can be very complex and that they are issued in the language of the country of destination? What does this mean for plants for which permits have been issued under a different legislation (e.g. outside the EU)? <i>Keywords: Procedure, Permits of treatment facilities</i> .....	61
4.8.	What kind of proof can a competent authority request in order to release the financial guarantee associated with the prior written notification and consent procedure? <i>Keywords: Procedural requirements; release of the financial guarantee</i> .....	62
4.9.	How the movement forms in the shipment of wastes requiring notification should be handled in the case of discontinued shipments, where more than one mode of transport (e.g. trucks, train, ships) is involved in a shipment? <i>Keywords: Procedure; notification procedure; movement documents; procedure in case of discontinued shipments</i> .....	62
4.10.	What procedural requirements may be used for importing wastes that are listed in Annex IIIB (including potential future entries) of the waste shipment regulation, into the European Community from an OECD country? <i>Keywords: Procedural requirements for Annex IIIB wastes</i> .....	65
4.11.	What procedural requirements may be used for importing wastes that are listed in Annex IIIB (including potential future entries) of the waste shipment regulation, into the European Community from a non-OECD country, party to the Basel Convention? <i>Keywords: Procedural requirements for Annex IIIB wastes</i> .....	66
4.12.	If a notifier proceeds with several notifications per year, is there a possibility to establish one single annual financial guarantee for all the relevant shipments concerned? <i>Keywords: Procedure, Financial guarantee for several shipments</i> .....	67

- 4.13. What procedure is necessary for the shipment of 'green-listed' waste for recovery from a non-EU country to another non-EU country transiting through the Community? *Keywords: Procedural requirements for Annex III wastes* ..... 68
- 4.14. Should shipments of hazardous waste transiting through the Community and destined to a country, to which the OECD Decision does not apply, be considered an illegal shipment? *Keywords: Procedural requirements for Annex III wastes* ..... 69
- 4.15. Is the import of green or hazardous waste from Kosovo to Germany for the purpose of laboratory analysis possible under the WSR? If yes what shipment procedure should apply? *Keywords: Procedural requirements; Wastes destined for laboratory analysis; areas during situations of crisis; Kosovo* ..... 70
- 4.16. What procedure governs the import of green-listed waste destined for recovery into the EU from a non-OECD country party to the Basel Convention? *Keywords: Procedural requirements for Annex III wastes* ..... 72
- 4.17. Shall the “date of transmission of the acknowledgement” as referred to in Article 9 of the WSR be understood as the date when the acknowledgement is received by the competent authority of transit? *Keywords: Time frame for taking a decision by the competent authorities concerned, transmission of the acknowledgement* ..... 73
- 4.18. Regarding the duration of a contract, does it explicitly mean that the period of validity of the contract shall be at least one year following the date of the last shipment indicated in block 6 of the Notification document and two years when one interim and one subsequent non-interim operation are notified? *Keywords: Procedural requirements; duration of contract* ..... 74
- 4.19. If during transmission of the notification the competent authority of dispatch informs other competent authorities concerned that it considers the notification not properly completed (but properly carried out), is the competent authority of destination bound by that information and is obliged to wait and not send the acknowledgement according to Art. 8(2) WSR until the competent authority of dispatch informs according to last sentence of Art. 8(1) WSR that the requested information and documentation has been received and that the notification is considered properly completed? *Keywords: Procedural requirements; notification procedure; bindingness of opinion of one CA* ..... 75
- 4.20. Is it admissible to lay down more detailed provisions regarding the notification (which shall certainly be in line with the provisions stipulated in Regulation 1013/2006) in the national legislation even if the main rules are already stipulated in the directly applicable Regulation? *Keywords: Basic questions; procedural requirements; Detailed provisions in national legislation additional to WSR requirements* ..... 76
- 4.21. Does the term “any natural or legal person under the jurisdiction of that Member State...” in the definition of the “notifier” under Article 2(15) of WSR, presuppose that the notifier has to have a business address in the Member State, where the shipment is dispatched from? *Keywords: Definition of notifier, Need of business address/seat, Free movement of services* ..... 78
- 4.22. With reference to the new waste framework directive 2008/98/EC, which recovery operation(s) shall describe the newly introduced operation “preparing for re-use”? *Keywords: Definition for R/D Codes; new WFD* ..... 79



4.23.	Should the shipment of waste destined for backfilling be regarded as shipment for recovery? / What is the appropriate operation to correctly describe backfilling operations? <i>Keywords: Treatment operations; Backfilling as disposal or recovery</i>	80
4.24.	Do the Mining Waste Directive’s provisions on placing waste other than extractive waste used for filling in excavation voids mandatorily mean that a backfilling operation fulfilling these criteria always has to be considered as a disposal operation in the meaning of WSR and WFD, or is it possible that a backfilling operation with waste other than extractive waste in an excavation void can be regarded as a recovery operation? <i>Keywords: Treatment operations; Backfilling as disposal or recovery; consistency with Mining Waste Directive</i>	82
5.	<b>Basic definitions, miscellaneous</b>	83
5.1.	What do the definitions of “producer” (Article 2(9)) and “notifier” (Article 2(15) (a) (ii)) mean for waste streams which arrive at a waste treatment plant after collection and which are subsequently shipped for export untreated because they are already in the shape required by the receiving plant – Does such a plant become the new waste producer for the following process if a transboundary shipment to a further waste treatment takes place? How do the WSR definitions apply in the case of a transboundary shipment of waste streams from one waste treatment facility to another? <i>Keywords: Basic definitions; Definitions of waste 'producer' and 'notifier'; waste streams from one waste treatment facility to another</i>	83
5.2.	Is it acceptable and compliant with WSR, that a company acting as a broker or a dealer but not taking any physical control of waste, be considered a consignee of a waste in the meaning of the definition stipulated in Article 2(14) of the regulation? <i>Keywords: Basic definitions; term "consignee" in WSR</i>	84
5.3.	Regarding Annex IC to WSR, to which situations does the sentence of paragraph 15 of Annex I to Commission Regulation (EC) No 669/2008 of 15 July 2008 “or have some other form of legal control over the waste” refer? <i>Keywords: Basic definitions; term "consignee" in WSR</i>	86
5.4.	How should a company handling the transport, reloading and storage for the same waste be regarded: as a transporter, a collector, or an interim recovery facility? <i>Keywords: Definition of transport, collection and storage; Storage within the transport vs. treatment; R/D Codes</i>	86
5.5.	What if, in the case above, the waste which finally is loaded into containers does not originate from the same source (e.g., trucks from different producers/starting points bring the waste into Member State B) – How should a company handling the transport, reloading and storage in this case be regarded: as transporter, collector, or interim recovery facility? <i>Keywords: Definition of transport, collection and storage; Storage within the transport vs. treatment; R/D Codes</i>	87

## 1. CLASSIFICATION ISSUES RELATED TO SINGLE WASTE STREAMS

### 1.1. When can plastic waste be regarded as plastic waste under the scope of entry B3010 in Annex V, Part 1, List B to Regulation (EC) No 1013/2006, including the fact that it shall have been "prepared to a specification"?

*Keywords: Classification of plastic waste; prepared to a specification*

Plastic waste can be regarded as plastic waste under the scope of entry B3010 if

- it is scrap plastic of non-halogenated polymers and copolymers, cured waste resins or condensation products and certain fluorinated polymer wastes (i.e. perfluoroethylene/propylene (FEP) and certain perfluoro alkoxyl alkane) or mixtures thereof;
- it is not mixed with other wastes;
- it is prepared to a specification;
- it is not contaminated by other materials to an extent which
  - 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 Hazardous Waste Directive 91/689/EEC; or
  - prevents the recovery of the waste in an environmentally sound manner.

The Basel Convention, the OECD-Decision C (2001)/107/Final and the WSR do not provide a definition of the term “prepared to a specification”.

Plastic scrap specifications may be obtained or found through or on the websites of organizations such as ISRI (Institute of Scrap Recycling Industries) or BIR (Bureau International de Recyclage).

However, since these documents do not have any legally binding impact, it might be possible that references made to these specifications are not accepted by authorities or courts.

If a disagreement on the classification of the waste in the country of dispatch and the country of destination is existent, Article 28 of the WSR shall be applied.

## **1.2. How should plastic waste containing brominated flame retardants (BFRs) be classified?**

*Keywords: Classification of plastic waste; prepared to a specification*

Brominated flame retardants that have been used in the manufacture of plastics often included chemicals of potential concern like polybrominated biphenyl ethers (PBDE), such as penta-, octa- and decabromodiphenyl ether.

In assessing the hazardousness of a waste, reference should be made to Note 1 of Annex III to Directive 2008/98/EC on waste. This note stipulates that the [...]attribution of the hazardous properties 'toxic' (and 'very toxic'), 'harmful', 'corrosive', 'irritant', 'carcinogenic', 'toxic to reproduction', 'mutagenic' and 'eco-toxic' is made on the basis of the criteria laid down by Annex VI, to Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances. Annex VI to this directive further indicates that where impurities, additives or individual constituents of substances have been identified at concentration greater than or equal to:

- 0,1% % for substances classified as very toxic, toxic, carcinogenic (category 1 or 2), mutagenic (category 1 or 2), toxic to reproduction (category 1 or 2), or dangerous for the environment (assigned the symbol 'N' for the aquatic environment, dangerous for the ozone layer), or
- 1% for substances classified as harmful, corrosive, irritant sensitising, carcinogenic (category 3), mutagenic (category 3), toxic to reproduction (category 3), or dangerous for the environment (not assigned the symbol 'N', i.e. harmful to aquatic organisms, may cause long-term adverse effects),

the classification of the waste should then be carried out according to the requirements of Articles 5, 6 and 7 of Council Directive 1999/45/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations.

Therefore, the classification of PBDE-containing plastic waste can only be made on a case-by-case basis.

Until 31 May 2015, the use of Annex VI of Directive 67/548/EEC to determine the classification of a waste in terms of its hazardousness may be used as an alternative option to the use of the new Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures (CLP regulation) and in particular its Annex I which sets out criteria and provisions for classification in hazard classes. As of 1 June 2015, directives 67/548/EEC and 1999/45/EC are repealed and only the new CLP regulation will apply.

- 1.3. It is perceivable that certain enforceability problems may exist, if a mixture of BFR-rich plastic waste containing penta- and octaBDE above the threshold level of 0,1% are not classified as B3010. Is the existence of a threshold level in wastes enforceable at all? How could associated enforceability problems be dealt with?**  
*Keywords: Classification of plastic waste; brominated flame retardants, enforceability problem*

The assignment made in the question above was related to the mixture of “BFR rich plastics” **and other plastic wastes**. It was specified that if the concentration of penta- and octaBDE in the BFR rich fraction in this mixture exceeds 0.1% than this mixture shall not be classified as B3010. This answer deals with the shipment of plastic waste from electric and electronic equipment containing brominated flame retardants and related enforcement problems.

The WEEE-Directive Annex II requires a selective treatment for plastic containing brominated flame retardants (in the following “BFR rich plastics”) using best available treatment, recovery and recycling techniques.

Plastic waste streams stemming from electric and electronic equipment contain mainly “BFR poor plastics” and only to a minor part “BFR rich plastics” if the separation step (as required by the WEEE Directive) has not been carried out.

In practice in some cases the separation step (removal) of the “BFR rich plastics” will take place in the country of destination. This means a waste stream containing two plastic waste fractions is shipped: A plastic waste fraction which is not listed (BFR rich plastics) and a plastic waste fraction (BFR poor plastics) that could be classified as B3010.

A shipment of this mixture of two plastic waste fractions as “green listed waste” is not in line with the WSR as for wastes not listed a notification procedure is required.

The concentrations of octa- or penta-BDE within the not separated plastic waste stream probably will be below 0.1% as the amount of “BFR rich plastics” is much smaller compared to the “BFR poor plastics”-fraction. Only the separated “BFR rich plastics” fraction will show concentrations of octa- or penta-BDE exceeding 0.1%.

As a consequence the enforceability problem in the shipment of plastic waste streams stemming from electric and electronic equipment cannot be solved by chemical analyses, but may be solved by better knowledge of the origin and previous handling of the waste.

Enforcement depends on sorting of the plastic wastes (like plastic components of TVs, computers, etc.). Once the plastics are shredded, it will be difficult to identify PBDEs in a mixed plastic fraction. However, a recycling plant that receives the WEEE and mixes different BFR-rich (thus hazardous) and BFR-free fractions is guilty of diluting hazardous wastes (infringement of Waste Framework Directive, thus illegal).

Inspectors can claim further information from the producer or trader of the waste:

- Asking for a confirmation/certificate that the removal step (as required by the WEEE Directive) has been carried out.
- If the waste was treated before in a treatment facility the permits of this plant could be claimed. The permits give evidence if the facility is able to carry out the removal step needed. However this permit does not allow to judge if the separation step has carried out or not.
- Companies are not required by law to deliver results of a chemical analysis for the waste shipped. However the assignment of wastes to a waste type has to be based on the characteristics of waste. The origin of the waste as well as the chemical characteristics have to be considered. In several cases chemical analyses will be necessary for a proper assignment of a waste to the correct waste type. The basics of the assessment shall be recorded at the producer of the waste. In the case of an inspection these records can be asked for.

A practicable way to better up the situation concerning the problems of enforceability could be an amendment of the WEEE Directive. It is recommended to consider at least the following two items:

- Currently it is not clear how the removal of “BFR rich plastics” from any separately collected WEEE (Annex II WEEE) has to be recorded. The plants where the separation takes place shall file records that the separation step has been carried out.
- According Article 6 (5) of the WEEE the treatment operation may also be undertaken outside the respective Member State or the Community provided that the shipment of WEEE is in compliance with the WSR. However, the export of plastics containing both fractions (“BFR rich plastics” and “BFR poor plastics”) as green listed waste is not in line with the WSR. A practical solution would be that the removal of “BFR rich plastics” required by the WEEE Directive Annex II has to be carried out before the shipment takes place.

To solve enforcement problems in the shipment of plastics from electric and electronic equipment a detailed documentation of the previous treatment processes is needed. The level of detail of this documentation should be stipulated e.g. by an amendment of the WEEE Directive.

**1.4. What should the correct classification for wastes from "white goods" (large household appliances such as stoves, dishwashers, refrigerators etc.) which have been decontaminated from any hazardous components and are free of any cables, printed circuit cards, capacitors and so on, be?**

*Keywords: Classification; decontaminated white goods*

GC020 of Annex III Part II WSR is not appropriate to classify “white goods” as it includes electronic scrap (e.g. printed circuit boards, electronic components, wire, etc.) and reclaimed

electronic components suitable for base and precious metal recovery (these parts have been already removed).

In contrast, "white goods" shall be classified as GC010 ("Electrical assemblies consisting only of metals or alloys") if

- they have been decontaminated from any hazardous components and are free of any cables, printed circuit cards, capacitors etc. and
- the non-metal-parts (E.g. for cooling devices the metal content amount to 60%, the plastic content to 35%) have been removed.

In the case that non-metal compounds have not been separated, "white goods", which have been decontaminated from any hazardous components and are free of any cables, printed circuit cards, capacitors and so on are not listed.

This is in line with the revised Correspondents' Guidelines No 1 on Shipments of Waste Electrical and Electronic Equipment (WEEE). "A precautionary approach should be taken to the classification of WEEE. If it is not clear that the WEEE in question is covered by an entry in Annex III ("Green" listed waste), IIIA or IIIB of WSR, the shipment should be notified."

**1.5. Plastic waste is often contaminated with other wastes (adhering foodstuffs, sterilizing agents, bleaches). Is post-consumer plastic waste excluded from entry B3010 unless it is properly sorted and cleansed, because of the phrase "not mixed with other materials"?**

*Keywords: Classification of post consumer plastic waste; mixing of wastes*

Entry B3010 states that plastic or mixed plastic materials, provided they are not mixed with other wastes, fall under the scope of this entry. Entry B3010 specifies three main groups of plastics (all of them including several indentations): Scrap plastic of non-halogenated polymers and copolymers, Cured waste resins or condensation products and fluorinated polymer wastes. For fluorinated polymer wastes post-consumer wastes are excluded explicitly from this entry.

The WSR prohibits the mixing of different **waste entries** (except they are included in Annex IIIA, otherwise for mixtures of wastes the notification procedure has to be applied). Therefore, it can be excluded, that the phrase "not mixed with other wastes" in the wording of B3010 means that this waste shall not be mixed with other waste **entries**.

"Not mixed with other wastes" has to be seen in light of the wording of the category of wastes within Annex V Part 1, List B B3 "Wastes containing principally organic constituents, which may contain metals and inorganic materials". Wastes within Category B3 contain principally organic constituents and may contain metals and inorganic materials. For B3010 Category B3 is further constricted: B3010 shall not be mixed with other wastes (this includes mixtures with hazardous as well as non-hazardous organic constituents, metals and inorganic materials mentioned in B3). Therefore other wastes shall be separated.

Post-consumer plastic waste is included in entry B3010

- if the plastic waste is not mixed with other wastes (this includes mixtures with hazardous as well as non-hazardous metals and inorganic materials mentioned in B3)
- the plastic waste is prepared to a specification
- polymers and copolymers are not halogenated

Post-consumer plastic waste fractions consisting predominantly of PVC are included in entry GH013 if the waste is not contaminated and a recovery of the waste in an environmentally sound manner is possible.

Aspects for the meaning of the term “prepared to a specification”: Current plastic scrap specifications may be obtained or found through or on the websites of organizations such as ISRI (Institute of Scrap Recycling Industries) and BIR (Bureau International de Recyclage). However, since these documents do not have any legally binding impact, it might be possible that references made to these specifications are not accepted by authorities or courts. If a disagreement on the classification of the waste in the country of dispatch and the country of destination is existent, Article 28 of the WSR shall be applied.

#### **1.6. How should post-consumer plastic waste be classified?**

*Keywords: Classification of post consumer plastic waste; contamination*

Plastic waste shall be classified as B3010

- if they are not mixed with other wastes (this includes mixtures with hazardous as well as non-hazardous metals and inorganic materials mentioned in B3)
- the plastic waste is prepared to a specification
- the polymers and copolymers are not halogenated (except certain fluorinated polymers)

Typical impurities in the separate collection of plastic waste amount to 20 – 30% of weight.

Post consumer plastic waste also includes halogenated polymers and copolymers (e.g. PVC).

Separately collected plastic waste from households is not prepared to a specification. Specifications are e.g. limitation of contaminations (e.g. 2% by weight of non specified plastic or non-plastic material). Further requirements are e.g. “essentially free of dirt, mud, stones”, or “no free flowing liquid”. Current plastic scrap specifications may be obtained or found through or on the websites of organizations such as ISRI and BIR.

Therefore, post consumer plastic waste cannot be assigned as B3010.

There is no Basel code assigning post consumer plastic waste.

Post-consumer plastic waste shall be classified as “plastics” according Annex V, Part 2 WSR, LOW code 20 01 39.

Post-consumer plastic waste fraction consisting predominantly of PVC is included in entry GH013 (Annex III, Part II) if the waste is not contaminated and a recovery of the waste in an environmentally sound manner is possible.

**1.7. How does the wording of entry B3010 relate to some of the other entries, like glass (B2020, which can also be packaging material) and paper (B3020, provided they are not mixed with hazardous wastes), where an explicit requirement such as – not mixed with other wastes – is not set?**

*Keywords: Classification of plastic, glass and paper; entry B3010*

Wastes within Category B2, and therefore, B2020 contain principally inorganic constituents and may contain metals and organic materials (e.g. screw caps, etiquettes).

Wastes within Category B3, contain principally organic constituents and may contain metals and inorganic materials (e.g. composite materials).

For B3010 and B3020 Category B3 is further constricted:

- B3010 shall not be mixed with other wastes (this includes mixtures with hazardous as well as non-hazardous organic constituents, metals and inorganic materials mentioned in B3). These fractions have to be separated from the plastic waste.
- B3020 shall not be mixed with hazardous wastes. This means that this waste can include non-hazardous fractions of organic constituents, metals and inorganic materials (e.g. beverage carton which can be listed as B3020 consists of paper, plastic and metal). Hazardous fractions have to be separated from paper, paperboard and paper product wastes.

In general, the entries B2020, B3010 and B3020 are not restricted to packaging materials. Further on, the phrase “not mixed with other wastes” is also valid for entries not typically applied for separate collection (e.g. B3040).

For the entries B3010 and B3020, it seems to be obvious that these wastes are firstly generated often in mixed form with other wastes. By that fact, the explicit requirement “not mixed with other wastes (B3010)” and “not mixed with hazardous waste (B3020)” respectively could be interpreted in that way, to guarantee unmixed waste fraction and well-defined assignment.

Further on, the mentioned explicit requirements could be interpreted in a way, to ensure that only separate collected waste fractions of low impurities are assigned to B3010 and B3020. Typical impurities in the separate collection of plastic waste amount to 20 – 30% of weight. These amounts exceed by far the allowable contamination of plastic wastes prepared to a specification.



**1.8. If there are indeed stricter standards with regard to plastic waste, are these stricter standards meant to exclude post-consumer plastic waste from entry B3010 unless it is properly sorted from other materials and cleansed?**

*Keywords: Classification of post consumer plastic waste; contamination; prepared to a specification*

In the answer to the question of Section 1.6, it was argued that post consumer plastic from separate collection cannot be classified as B3010 as this waste is not prepared to a specification. Specifications are e.g. limitation of contaminations (e.g. 2% by weight of non specified plastic or non-plastic material). Further requirements are e.g. “essentially free of dirt, mud, stones”, or “no free flowing liquid”.

Sorting and/or cleansing will be necessary to meet the specifications of the categories.

In the answer to the previous question of Section 1.7, it was argued that according the phrase “not mixed with other wastes” a separation of organic constituents, metal and inorganic wastes, which may be contained in wastes of category B3 (Annex V Part 1, List B) is required.

Post-consumer plastic waste is excluded from entry B3010 if other wastes have not been removed and if the solid plastic waste is not prepared to a specification.

**1.9. What is the relationship between the term “mixture” in the sense of the definition of mixture in Article 2 (3) of the WSR and the wording "not mixed with other wastes" in entry B3010, and the term "contamination"?**

*Keywords: Classification; Plastic waste; Definition of mixture and contamination*

*“Mixture of wastes” means waste that results from an intentional or unintentional mixing of two or more different wastes and for which mixture no single entry exists in Annexes III, IIIB, IV and IVA. (Article 2 No.3 WSR)*

For waste shipment, mixtures of waste 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 have to be listed in Annex IIIA, in accordance with Article 58 (Amendment of Annexes).

The WSR prohibits the mixing of different waste entries (except they are included in Annex IIIA, otherwise for mixtures of wastes the notification procedure has to be applied). Therefore, it can be excluded, that the phrase “not mixed with other wastes” means that this waste shall not be mixed with other waste entries. An explicit mentioning of the prohibition of mixing for B3010 would not be consistent.

“Not mixed with other wastes” comprises two aspects:

- In light of the wording of the category of wastes within Annex V Part 1, List B B3 “Wastes containing principally organic constituents, which may contain metals and inorganic materials”. Consequently, wastes within Category B3 contain principally organic constituents and may contain metals and inorganic materials. For B3010 Category B3 is further constricted: An assignment of solid plastic waste as B3010 is only possible if it is unmixed with other waste (organic constituents, metals and inorganic materials in the sense of B3).
- If plastic waste from households is collected (separate collection system) the impurities can amount to 20-30 %. In this respect “not mixed with other wastes” mean, that this impurities have to be removed.

A definition of “contamination” can be derived from the introductory notes of Annex III WSR:

Contamination by other materials

- (a) increases the risks associated with the wastes sufficiently or
- (b) prevents the recovery of the wastes in an environmentally sound manner.

"Not mixed with other wastes" in entry B3010 means that all other wastes not listed in that entry shall be removed. The contamination of the solid plastic waste shall be below the thresholds given by specifications. Only plastic waste prepared to a specification shall be classified as B3010.

**1.10. How should clean, separated beverage cartons with plastic and/or metallic coatings, such as TetraPaks be classified?**

*Keywords: Classification, Laminated Cardboard; TetraPak*

***Classification as B3020***

The WSR includes in its Annex V, part I, list A (Annex VIII to the Basel Convention) the in entry B3020 “Paper, paperboard and paper product wastes” including laminated paperboard.

Consequently, laminated paperboard is included into entry B3020.

Neither the WSR nor the Basel Convention, the WFD or the European Waste List provide a definition of what is meant exactly by the term “laminated paperboard”. A general, non-binding definition of lamination however is provided as follows:

A **laminat**e is a material that can be constructed by uniting two or more layers of material together. The process of creating a laminate is **lamination**, which in common parlance refers to the placing of something between layers of plastic and glueing them with heat and/or pressure, usually with an adhesive.

[...]The materials used in laminates can be the same or different.<sup>2</sup>

Consequently, following this definition, the lamination is not restricted to one material. There have been no indication that binding definitions exist which would be in contradiction to this statement.

TetraPak is described as in several information sources as follows:

“TetraPak - The packaging material for carton-based packages is composed of a laminate of paper, polyethylene and, for aseptic packages, aluminium foil.<sup>3</sup>

A Tetra Pak carton is typically made from 75% paperboard, and between 10% and 25% low density polyethylene (LDPE), which is used to laminate the inside and outside of the carton. The HDPE is used to make the caps and closures. Long-life and aseptic cartons also contain a thin layer of aluminium, typically around 5%<sup>4</sup>.

The printed paper is then **laminated** with polyethylene on the outside and with foil (for aseptic cartoons) and polyethylene on the inside.<sup>5</sup>”

Consequently, following these explanations, beverage cartons as TetraPak can be classified as laminated paperboard falling under entry B3020 of the Waste Shipment Regulation.

### ***Classification as EWC 19 12 12***

The European Waste List (EWL) includes in its Annex the entry 19 12 12 “other wastes (including mixtures of materials) from mechanical treatment of wastes other than those mentioned in 19 12 11. Entry 19 12 11 is defined as other wastes (including mixtures of materials) from mechanical treatment of waste containing dangerous substances.

Following the classification system, entry 19 12 12 of the EWL includes wastes (including mixture of materials) from waste management facilities (code 19), in particular from mechanical waste treatment plants including sorting, crushing, compacting and pelletising facilities (code 19 12) not containing dangerous substances (code 19 12 11).

The question given is based on the assumption, that the beverage cartons are cleaned and separated from the household waste, thus implying the cleaning and sorting in a mechanical treatment plant.

Consequently, if the beverage cartoons are firstly cleaned and sorted in a mechanical treatment plant, they can be classified as EWC 19 12 12.

However, a clear prioritisation is given in the WSR using the Basel code in the first place rather than the EWC code, stated in the introductory note to Annex V of WSR.

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<sup>2</sup>The free encyclopedia Wikipedia, <http://en.wikipedia.org/wiki/Laminate>

<sup>3</sup>Development in brief, Brochure, download at: [http://www.tetrapak.com/Document%20Bank/9704en\\_low.pdf](http://www.tetrapak.com/Document%20Bank/9704en_low.pdf)

<sup>4</sup>Packagingnews.co.uk, <http://www.packagingnews.co.uk/News/MostEmailed/969611/Tetra-Pak-plans-bioplastic-trials-2011/>

<sup>5</sup>Information about TetraPak at [http://www.tetrapakrecycling.co.uk/tp\\_howaretheymade.asp](http://www.tetrapakrecycling.co.uk/tp_howaretheymade.asp)

Code B3020 is listed in part 1, list B of Annex V of WSR while the EWC code 19 12 12 is listed in part 2 of the Annex V of the WSR. As code B3020 does sufficiently describe the clean, separated beverage cartons. It therefore should be classified as B3020.

Consequently, the clean, separated beverage cartons such as TetraPak should be classified as entry B3020 rather than EWC 19 12 12.

However, the extent of cleaning and sorting of the beverage cartons might play a major role when it comes to the classification, referring to the introductory note of Annex V of WSR

That means, that pollution of the beverage cartons with consumption residues to an extent avoiding the recovery in an environmental sound manner, should not be classified according to list B of Part 1 including the Basel code B3020. In this case other classification codes should be used.

Consequently for beverage cartons such as TetraPak code B3020 would not apply, if they would be contaminated to an extent as described in the introductory note of Annex V of WSR.

The origin of the beverage cartons (households, mechanical treatment plants, wastes from carton production process) might then play a role in a further classification.

Final answer:

Clean and separated beverage cartons with plastic and/or metallic coatings, such as TetraPaks, shall be classified as B3020, when not contaminated to an extent which

- 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 91/689/EEC; or
- prevents the recovery of the waste in an environmentally sound manner.

**1.11. In the final process of textile manufacturing, rolls of textiles are edge-trimmed. The resulting edge-trim (weft) is intended for use in the manufacturing of rags. Assuming that this weft meets the conditions of Article 5 (1) [(a) to (d)] of the WFD, what other additional criteria, if any, would need to be met for such textile edge trim to be regarded as a by-product?**

*Keywords: Definition of by-product, waste textiles*

By date, no additional criteria to be met for textiles to be regarded as a by-product were determined by a regulatory committee related to in Article 5 and 7 of Decision 1999/468/EC.

Article 5 of the WFD defines the main criteria to be met to be regarded as a by-product. In Annex II of the communication COM (2007) 59 final, a decision tree for waste versus by-product decisions is stipulated. These overall provisions of the communication COM (2007) 59 final have to be taken into consideration.

Consequently, if edge-trim (weft) meets the conditions of Art.5 (1) [(a) to (d)] of Directive 2008/98/EC on waste, by date, there are no additional criteria need to be met for such textile edge trim to be regarded as a by-product.

**1.12. Does the code B1120 refer to catalytic converters used in vehicles containing lanthanides or transition metals (e.g. cerium, iron, or manganese)?**

*Keywords: Classification issues related to single waste streams; Catalysts*

The WSR includes in Annex V part 1 list B as entry B 1120:

“Spent catalysts excluding liquids used as catalysts, containing any of transition metals, excluding waste catalysts (spent catalysts, liquid used catalysts or other catalysts) on list A (...) and lanthanides (rare earth metals)(...)”

Annex V part 1, list B, entry B1130 reads:

“B1130 Cleaned spent precious-metal-bearing catalysts”

Annex V part 1, list A, entry A2030 comprises:

“Waste catalysts but excluding such wastes specified on list B”.

The wording of entry B1120 is not entirely unambiguous. For this answer, it is understood that the clause “Spent catalysts excluding liquids used as catalysts, containing any of ...” means that

- Liquids used as catalysts are excluded from this entry independently of their composition;
- Spent catalysts are subject to entry B1120 only if they contain transition metals (but excluding waste catalysts on list A) or Lathanides.

The term “**catalyst**” is not specified in the WSR. Following EIONET, the term is generally defined as:

“A catalyst is a substance whose presence alters the rate at which a chemical reaction procedes, but whose own composition remains unchanged by the reaction. Catalysts are usually employed to accelerate reactions (positive catalyst), but retarding (negative) catalysts are also used.”<sup>6</sup>

The term “**catalytic converter**” is not mentioned in the WSR. Following EIONET:

“Catalytic converters are designed to clean up the exhaust fumes from petrol-driven vehicles [...]. Converters remove carbon monoxide, the unburned

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<sup>6</sup> European Environmental and Observation Network (EIONET), at: <http://www.eionet.europa.eu/gemet/concept?cp=1210&langcode=en&ns=1>

hydrocarbons and the oxides of nitrogen. [...]Exhaust gases pass through the cellular ceramic substrate, a honeycomb-like filter. While compact, the intricate honeycomb structure provides a surface area of 23.000 square metres. This is coated with a thin layer of platinum, palladium and rhodium metals, which act as catalysts that simulate a reaction to changes in the chemical composition of the gases. Platinum and palladium convert hydrocarbons and carbon monoxide into carbon dioxide and water vapour. Rhodium changes nitrogen oxides and hydrocarbons into nitrogen and water, which are harmless.”<sup>7</sup>

However, this definition describes common types of catalytic converters, and is not to be understood to exclude other types of catalytic converters used in automotives.

Following the general definition, the term “catalyst” is covering catalytic substances and the question arises, if catalytic converters containing lanthanides or transition metals are also covered by entry B1120 or if the entry only refers to the catalytic substance, excluding catalytic converters.

Hence, two possible interpretations are possible:

- (1) The term “catalyst” as applied in the WSR is restricted to catalytic substances and excludes catalytic converters.
- (2) The term “catalyst” as applied in the WSR includes catalytic converters.

***(1) The term “catalyst” as applied in the WSR is restricted to catalytic substances***

Several entries in the WSR are referring to the term “catalyst” (entry GC050, A1140, A2030, B1120, B1130). Also the entries 16 08 01 to 16 08 07 listed in Annex V, part 2 of the WSR, referring to the European Waste List, are using the term “catalyst”. However none of those entries is specifying or including the term “catalytic converter”.

One could argue that, if it would have been the intention to include catalytic converters into these entries, it would have been made clearer by using the specific term for such converters or event making a more specific wording including the catalytic converters from vehicles.

***(2) The term “catalyst” as applied in the WSR includes catalytic converters***

Even though the term “catalytic converter” is not used in the WSR, there are several arguments in favour of interpretation (2):

- Besides the mentioned entries (see (1)), entries referring to the terms “catalytic converter” or “converter” are neither included in the WSR nor in the EWL. If following the first interpretation, this would lead to the situation that wastes from

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<sup>7</sup> European Environmental and Observation Network (EIONET), at: <http://www.eionet.europa.eu/gemet/concept?cp=1210&langcode=en&ns=1>

catalytic converters would have to be classified as unlisted waste. Catalytic converters from used vehicles however is a waste generated regularly and in high amount. It is unlikely that the waste is supposed to be classified as unlisted.

- The wording “spent catalysts excluding liquids used as catalysts, containing any of [...]” as used in entry B1120 in the WSR, indicates that the entry also refers to catalytic converters, when the liquid catalytic substance is removed.
- In several languages one word is used describing both the chemical substances and the technical equipment hosting the chemical process (e.g. Polish “katalizator”, German “Katalysator”, Spanish “catalizador”). In the translation of the WSR in these languages the used term would therefore cover both the substance and the equipment.
- Member States do interpret the term including catalyst converters. E.g., a guidance document provided by Austrian Ministry of Environment to the WSR does include catalytic converters from vehicles (“KFZ Katalysatoren”, explicitly mentioned in the explanation to entry B1130).<sup>8</sup>

*Consequently*, the wording of the entries using the term “catalyst” in the WSR does not specifically mention “catalytic converters” to be included into the entries. However against the listed arguments it does not seem concise to explicitly exclude converters from the entries either.

**For classification purposes, please note two further aspects:**

1. The catalytic converters used in vehicles have either to be classified as code B1120 or as B1130, depending on whether they contain transition metals or lanthanides as listed in entry B1120 or not.
2. Further, Annex V, introductory note 3 of WSR has to be regarded.

The Austrian Ministry of Environment in the cited Guidance Document clarifies in this context that<sup>9</sup>,

“Catalysts, if not contaminated by substances being listed in the “amber waste list” (e.g. contamination of mineral oil), are part of the “green waste list”, even if the intrinsic substance specific properties of the catalyst (e.g. carcinogen nickel contents) are classified as dangerous. The European Waste list classifies used catalysts, containing transition metals or other substances, as hazardous.

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<sup>8</sup> Anwendungshinweise zu den Anhängen III bis V der EG Abfallverbringungsverordnung Nr. 1013/2006, Aktualisierung des Kapitels 5.3. – Version 2009, BUNDES-ABFALLWIRTSCHAFTSPLAN 2006, Lebensministerium, page 89, at: <http://www.bundesabfallwirtschaftsplan.at/>

<sup>9</sup> Translated from: Anwendungshinweise zu den Anhängen III bis V der EG Abfallverbringungsverordnung

Nr. 1013/2006, Aktualisierung des Kapitels 5.3. – Version 2009, BUNDES-ABFALLWIRTSCHAFTSPLAN 2006, Lebensministerium, page 87-88, at: <http://www.bundesabfallwirtschaftsplan.at/>

However such catalysts are classified as waste under the “green waste list” if not additionally contaminated with hazardous substances (e.g. mineral oil, tar residues.)”

*Consequently*, it does seem in line with the WSR to understand catalytic converters used in vehicles containing lanthanides or transition metals (e.g. cerium, iron, or manganese) as “catalysts” in the meaning of code B1120 and to classify them accordingly if the other preconditions of this entry are in place.

**1.13. Does the code B1130 refer also to catalytic converters used in vehicles containing precious metals such as platinum, rhodium, palladium (most common)?**

*Keywords: Classification issues related to single waste streams; Catalysts*

The two possible interpretations as outlined in the answer to the previous question of Section 1.12 above are identically applicable.

Additionally, in favour of the position that the term “catalyst” as applied in the WSR includes catalytic converters, one could argue that

- Member States do interpret the term including catalyst converters. An Austrian guidance document to the WSR for example does include catalytic converters from vehicles (“KFZ Katalysatoren” into entry B1130 explicitly). The Austrian Ministry of Environment clarifies further to entry B1130<sup>10</sup>:

“Catalysts, if not contaminated by substances being listed in the “amber waste list” (e.g. due to the process in which they are used) are part of the “green waste list”, even if the intrinsic substance specific properties of the catalyst are classified as dangerous.”

*Consequently*, the wording of the entries using the term “catalyst” in the WSR does not specifically mention “catalytic converters” to be included into the entries. However against the listed arguments it does not seem concise to explicitly exclude converters from the entries either.

Spent catalytic converters used in vehicles have either to be classified as code B1120 or as B1130, depending on whether they are cleaned and precious-metal-bearing as listed in entry B1130 or not. Please note that Annex V, introductory note 3 has to be considered when classifying catalytic converters.

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<sup>10</sup> Translated from: Anwendungshinweise zu den Anhängen III bis V der EG Abfallverbringungsverordnung

Nr. 1013/2006, Aktualisierung des Kapitels 5.3. – Version 2009, BUNDES-ABFALLWIRTSCHAFTSPLAN 2006, Lebensministerium, page 89, at: <http://www.bundesabfallwirtschaftsplan.at/>



*Consequently*, it does seem in line with the WSR to understand catalytic converters used in vehicles and containing precious metals such as platinum, rhodium, palladium as “catalysts” in the meaning of code B1130 and to classify them accordingly if the other preconditions of this entry are in place.

**1.14. Code B1130 is defined as: “Cleaned spent precious-metal-bearing catalysts”. What does the word “cleaned” mean in reference to vehicle catalytic converters?**

*Keywords: Classification; Catalysts*

Please note the answers to the two questions in Sections 1.12 and 1.13 above.

The WSR includes in Annex V part 1 list B as entry B1130:

“Cleaned spent precious-metal-bearing catalysts”

The WSR does not include an interpretation for the term “cleaned” nor is any guidance at EU level in place.

Taking in mind the introductory note 3 of Annex V, it can be concluded that the term “cleaned” goes beyond the requirements in this paragraph i.e. that, as a minimum requirement, these catalysts have to be cleaned from mineral oil and tar residues and do not obtain residues of organic, e.g. aromatic residues.

It is always to be checked whether

- 1) the classification as “Cleaned spent precious-metal-bearing catalysts” is justified *and*
- 2) a) a risk as mentioned in Annex III, introduction paragraph lit. (a) is not in place *and*  
b) a risk as mentioned in Annex III, introduction paragraph lit. (b) is not in place.

To what extent the named criteria are fulfilled in case of a contamination of waste, is to be checked by the notifier and, in case of controls, to be supervised by the authorities for each type of waste on a case-by-case basis.

*Consequently*, the term “cleaned” is open to interpretation. As a minimum, all parts and substances which increases the risks associated with the waste sufficiently to render it appropriate for submission to the procedure of prior written notification and consent classified as hazardous by Annex III of Directive 91/689/EEC on hazardous waste or which prevents the recovery of the waste in an environmentally sound manner have to be removed; however, the term additional requirement of “cleaned” catalysts seem to go beyond this requirement.

**1.15. What would be the correct classification of vehicle catalytic converters according to WSR: A2030 or unlisted waste?**

*Keywords: Classification; Catalysts*

Annex V part 1, list A, entry A2030 comprises:

“Waste catalysts but excluding such wastes specified on list B”.

For the question whether the term “catalyst” in Annex V of WSR is to be understood in a way that catalytic converters used in vehicles are included or not, please note the previous draft replies. The position held here is that the term is understood comprising catalytic converters.

Therefore, any waste catalytic converters not to be classified under entry B1120 or B1130 is to be classified as entry A2030.

**1.16. Basel entry A1190 reads: “Waste metal cables coated or insulated with plastics containing or contaminated with coal tar, PCB, lead, cadmium, other organohalogen compounds or other Annex I constituents, to the extent that they exhibit Annex III characteristics”. Does the word 'containing' refer to the plastic part only, or does it apply to the total cable?**

*Keywords: Classification; Waste metal cables coated or insulated with plastics*

In 2003 India took an initiative concerning the placement of new entries regarding plastic-coated cable scrap on Annex VIII and Annex IX of the Basel Convention.

Plastic coated cables consist of two main fractions: “metal” (mainly copper) and “plastic” (mainly PVC, partly PE and to a small extent other resins).

The documentation available on the introduction of the new entries strongly focus on the mirror entry B1115 stressing that cables coated with PVC/PE would contain only environmental friendly materials. Oil and coal tar filled cable scrap has to be treated differently and should be placed on list VIII (of the Basel Convention). The substances listed in A1190 (coal tar, PCB, lead, cadmium, other organohalogen compounds) are/ have been used for the coating of cables, partly contained in the plastic coating (e.g. PCB was used as flame retardant, lead and cadmium as stabilizer), or as a further isolation layer.

There was strong concern that the plastic coating would not be treated in an environmental friendly manner (e.g. uncontrolled thermal processes).

Therefore, it can be concluded that the restrictions given for B1115 (substances listed in A1190 have to be below levels of exhibiting Annex III characteristics) relate to the plastic coating and not to the total cable.

Further, “Green listed waste” is destined for recovery (B1115 explicitly exclude wastes destined for Annex IVA operations). Consequently, both fractions of the plastic coated cable

(“metal” and “plastic”) have to be recovered. The separation of these two fractions as well as the recovery of the separated fractions is state of the art. If the concentration of substances differs between the two fractions “metal” and “plastics” the concentrations within one of the fractions would exhibit Annex III characteristics after the separation step. Consequently, this fraction could not be considered as a non-hazardous fraction anymore.

Following the above, the word 'containing' within Basel entry A1190 refers only to the plastic part.

**1.17. If the word 'containing' within Basel entry A1190 refers to the plastic part only, does this mean that old ground cables without plastic coating/insulation are not classified in this entry?**

*Keywords; Classification; Waste metal cables coated or insulated with plastics*

In the answer to the previous question in Section 1.16 above, it was argued that the word 'containing' within Basel entry A1190 refer to the plastic cover of the cables only. Further it was demonstrated that entry A1190 includes only cables coated or insulated with plastics. Consequently, old ground cables without plastic coating/insulation are not classified in this entry.

This understanding is supported by the following:

In 2003 India took an initiative concerning the placement of new entries regarding plastic-coated cable scrap on Annex VIII and Annex IX of the Basel Convention.

The wording proposed by India in 2003 was:

- “Cables containing oil, coal tar and other dangerous substances: Annex VIII”
- “Cables other than those mentioned above: Annex IX”

The name of the waste was specified as “Plastic coated cables (excluding an appropriated incineration disposal)”.

The Secretariat of the Basel Convention received several comments from different countries on the application from India for placement of plastic coated cable scrap on Annexes VIII and IX. Canada proposed i.a. the following: *“The use of the word "insulated cable or wire scrap" is far too broad an entry. There is a wide array of insulating materials others than plastics used to produce cable or wire, such as paper or cardboard which would be captured under this entry. This also ensures only those cables or wire scrap coated with plastics or plastic insulation captured.”*

In 2004 the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted the inclusion of the new entries A1190 and the corresponding mirror entry B 1115 in Annex VIII resp. Annex IX of the Basel Convention.

Basel entry A1190 refers only to cables coated or insulated with plastics. Consequently, old ground cables without plastic coating/insulation shall not be classified in this entry.

## 2. GENERAL CLASSIFICATION AND PROCEDURAL ISSUES

### 2.1. In order for a waste shipment to fall within a specific waste entry in Annex V of the WSR which has several indentations, shall the shipment contain only one of the specific indentations or may the shipment also contain several of the indentations mixed together?

*Keywords: Mixing of wastes; indentations; contamination*

The question is whether a mixture of several indentations might be classified as green listed waste or as a “mixture of wastes” which usually lead to a classification as “green listed” as long as the mixture of different wastes (indentations) is not included in Annex IIIA.

In the *Omni Metal Case C-259/05*, the European Court of Justice has held, in a strict interpretation of the WSR, that the conditions of waste management and the potential environmental risks associated to each one of the waste in a composed waste are not necessarily the same as the ones associated to the composed waste. In consequence, the blend of different "green-listed" substances indented under the same code cannot possibly be automatically assigned the same code and therefore characterised as "green-listed".

In light of the environmental and health objectives of the WSR, and in line with the Court's ruling, it is appropriate that the WSR be interpreted in a cautious and restrictive fashion. Shipments of certain types of waste should be excluded from the supervision and control procedures established by that Regulation only by including such waste on the green list after a prior assessment has been carried out of the environmental risks associated with its processing and handling.

**Consequently**, if the WSR is interpreted in a cautious and restrictive fashion a shipment containing several of the indentations of the same waste entry mixed together is a shipment of mixtures of waste.

**2.2. Competent authorities of some Member States refuse to accept that only one Basel or OECD waste identification code is used in the notification document in case a number of similar codes from the 'European Waste List' (EWL) can be put under the umbrella of one single Basel code. What should the legitimate practice be and under what rules can this practice be used?**

*Keywords: General classification issues; classification in case of several EWC codes under one Basel code*

The WSR requires putting into the notification and movement documents information on the identity of the waste in Block 14 according to the description made in Annex IC, para 25 of WSR. In particular the code adopted under the Basel Convention (subheading (i)) and, where applicable, the systems adopted in the OECD Decision (subheading (ii)) and other accepted classification systems (under subheadings (iii) to (xii)) of waste have to be inserted.

In this context the codes from EWL are specified as subheading (iii).

Following Article 4(6) of WSR only one waste identification code shall be covered for each notification, except for waste not classified under one single entry in either Annex III, IIIB, IV or IVA or in the case of mixtures of waste not listed in one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.

The question concerns three constellations that have to be distinguished:

- The first constellation relates to wastes classified under one single entry in either Annex III, IIIB, IV or IVA of WSR.
- The second regards wastes not classified under one single entry in either Annex III, IIIB, IV or IVA of the WSR.
- The third concerns mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA of WSR.

In case a number of similar codes from the EWL can be put under the umbrella of one single Basel code, two possible interpretations for one code/one type are supposable:

1. One code/one type of waste refers to *one* EWL code, hence requiring a single notification form for every single EWL code;
2. The one code/one type refers to the Basel code and EWL codes are used as additional information source, hence relating the notification form to the Basel Code.

It is argued that interpretation number 1 would simplify the procedure for the concerned authorities and would support enforcement, as all the waste data elaboration and reporting is done according to a singular EWL code and as such a procedure would also simplify controls and enforcement.

However, if the first interpretation was appropriate, Article 4(6) of WSR referring explicitly to “single entry in either Annex III, [...] or IV [...]” would be obsolete.

In addition the wording of Annex IC para 25 of WSR provides severe arguments in favour of the second implies a priority of the Basel Convention codes which is in line with the scope of this legislation. Identification pursuant to EWL codes is to be added as additional means of further information.

Consequently in case of waste shipments subject to the notification procedure, the **one waste identification code** used for identification of waste in Block 14 of the notification document laid down in Annex IA of WSR for all wastes classified under one single entry in either Annex III, IIIB, IV or IVA of WSR **is to be based primarily on the Basel Convention (or where applicable on the OECD classification system)**.

Consequently in case of waste shipments of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA of WSR **one type of waste according to the Basel Convention or where applicable the OECD classification system must be specified**. In case of an appropriate EWL, the notification might then be related to one EWL code.

Further information relevant for the rules under what this practice can be used is provided in Annex IC para 25(c) of WSR:

- “(iii): European Union Member States should use the codes included in the European Community list of wastes (see Commission Decision 2000/532/EC as amended). Such codes may also be included in Annex IIIB of this Regulation.”
- “(vi): If useful or required by the relevant competent authorities, add here any other code or additional information that would facilitate the identification of the waste.”

There is no specific statement that only one code shall be used under subheadings (iii) to (xii) of Annex IC para 25(c) of WSR. Furthermore subheading (vi) of the same para allows Member States to request any other additional information that would facilitate the identification of the waste.

**Consequently**, the legitimate practice should be an interpretation of the one code as the Basel (or where applicable according to Annexes III and IV of WSR, the OECD) code with a listing of all relevant EWL comprised and inclusion of other information under subheading (vi) of Annex IC para 25(c) of WSR in case a number of similar codes can be put under the umbrella of one single Basel code.

### **2.3. What is the relationship between the term “mixture” in the sense of the definition of mixture in Article 2 (3) of the WSR and the wording "not mixed with other wastes" in entry B3010, and the term "contamination"?**

*Keywords: Classification; Plastic waste; Definition of mixture and contamination*

*“Mixture of wastes” means waste that results from an intentional or unintentional mixing of two or more different wastes and for which mixture no single entry exists in Annexes III, IIIB, IV and IVA. (Article 2 No.3 WSR)*

For waste shipment, mixtures of waste 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 have to be listed in Annex IIIA, in accordance with Article 58 (Amendment of Annexes).

The WSR prohibits the mixing of different waste entries (except they are included in Annex IIIA, otherwise for mixtures of wastes the notification procedure has to be applied). Therefore, it can be excluded, that the phrase “not mixed with other wastes” means that this waste shall not be mixed with other waste entries. An explicit mentioning of the prohibition of mixing for B3010 would not be consistent.

“Not mixed with other wastes” comprises two aspects:

- In light of the wording of the category of wastes within Annex V Part 1, List B B3 “Wastes containing principally organic constituents, which may contain metals and inorganic materials”. Consequently, wastes within Category B3 contain principally organic constituents and may contain metals and inorganic materials. For B3010 Category B3 is further constricted: An assignment of solid plastic waste as B3010 is only possible if it is unmixed with other waste (organic constituents, metals and inorganic materials in the sense of B3).
- If plastic waste from households is collected (separate collection system) the impurities can amount to 20-30 %. In this respect “not mixed with other wastes” mean, that this impurities have to be removed.

A definition of “contamination” can be derived from the introductory notes of Annex III WSR:

Contamination by other materials

- (a) increases the risks associated with the wastes sufficiently or
- (b) prevents the recovery of the wastes in an environmentally sound manner.

"Not mixed with other wastes" in entry B3010 means that all other wastes not listed in that entry shall be removed. The contamination of the solid plastic waste shall be below the thresholds given by specifications. Only plastic waste prepared to a specification shall be classified as B3010.

**2.4. Should an entry of Annex III (green-list) that is contaminated no longer be subject to the general information requirement, if the contamination levels are too high, or should the basic principle be that contaminated waste not be regarded as "green" and only in cases of minor contamination be regarded as such?**

*Keywords: General classification issues; procedure; contamination of waste; ways of evaluation of appropriate procedure*

Annex III of WSR says in the introduction paragraph that

“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 risks associated with the wastes sufficiently to render them 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. “

Following the system as introduced by Article 3(1) and (2) of WSR together with the introduction paragraph of Annex III, the information procedure following Article 18 is applicable only in cases of waste

- which fulfils the criteria of an entry as referred to in Article 3(2) (a) or (b)

In this context, it has to be noted that for some types of wastes it is explicitly required that the waste in question must not be contaminated with other material when to be classified in the respective “B”-entry (for example: plastic wastes are only subject to classification under entry B3010 “(...) provided they are not mixed with other wastes and are prepared to a specification”; other example: entry B1020 reads “Clean, uncontaminated metal scrap”)

- and which
  - a) neither is contaminated as described in Annex III, introduction paragraph lit. (a) (=increases the risks associated with the wastes as described in the respective paragraph)
  - b) nor is contaminated as described in Annex III, introduction paragraph lit. (b) (=in a way which prevents the recovery of the wastes in an environmentally sound manner)

In all other cases, the Article 18 procedure is not applicable and the notification procedure has to be undergone.



Thus, in case of a contamination of a waste, it is always to be checked whether

- a respective entry to justify the classification as waste appropriate for the Article 18 procedure is (still) applicable *and*
- a) a risk as mentioned in Annex III, introduction paragraph lit. (a) is not in place *and*  
b) a risk as mentioned in Annex III, introduction paragraph lit. (b) is not in place.

If one of the questions is to be denied, a shipment of this waste has to undergo the notification procedure and must not be shipped under the Article 18 procedure. A further “basic principle” is not outlined in the WSR. To what extent the named criteria are fulfilled in case of a contamination of waste, is to be checked by the notifier and to be controlled by the authorities for each type of waste on a case-by-case basis.

Some Member States take the view that, in the spirit of a harmonised approach, the basic principle for Green Listed wastes should be a minor contamination, independently from the following recovery operation or the fact, whether the operation will take place in an EU-member state with best available technology or in a non-OECD country with low environmental standards since, in their opinion, the concept for classification of Green Listed would be tremendously undermined, if the final destination and type of recovery were the decisive factors. However, it should be noted that the WSR does not prescribe any procedure of how to assess these criteria nor is any binding legislation or EC guidance in place.

The competent authorities of dispatch (and destination) may be consulted by a notifier in cases of doubt.

In case of disagreement of the involved authorities, the procedure as outlined in Article 28 WSR applies.

**2.5. As far as the environmentally sound recovery is concerned, can standards be used to determine that certain waste may not be regarded as "green", or is the decision always dependent on the standard of the recovery facility in the country of destination?**

*Keywords: General classification issues; procedure; contamination of waste; ways of evaluation of appropriate procedure*

Article 2(8) of WSR defines environmentally sound management as

“(…) taking all practicable steps to ensure that waste is managed in a manner that will protect human health and the environment against adverse effects which may result from such waste”

If the notifier and/or an involved authority in the case of Article 49(1) – after having checked whether the criteria outlined in the answer to the previous question of Section 2.4 above are fulfilled – have doubts about the soundness of the recovery of a contaminated waste in the country of destination, the benchmark for determination are the standards of Community

legislation on waste and – where applicable for the intended treatment – the standard following the concept as laid down in the IPPC Directive 2008/1/EC.

In the case of shipments outside the EU, Article 49(2) provides detailed prescriptions for the level of examination.

**2.6. Considering that for heavily contaminated wastes the recovery in an environmentally sound manner is often possible, should in such cases this waste be only subject to the general information requirements laid down in Article 18?**

*Keywords: General classification issues; procedure; contamination of waste; ways of evaluation of appropriate procedure*

If a waste is “heavily contaminated”, a notifier and/or an authority is requested not only to rely on a positive statement of the receiving facility but to carefully check whether the criteria outlined in the answer to the previous question (see Section 2.5) are fulfilled.

In case no diverse classification is in place, no risk is in place and the receiving facility does fulfil IPPC standard, the Article 18 procedure applies.

**2.7. Is a shipment of green-listed waste (e.g. metal scrap) where radioactive contamination is detected considered to be legal, illegal, or incomplete?**

*Keywords: General classification issues; scope of WSR; radioactive contamination of waste*

***Is a shipment of green-listed waste where radioactivity is detected considered to be an illegal shipment under the WSR?***

The question is whether a shipment

- of green listed waste (i.e. waste listed in Annex III to WSR)
- containing radioactive contamination
- shipped without notification but under the Article 18 / Annex VII procedure

is to be considered an illegal shipment under the WSR.

It could be claimed that such a shipment

- may only be shipped under the Article 18 - Annex VII procedure if the environmentally sound recovery (in the sense of introductory paragraph of Annex III to WSR) is not be impaired;
- radioactive contamination would increase the risks associated with the wastes sufficiently to render them appropriate for submission to the procedure of prior written

notification and consent and/or prevent the recovery of the wastes in an environmentally sound manner;

- so that legally, the shipment would be indeed subject to the procedure of prior written notification and consent;
- so that, following to Article 2(35) (a) of WSR, the shipment would be considered to be illegal because it was shipped without the notification to all competent authorities concerned.

In this context, it should first be noted that “radioactive” is not contained in the list of properties contained in Annex III to Directive 91/689/EEC on hazardous waste so that the first alternative of the introductory paragraph of Annex III to WSR as laid down in lit. (a) is not applicable.

It could be opined that the wording of the second alternative of the introductory paragraph of Annex III to WSR (lit. (b)) is fulfilled at first glance: A radioactive contamination might prevent the recovery of the wastes in an environmentally sound manner. It might further be argued that it seems hardly believable that such a shipment would have to be deemed a “legal” shipment and that the consequence for legal shipments would apply if detected.

On the other hand, it might be argued that the term “legal shipment“ is entirely to be understood as – and restricted to – the scope of the WSR. Following to Article 1(3) (b) of WSR,

*“shipments of radioactive waste as defined in Article 2 of Council Directive 92/3/Euratom of 3 February 1992”*

(now: Article 5 of Directive 2006/117/Euratom) shall be excluded from the scope of WSR which, against the wording of its Article 1(1), means that the WSR does not apply for radioactive waste as defined in the respective paragraph. Article 5 of Directive 2006/117/Euratom introduces the following definition:

*“1. ‘radioactive waste’ means radioactive material in gaseous, liquid or solid form for which no further use is foreseen by the countries of origin and destination, or by a natural or legal person whose decision is accepted by these countries, and which is controlled as radioactive waste by a regulatory body under the legislative and regulatory framework of the countries of origin and destination;”*

which allows determining which kinds of wastes are in the scope of Directive 2006/117/Euratom and, consequently, out of the scope of the WSR.

Directive 2006/117/Euratom introduces an idiosyncratic system of supervision of shipments of radioactive wastes between Member States to be supervised by radiation protection authorities which is to be applied independently alongside and separated from the WSR. This system might further be complemented by Member States’ legislation.

If one would read the wording “prevents the recovery of the wastes in an environmentally sound manner” of introductory paragraph of Annex III to WSR as if comprising radioactive properties of waste, this would introduce a system outside of the requirements of Hazardous

Waste Directive and radiation protection legislation which is not intended by European legislation.

**Consequently**, a shipment

- of green listed waste (i.e. waste listed in Annex III to WSR)
- with radioactive contamination
- shipped without notification but under the Article 18 / Annex VII procedure

is not considered to be an illegal shipment under the WSR.

***Is such a shipment considered to be incomplete and, thus, subject to the take-back-procedure (Article 22 WSR)?***

Article 22 of Waste Shipment reads:

*“(1) Where any of the competent authorities concerned becomes aware that a shipment of waste, including its recovery or disposal, cannot be completed as intended in accordance with the terms of the notification and movement documents and/or contract referred to in the second subparagraph, point 4 of Article 4 and in Article 5, it shall immediately inform the competent authority of dispatch. (...)”*

Article 22 applies, following its unambiguous wording, only to shipments where a notification was required. It is not foreseen for cases in which a waste shipment took place under the Article 18 / Annex VII procedure.<sup>11</sup>

**Consequently**, a shipment of green-listed waste where radioactivity is detected is not considered to be incomplete under the WSR.

***Is such a shipment, in case radioactive levels are detected below the threshold of radiation protection as defined in Euratom legislation, considered as "unlisted waste" under the argument that the environmentally sound recovery may be impaired and thus, this shipment should be subject to the procedure of prior written notification and consent?***

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<sup>11</sup> It should be added that Article 18(2) of WSR does foresee that

*“The contract referred to in Annex VII between the person who arranges the shipment and the consignee for recovery of the waste shall be effective when the shipment starts and shall include an obligation, where the shipment of waste or its recovery cannot be completed as intended or where it has been effected as an illegal shipment, on the person who arranges the shipment or, where that person is not in a position to complete the shipment of waste or its recovery (for example, is insolvent), on the consignee, to:*

- (a) take the waste back or ensure its recovery in an alternative way; and*
- (b) provide, if necessary, for its storage in the meantime.”*

The question is whether a shipment:

- of green listed waste (i.e. waste listed in Annex III to WSR)
- with radioactive contamination
- shipped without notification but under the Article 18 / Annex VII procedure

is to be considered an illegal shipment under the WSR although environmentally sound recovery may be impaired due to the radioactive contamination.

The WSR mentions the wording “*impair their environmentally sound recovery*” only with regard to the composition of mixtures of waste (see the cited Article 3(2) (b) of WSR) whereas the criterion for deciding whether a single entry of the green list shall not be subject to the Article 18/Annex VII procedure in case of contamination of the waste is laid down in the introductory paragraph of Annex III to WSR. The arguments for deciding this issue were provided within the answer above. The position held here is that the terms “legal shipment“ and “illegal shipment” in the WSR is entirely understand as – and restricted to – its scope and, as shown, radioactive properties of waste are not covered by the Hazardous Waste Directive 91/689/EEC, whereas radioactive waste in the meaning of Directive 2006/117/Euratom is out of this scope. If one would read the wording “*prevents the recovery of the wastes in an environmentally sound manner*” of introductory paragraph of Annex III to WSR as if comprising radioactive properties of waste, irrespective whether thresholds as provided by radiation protection legislation are exceeded by the waste or not, this would introduce a system outside of Hazardous Waste Directive and radiation protection legislation which is not intended by European legislation.

**Overall conclusion:** Metal scrap with radioactive contamination is not to be considered as "unlisted waste" under the argument that the environmentally sound recovery may be impaired and thus, this shipment should be subject to the procedure of prior written notification and consent. This is irrespective whether thresholds laid down in radiation protection legislation are exceeded or not.

**2.8. What is the meaning of the term type of waste in Article 4(6) of the WSR? (Does it refer to waste which can be classified under the same EWC or to a single material which can be assigned different EWC, such as aluminium waste from packaging, or from demolition...?)**

*Keywords: General classification issues; definition "type of waste" in WSR; one/several EWC codes*

The WSR requires putting into the notification and movement documents information on the identity of waste. Following Article 4(6) of WSR only one waste identification code shall be covered for each notification, except for waste not classified under one single entry in either

Annex III, IIIB, IV or IVA or in the case of mixtures of waste not listed in one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.

This means the following three constellations that have to be distinguished:

- The waste *is* classified under one single entry in either Annex III, IIIB, IV or IVA of the WSR – The entry of the one single code of these Annexes has to be used for the identification of the waste.
- The waste *is not* classified under one single entry in either Annex III, IIIB, IV or IVA of the WSR – Only *one type of waste* shall be specified.
- The mixture of waste *is not* classified under one single in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA. – The *code for each fraction* of the waste shall be specified in order of importance.

Article 4(6) of WSR does not include an explanation to the term ‘type of waste’.

The term ‘type of waste’ is used besides in article 4(6) in six different provisions of the WSR (Recital 20, Article 1 part 1, Article 2(a) point 15, Article 11 (1)(g), Annex IC part IV point 25, Annex V part 2). The provisions do not include any further explanation to the term.

Definition for the term is also not given in the Basel Convention and the OECD Decision.

Looking at the several sources where the term ‘type of waste’ is used, in general the term describes a grouping of wastes with similar physical, chemical or biological properties or similar processes where the waste is generated.

A more precise definition of the term “type of waste” is given in WFD (Recital (14) together with Commission Decision 2000/532/EC.

Point 3 of the Introduction to the Annex of Decision 2000/532/EC then clarifies:

“The different types of wastes in the list are fully defined by the six-digit code for the waste and the respective two-digit and four-digit chapter headings. This implies that the following steps should be taken to identify a waste in the list.”

**Consequently**, in the meaning of Commission Decision 2000/532/EC *one type of waste* is related to *one entry in the list* and is fully defined by the ix digit code (also referred as EWC or EWL code).

The WSR requests that besides the Basel or OECD codes, other accepted classification systems should be used for identification of the waste in the notification document.

The EWC is described as such a classification systems in subheadings (iii) of Annex IC part IV point 25 of WSR.

**Consequently**, the EWC should be used in the case the waste cannot be classified with Basel or, if applicable, OECD codes.

**Consequently**, in cases where wastes are not classified under one single entry in either Annex III, IIIB, IV or IVA, the type of waste could be classified by using the corresponding EWC.

Article 4 (6) of WSR requests, that “only one type of waste shall be specified”. This provision can be fulfilled by using one EWC for specifying one type of waste.

***In consequence, one EWC should be used to describe one type of waste.***

If a waste cannot be specified within the system of the six-digit EWC but belongs to different EWC such as aluminium waste from packaging and aluminium waste from demolition this would be following Article 2 point 3 of WSR regarded as a mixture of waste. In this case of a mixture of waste Article 4(6) (b) of the WSR would apply.

***Consequently***, in the case the waste is a mixture of waste and the mixture is not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA, each fraction of the waste shall be specified in order of importance.

**2.9. In the meaning of the WFD what kind of wastes is to be considered as the same type of wastes, when the requirements of Decision 2000/532/EC are to be taken into consideration?**

*Keywords: General classification issues; definition "type of waste" in WSR; one/several EWC codes*

A more precise definition of the term “type of waste” is given in WFD (Recital (14) together with Commission Decision 2000/532/EC.

Point 3 of the Introduction to the Annex of Decision 2000/532/EC then clarifies:

“The different types of wastes in the list are fully defined by the six-digit code for the waste and the respective two-digit and four-digit chapter headings. This implies that the following steps should be taken to identify a waste in the list.”

This means that one entry in the European Waste List using the six-digit code is fully defining on type of waste.

***Consequently***, Decision 2000/532/EC does impose a definition for the term ‘type of waste’ referring to the six-digit waste code (EWC). The meaning of the term ‘type of waste’ in Directive 2008/98/EC refers to waste which can be classified under the same EWC.

**2.10. Shall waste classification be made in accordance to annexes III, IIIA, IV and IVA of the WSR, if transboundary shipment takes place for the purpose of disposal operations, or is the use of these annexes only relevant for shipments destined for recovery operations?**

*Keywords: General classification issues; procedural requirements; Use of Annexes II, IIA, IV and IVA in case of shipments destined for recovery operations*

Article 3 of WSR introduces two different procedures of supervision and control for waste shipments:

- the notification procedure of Article 4-17 of WSR is applicable to shipments of waste in the meaning of Article 3(1) a and b of WSR;
- the so called Article 18 procedure is applicable for shipments of waste referred to in Article 3(2) and (4), i.e. waste for which the procedure of Article 18 of WSR has to take place.

Waste destined for disposal operations is submitted to notification procedure irrespective of its composition and properties whereas, for waste destined for recovery operations, the identification is crucial to decide whether the notification procedure or the Article 18 procedure applies.

It is unclear whether for waste shipments destined for disposal operations, a classification according to the Annexes of the WSR (namely Annex III, IIIA, IV and IVA) has to be made in the notification and the movement document, in other words, whether the list is “appropriate” in the meaning of Annex II, Part 1 and whether the code is “relevant” in the meaning of Block 14 of notification form and movement document.

There is no indication in the wording of the WSR whether it is mandatory to classify wastes which are intended to be shipped for disposal alongside Annexes III to IVA or not.

One could deny an obligation for classification with the argument that that the entire system of classification as outlined in the Annexes is only in place because of the differentiated system introduced for waste shipments for recovery. Correspondingly, the headings of the Annexes III and IIIA relate to “List of wastes subject to the general information requirements laid down in Article 18” and “Mixtures of two or more wastes listed in Annex III and not classified under one single entry as referred to in Article 3(2)” respectively and, thus, cannot apply to wastes destined for disposal operations.

On the other hand, it could be argued that the relevant provisions of the WSR mention the “appropriate list” and that this wording would not exclude the request for a classification alongside the Annexes III to IVA. Further, one could claim that the word “relevant” must be read against the fact that the information contained in the notification document is basis for the decision of the concerned authorities. In this context, Article 11(1) WSR provides a list of ground for objection for all competent authorities regarding shipments of waste destined for disposal operations, among these the grounds which are clearly related (or may be related to) the properties of the waste. One could argue that the correct identification of the waste would be necessary for a proper decision of the concerned authorities on the prior written notification and particularly on the possible justification of objections according to Article 11 WSR.

Finally, Annex IC provides instructions for completing the notification and movement documents, elaborated by the Commission and introduced into WSR by Commission Regulation (EC) No 669/2008 of 15 July 2008<sup>12</sup>.

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<sup>12</sup> Commission Regulation (EC) No 669/2008 of 15 July 2008 on completing Annex IC of Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste (Text with EEA relevance) (*OJ L 188, 16.7.2008, p. 7*).



Point 25 of Annex IC is related to filling of relevant Block 14. The wording of Point 25 is as follows:

“State the code that identifies the waste according to Annexes III, IIIA, IIIB, IV or IVA of this Regulation.”

In this wording, no distinction between wastes for recovery and wastes for disposal is made which supports the position that irrespective whether the waste is shipped for recovery or for disposal.

However, it should be noted that one may understand this section also in a way that the waste should be identified *as appropriate* – e.g. because it is explicitly referring to Annex III and IIIA which, itself, relate to wastes in the meaning of Article 3(2) and (4) of WSR – and, thus, it does not provide an unchallengeable argument.

**Conclusion:** Although there are strong arguments in favour of the position that a classification of waste alongside the Annexes III, IIIA, IVA and IV has to be done also in cases of wastes destined for disposal operations, the WSR does not provide a definitive answer on this question.

### **3. TAKE-BACK PROCEDURE**

#### **3.1. Who is responsible for cases of damages during transport and combined changes of the composition of the wastes? Who shall bear the costs for transport and alternative treatment? Is it the original dispatcher (notifier) or the carrier, who is the generator of the (new) waste?**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

The WSR does not contain provisions on responsibility for cases of damages. Those provisions might be laid down in national legislation. It should be noteworthy that e.g. any claims subject to civil law (e.g. of the Notifier to the carrier on the basis of their contractual relation) are not affected by the Regulation.

It should be emphasized in this context that, in cases of accidents during transport with damages of the waste, the insurances of the transport company are applicable.

Regarding responsibility and cost bearing for transport and alternative treatment, it is doubtful whether an answer to the question, who would bear the costs for transport and alternative treatment in case that waste is generated through an accident is provided in the WSR.

The WSR does contain rules on

- Intended shipments of an identified load of waste to be submitted to either notification procedure or Article 18 procedure;
- Take-back obligations including transport of the waste if a shipment which is subject to notification procedure cannot be completed as intended, Article 22 of WSR with correlated provisions on cost-bearing in Article 23. In this respect, Article 22 refers to “the waste in question” (Article 22(2)) and “the waste” (Article 22(3)) respectively to be taken back;
- Take-back obligations including transport of the waste in cases of illegal shipments, Article 24 of the Regulation with correlated provisions on cost-bearing in Article 25. Article 24 refers to “the waste in question” to be taken back (Article 24(2) and 24(3)).

Whether the rules for the notification procedure or the rules for take-back-obligations (and correlated cost-bearing provisions) apply depends on the interpretation of Article 22 and 24: If one would read the words “the waste in question” as if they would only relate exclusively to the waste which was originally exported (i.e., waste of the same quality), waste which has changed its nature or composition (e.g., as in the mentioned case, during an accident) would not be covered by Article 22 or 24.

However, another interpretation of this paragraph would be that the words have to be understood as “the load of waste for which the notification was issued” (or, respectively, the Annex VII form was filled). In favour of this position, it could be argued that the procedures of Articles 22 or 24 do provide suitable instruments to get situations of incomplete/illegal shipments under control. For example, the take-back in case a shipment cannot be completed as intended may not apply if the competent authorities of dispatch, transit and destination agree on, an alternative way of treatment can be chosen in the country of dispatch or elsewhere (see Article 22(3)). Consequently for this case, the costs for take-back would be imposed following the rules as laid down in Article 23 and 25, respectively.

On the other hand, another interpretation highlighting the responsibility (and correlating cost bearing) of the waste producer as emphasized in Recital 18 of WSR seems as well justifiable.

There is no legislation of the European court of justice available to this question nor has the European Commission issued guidance on this question. From the documents issued during the legislative process when adopting WSR, it is not evident that the legislator has had an opinion to this question.

Development in this field might evolve through case-by-case decisions and ruling by Member States’ courts of law and the European Court of Justice.

### **3.2. Who should be the notifier, if a return of a waste which has changed composition to the state of dispatch is required?**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

Provisions which contain rules on the notification in case of take-back constellations are laid down in Article 22(4) and 24(2).

Regarding the duty to notification, Article 24(2) points out that

“(…) the new notification shall be submitted by the person or authority listed in (a), (b) or (c) and in accordance with that order (…). In the case of alternative arrangements as referred to in (d) and (e) by the competent authority of dispatch, a new notification shall be submitted by the initial competent authority of dispatch or by a natural or legal person on its behalf unless the competent authorities concerned agree that a duly reasoned request by that authority is sufficient.”

There is no legislation of the European court of justice available to this question nor has the European Commission issued guidance on this question. From the documents issued during the legislative process when adopting WSR, it is not evident that the legislator has had an opinion to this question.

Development in this field might very probably arise through case-by-case decisions and ruling by Member States’ courts of law and the European Court of Justice.

### **3.3. Is a duly reasoned request by the state, where the accident happened (e.g. also a transit state) sufficient for a take-back procedure?**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

„Duly reasoned requests“ instead of notification in the context of take-back-obligations are mentioned in four constellations in Article 22(4) and (6) and in Article 24 of WSR.

In all of these cases, the only authority which is entitled to issue a duly reasoned request is the “initial authority of dispatch” (not the authority of transit; not the authority to which the notification in the course of the take-back obligation is issued).

Further, all of these cases require an “agreement” between the concerned competent authorities.

From the systematic of the take-back related provisions, it can be concluded that a duly reasoned request for a transfrontier shipment of waste shall only be issued by the initial authority of dispatch (or the initial notifier) and only take place in case of an agreement between the concerned competent authorities. From its wording, an “agreement” does require unanimity.

Consequently, a duly reasoned request by an authority is only sufficient if issued by the initial authority of dispatch and in cases of transfrontier shipments only in conclusion with other competent authorities.

**3.4. If the original dispatcher, who might simultaneously be the carrier went bankrupt or entered into liquidation after having received the transport insurance payment, is there liability of the state, where the waste was generated (e.g. a transit state, when the accident happened on its territory)?**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

The WSR does provide cost distribution provisions within Articles 23 and 25, out of these provisions, Article 23 concerns costs for take-back in case a shipment cannot be completed as intended.

A cost allocation for a country of transit justified by the only fact that the country had the jurisdiction over the area – as it would be in the case an accident happened during transport – is not introduced within the WSR.

It might be questioned whether basic ideas introduced by the WSR may justify another result. Cases of “responsibility” of a country due to the fact that a country has the jurisdiction over an area in the context of take-back obligation and related costs are laid down in Article 22(9) and Article 24(7). Both provisions introduce an “interim” responsibility related to the place of discovery of a waste. It is rather unlikely that this idiosyncratic case might be seen as a general principle to impose responsibility and related cost allocation to a country of transit.

Consequently, the WSR does not provide a direct basis for cost allocation for a country of transit which had the jurisdiction over the area where an accident has happened which lead to an incomplete or illegal shipment.

**3.5. The consignee of Member State B simultaneously acts as a carrier and picks up hazardous wastes at a collector’s site in the state of dispatch A. The consignee of the Member State B is an authorized collector and conditioner for the wastes in question, showed the appropriate license for collection of hazardous wastes and pretended to have all necessary permits for the transfrontier shipment of these wastes, although this is not the case in reality. Is the consignee of Member State B the main responsible person for the illegal shipment in this case or the waste collector in Member State A?**

*Keywords: Take-back-procedure; costs; shared responsibility*

The WSR defines in Article 2 the terms consignee and notifier.

Further Article 5 (1) of the WSR lays down that all shipments of waste for which notification is required shall be subject to the requirement of the conclusion of a contract between the notifier and the consignee for the recovery or disposal of the notified waste.

Following these provisions the position that the consignee and the notifier can be an identical person cannot be supported.

### ***I. The system on responsibility and cost charging according to the WSR***

The rules on cost allocation for the take-back of waste in cases of illegal shipments are laid down in Title II, Chapter 4 of WSR. Article 24 of WSR distinguishes three constellations of responsibility and imposes different consequences for each constellation; each constellation has a corresponding cost-regulation in Article 25 WSR:

Article 24(2) WSR contains rules for take-back if an illegal shipment is the responsibility of the notifier, Article 24(3) WSR contains rules for take-back if an illegal shipment is the responsibility of the consignee and Article 24(5) of WSR contains rules for take-back in particular in cases where responsibility for the illegal shipment cannot be imputed to either the notifier or the consignee. The corresponding cost-related rules are laid down in Article 25(1), (2) and (3) of WSR.

The case, that both the notifier and the consignee are responsible for the illegal shipment is not explicitly foreseen by the system as introduced by Article 24. Two interpretations are supposable:

- Article 24(5) of WSR is relevant only for particular, exceptional cases; basically, the responsibility and the related costs shall be decided by charging the costs entirely to either the notifier or the consignee pursuant to Article 24(2) and 24(3) respectively; or
- Article 24(5) of WSR is meant to regulate all cases that do not fit perfectly in Article 24(2) or 24(3).

Both interpretations seem to be in line with the wording of Article 24(5) of WSR (“in particular”). It should be noted that Article 25(3) WSR, which allows the competent authorities to charge the costs to the notifier and/or the consignee, might be seen in favour of the second position: If Article 24(5) WSR would only apply to cases where neither the notifier nor the consignee would be responsible, this flexibility would be rather surprising. However, a binding interpretation on this matter has not been provided by the European Court of Justice yet nor is guidance available by the European Commission.

### ***II. Applying this scheme for the present case***

For applying this scheme in case a competent authority feels that there is morally responsibility of both the notifier and the consignee, the following has to be considered:

#### ***II.1. No notification has been submitted***

For a shipment of waste requiring a prior written notification, the notifier has to submit to the authority of country of dispatch the notification documents, whereas the notifier has to be understood in accordance with the ranking regarding to Article 2(15) (a) of WSR.

The licensed collector, carrying out the collection of waste destined for shipment requiring a notification, which is carried out without a notification to all competent authorities, is defined as illegal (Article 2 point 35 (a) of WSR).

As regards the responsibility in light of the take-back system of the WSR, the result depends on the interpretation of the Regulation as outlined above (see I.).

- If following the first interpretation of Article 24(5) WSR, it could be argued that the behaviour of the collecting company in the country of dispatch is the main responsible person for the illegal shipment as not submitting the notification to the competent authority and, independently of possible moral co-responsibility of the consignee, thus, rather Article 24(2) would apply with the corresponding cost regulation of Article 25(1) WSR;
- If following the second interpretation, and in case a shared responsibility of notifier and consignee is determined, the competent authorities would have to jointly decide on the costs pursuant to Article 25(3) WSR.

## *II.2. Notification procedure has been carried out*

Given the case that the notification procedure has been carried out by the collecting company of the country of dispatch, the illegal shipment is still regarded as illegal referring to Article 2(35) (c) WSR when the shipment of waste is effected with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud.

In the case described, the waste collector of the country of destination (consignee) pretended to have all necessary permits and licenses, although this is not the case in reality. The moral responsibility seems to be on the side of the consignee.

As regards the responsibility in light of the take-back system outlined above (see I.), the result depends on the interpretation of the Regulation.

- If following the first interpretation, it would be necessary to further investigate the exact responsibilities of both the notifier and the consignee; if the notifier has been entirely in good faith, it does not seem appropriate to impose him the responsibility;
- If following the second interpretation and if a shared responsibility is determined, the Competent Authorities will have to jointly decide on the costs pursuant to Article 25(3) WSR.

### **3.6. As regards the shipment of green-listed waste with notification to EU-Member States with a transitional period, would it be correct ex lege, there would only be a moral obligation for the dispatcher or state of dispatch to take back illegal shipments of falsely declared green-listed waste?**

*Keywords: Take-back-procedure; transitional periods for new Member States*

Transitional periods for certain Member States and conditions for its application are laid down in Article 63 of WSR. Article 63(1) to (5) deals with specific transitional rules for each one of the addressed Member States (Latvia, Poland, Slovakia, Bulgaria, and Romania). The character of the transitional rules is diverse. However, one common regulatory technique for

several elements is that waste listed in Annex III destined for recovery is submitted to the procedure of prior written notification and consent as laid down in Title II of WSR.

Take-back obligations have to be included into the contract

- between the notifier and the consignee in case that the notification procedure applies, according to Article 5(3) of WSR
- between the person arranging the shipment and the consignee in case the shipped waste is subject to the procedure as laid down in Article 3(2), according to Article 18(2) of WSR

Articles 24 and 25 of the WSR deal with take-back obligation and cost of take-back in case of illegal shipments. The WSR does not contain further rules on take-back obligation for cases of illegal shipments and correlated costs outside of these provisions.

The definition of illegal shipments itself is to be found in Article 2(35) of WSR. The definition covers both wastes for which the notification procedure is necessary (see Article 2(35) lit. 1 to f) and wastes for which the Article 18 procedure applies (see Article 2(35) lit. g (i) to (iii)). The case in question (falsely declared green listed waste) would certainly fulfil the definition of an illegal shipment.

Against this background, Article 63(6) states:

“When reference is made in this Article to Title III in relation to waste listed in Annex III, Article 3(2), Article 4, second subparagraph, point 5, and Articles 6, 11, 22, 23, 24, 25 and 31 shall not apply.”

The wording of Article 63(6) makes clear that the provision is only related to waste listed in Annex III. A falsely declared “green listed” waste – as in the example – does not fulfil this definition. Therefore, Article 63(6) does not apply to this constellation. Since the exemption clause of Article 63(6) does not apply, Article 24 and 25 are not excluded from application, and the regular rules of take-back-procedure apply.

### **3.7. Is the take back obligation also applicable in cases of bankruptcy of the consignee?**

*Keywords: Take-back-procedure; bankrupt of consignee; destiny of waste unclear*

**Background:** Shipments of contaminated soil waste were carried out from country A to country B in two different instances; one using a notification under the old Regulation 259/93/EEC and another using a notification under the WSR. The consignee of country B got bankrupt after the waste was accepted. The competent authorities of dispatch received a

confirmation of receipt from the consignee for these shipments but no certificate for the treatment.

The provisions of the WSR with regard to take-back obligations are laid down in Title I, Chapter 4: “Take-back obligations”, in Articles 22 and 24. Whereas Article 22 concerns the situation that a shipment cannot be completed as intended, Article 24 introduces take-back obligations in case an illegal shipment (as defined in point 35(g) of Article 2 of the WSR) is in place.

In case the consignee goes bankrupt and the authority in the country of dispatch is not aware whether the non-interim treatment of the waste has been completed as intended in the notification document or not, the authority is required to collect evidence on the completion. According to Article 16(e) of WSR, the non-interim treatment facility has to submit signed copies of the movement document containing the certificate to the competent authorities concerned; it has to be enforced by Member States’ authorities that this obligation is fulfilled. Thus, Member States authorities have to investigate whether there is evidence that

- the shipment has not been completed as intended or;
- the shipment is deemed to be illegal (e.g. in the meaning of Article 2(35) lit. (d) or (e)).

In both cases, given that the further preconditions are given, a take-back procedure applies. Particularly, according to its wording, Article 22 does not only relate to the non-completion of the shipment, but does include explicitly the non-completion of transport and recovery.

#### *Regulation (EEC) 259/93*

The relevant provisions of Article 25 of Regulation (EEC) 259/93 are to be found in Article 25, 8(6) and 26. In Article 26, it is stipulated that

“(1) any shipment of waste effected: (...)

(d) which is not specified in a material way in the consignment note; or

(e) which results in disposal or recovery in contravention of Community or international rules (...)

shall be deemed to be illegal traffic.

(2) If such illegal traffic is the responsibility of the notifier of the waste, the competent authority of dispatch shall ensure that the waste in question is:

(a) taken back by the notifier or, if necessary, by the competent authority itself, into the State of dispatch, or if impracticable; (b) otherwise disposed of or recovered in an environmentally sound manner, within 30 days from the time when the competent authority was informed of the illegal traffic or within such other period of time as may be agreed by the competent authorities concerned.”



In case the consignee goes bankrupt and the authority in the country of dispatch is not aware that the non-interim treatment has been completed as intended in the notification document, the authority is required to collect evidence on the completion. According to Article 8(6) of Regulation (EEC) 259/93, the non-interim treatment facility has to submit a certificate of recovery of the waste to the notifier and the other competent authorities concerned as a part of or attached to the consignment note which accompanies the shipment. Thus, Member States authorities have to evaluate whether there is evidence that

- the shipment has not been completed as intended or;
- the shipment is deemed to be illegal.

In both cases, given that the further preconditions are given, a take-back procedure applies.

It could be argued that (contrary to the provisions of the WSR) the take-back procedure in case of non-completion of the shipment pursuant to the wording of Article 25 Regulation 259/93 does not include the non-interim treatment. One could argue that the obligation of the notifier (and the state of dispatch) to take back the waste would end at the very moment where the transport arrives at the non-interim facility. However, this position itself does not seem to be convincing since it is explicitly laid down in Article 25(3) that the obligation of the notifier and the subsidiary obligation of the State of dispatch to take the waste back ends only after the issuing the certificate referred to in Article 8(6). As this certificate may only be issued after the recovery of the waste, it can be concluded that the take-back procedure would still be applicable after completion of the shipment but before the completion of the final treatment.

**3.8. Is the take back obligation still applicable after the 180-day period (Article 8(6) of the old Regulation 259/93/EEC) and after the one year period (Article 16(e) of the WSR?)**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

**Background:** Shipments of contaminated soil waste were carried out from country A to country B in two different instances; one using a notification under the old Regulation 259/93/EEC and another using a notification under the WSR. The consignee of country B got bankrupt after the waste was accepted. The competent authorities of dispatch received a confirmation of receipt from the consignee for these shipments but no certificate for the treatment.

Neither the relevant Article 16(e) of WSR nor Article 8(6) of Regulation (EEC) 259/93, any deadlines for further investigation or actions of all concerned authorities beyond the named cases are in place. Where there are deadlines (such is the case for the 90-days-period as contained in Article 25(1) of Regulation (EEC) 259/93) they are introduced to speed up administrative procedures, not in the sense that a granted competence would expire after this date.

Whereas the concerned authority comes to the conclusion that the preconditions of the respective take-back procedures are fulfilled, these procedures are to be arranged.

**3.9. Given that the consignee in country B got bankrupt after the 180-day period expired (under the old Regulation 259/93/EEC), is the notifier still obliged to take back the waste?**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

**Background:** Shipments of contaminated soil waste were carried out from country A to country B in two different instances; one using a notification under the old Regulation 259/93/EEC and another using a notification under the WSR. The consignee of country B got bankrupt after the waste was accepted. The competent authorities of dispatch received a confirmation of receipt from the consignee for these shipments but no certificate for the treatment.

Article 8(6) of Regulation (EEC) 259/93 lays down that

“As soon as possible and not later than 180 days following receipt of the waste the consignee, under his responsibility, shall send a certificate of recovery of the waste to the notifier and the other competent authorities concerned. This certificate shall be part of or attached to the consignment note which accompanies the shipment.”

It has to be investigated whether the preconditions for a take-back procedure are in place or not. Article 25 and Article 26 of Regulation (EEC) 259/93 respectively do not contain any deadlines which expiring would nullify the take-back obligation. Where there are deadlines (such is the case for the 90-days-period as contained in Article 25(1) of Regulation (EEC) 259/93), they are introduced to speed up administrative procedures, not in the sense that a granted competence would expire after this date.

Further, Article 25(3) states that

“The obligation of the notifier and the subsidiary obligation of the State of dispatch to take the waste back shall end when the consignee has issued the certificate referred to in Articles 5 and 8.”

Regarding the end of the obligation, Article 25(3) of Regulation (EEC) 259/93 does not lay down any substitution for the condition that the certificate according to Article 8(6) has to be issued.

**3.10. In case waste got irreversibly mixed with other waste, taking into account the second paragraph of Article 22(3) of WSR that the take-back obligations shall not apply, how does this relate to Article 23 on the costs for take-back? Who bears the costs for such a treatment, the notifier or, if impracticable, the competent authority of dispatch?**

*Keywords: Take-back-procedure; costs; damage of waste during transport*

**Background:** Shipments of contaminated soil waste were carried out from country A to country B in two different instances; one using a notification under the old Regulation 259/93/EEC and another using a notification under the WSR. The consignee of country B got bankrupt after the waste was accepted. The competent authorities of dispatch received a confirmation of receipt from the consignee for these shipments but no certificate for the treatment.

Provisions regarding the costs for take-back in case of Article 22(3) WSR are laid down in Article 23:

“(1) Costs arising from the return of waste from a shipment that cannot be completed, including costs of its transport, recovery or disposal pursuant to Article 22(2) or (3) and, from the date on which the competent authority of dispatch becomes aware that a shipment of waste or its recovery or disposal cannot be completed, storage costs pursuant to Article 22(9) shall be charged:

(a) to the notifier as identified in accordance with the ranking established in point 15 of Article 2; or, if impracticable;

(b) to other natural or legal persons as appropriate; or, if impracticable;

(c) to the competent authority of dispatch; or, if impracticable;

(d) as otherwise agreed between the competent authorities concerned.

(2) This Article shall be without prejudice to Community and national provisions concerning liability.”

Although the heading of Article 23 reads “Costs for take-back when a shipment cannot be completed”, there is no space for doubt that the provisions of Article 23 are applicable also in case of Article 22(3) following the unambiguous wording of Article 23(1) (“including costs of its transport, recovery or disposal pursuant to Article 22(2) or (3)”).

The term “impracticable” in Article 23(1) (c) of WSR leaves space for interpretation. As it is mentioned with relation to an authority (of dispatch), it seems hardly possible that “impracticable” is solely meant “in case of bankruptcy or other technical dysfunction”. Thus, the cost sharing as introduced by Article 23(1) (d) – agreement between the concerned

authorities – seems also to be applied in case it seems not appropriate to charge the competent authority of dispatch with the entire costs.

In any case following paragraph 2, Community and national legislation concerning liability stays applicable.

#### **4. GENERAL PROCEDURAL ISSUES - TREATMENT OPERATIONS**

**4.1. If a waste shipment is destined for interim recovery operations R12-R13, does the WSR require that information is provided about the final recovery operation, i.e. in the sense that the competent authority of dispatch may demand that the final recovery operation is mentioned on the notification form (in case of prior written notification and consent-procedure) or on the Annex VII-document (in case of Article 18-procedure) or is it allowed to provide such information at a later stage? Is it allowed under the WSR to arrange a shipment destined for storage even if the final recovery is still unclear?**

*Keywords: Procedure; Treatment operations; Article 18 procedure; Interim recovery*

The questions concern two constellations which have to be distinguished:

- The first constellation relates to shipments of waste in the meaning of Article 3(1) a and b of WSR, i.e. where the notification procedure of Article 4-17 of WSR has to take place (see below 1.);
- the second constellation concerns shipments of waste referred to in Article 3(2) and (4), i.e. waste for which the procedure of Article 18 of WSR has to take place (see below 2.)

For shipments of waste

- where notification procedure has to take place
- destined for recovery operations R12 and R13 in the meaning of WFD 2006/12/EC (these operations are defined by Article 2 No. 7 of WSR as “interim recovery operations”),

the pertinent procedural rules are laid down in Article 4 and Article 15 of WSR.

Article 4 para 2 No. 6 of WSR 1013/2006 states that:

“A notification shall cover the shipment of waste from its initial place of dispatch and including its interim and non-interim recovery or disposal”

Article 15 of WSR contents further specific provisions for the shipment of waste destined for interim recovery. Article 15(1) clearly points out that

“Where a shipment of waste is destined for an interim recovery (...) 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.

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.”

**Consequently**, in cases of waste shipments to which the notification procedure has to take place, the competent authority of the country of dispatch may demand that the final recovery operation is mentioned on the notification form and does not have to accept that such information is provided at a later stage.

Article 4 para 2 No 2 states information as required by Annex II Part 1 has mandatorily to be supplied on or annexed to the notification at the time of submission. Annex II, Part 1, No. 5 says that among this information is the following:

“Recovery or disposal facility's name, address, telephone number, fax number, e-mail address, registration number, contact person, technologies employed and possible status as pre-consented in accordance with Article 14. If the waste is destined for an interim recovery or disposal operation, similar information regarding all facilities where subsequent interim and non-interim recovery or disposal operations are envisaged shall be indicated.”

A planned shipment subject to the procedure of prior written notification and consent may take place only after the notification and movement documents have been completed pursuant to the Regulation and it shall not be started until the complete notification form has been submitted to the competent authority and a prior written consent has been transmitted to the notifier.

**Consequently**, in cases of waste shipments to which the notification procedure has to take place, it is not allowed under the WSR to arrange a shipment destined for storage if the final recovery is still unclear.

For shipment of waste referred to in Article 3(2) and (4), Article 18 of WSR contains the main procedural rules. Annex VII contains a form for these kinds of shipments. These provisions do not contain specific provisions on interim recovery operations.

In the judgment of 25 June 1998 (Beside, Case C-192/96) the European Court of Justice, had *inter alia* to decide on the question

“What is the minimum evidence that the competent authority must normally require, in the absence of notification, in order to establish that the “green waste” is intended for recovery”.

The Court stated that

“given that the storage of a batch of 'green waste' is not regarded as a recovery operation unless it takes place pending such an operation, such evidence must relate to the final recovery operation, even if it is to take place outside the Community.”

In other words, the Court stated that the storage of waste may only be regarded as a recovery operation if it is evident that the foreseen final treatment of the waste is a recovery operation complying with legal requirements.

This Court ruling was related to former Regulation (EEC) 259/93 which meanwhile has been repealed. However, it has to be taken in mind that the procedure of Article 11 Regulation (EEC) 259/93 applied to “waste for recovery listed in Annex II” (“Green list of wastes”) and thus covers the same constellation as Article 18 WSR. The objective of environmental protection remains identical in the WSR with regard to former Regulation (EEC) 259/93. Consequently, the arguments the Court have an identical impact for shipments to which the Article 18 procedure applies.

**Consequently**, following the arguments of the Court, the competent authority of the country of dispatch may demand that the final recovery operation is mentioned on the Annex VII form and does not have to accept the provision of such information at a later stage. If this information is not yet available, i.e. if the final recovery is still unclear, it is not allowed arranging a shipment destined for storage under the WSR.

**4.2. Is a shipment destined for 'R12' and 'R13' always destined for interim recovery or can it also be recovery?**

*Keywords: Procedure; Treatment operations; Article 18 procedure; Interim recovery*

**Background:** On grounds of Article 2(7) of WSR, 'interim recovery' means recovery operations 'R12' and 'R13'. 'R12' and 'R13' are not limited to interim recovery, but can also be regarded as recovery (Article 2(6) of WSR). It could be assumed that a shipment destined for 'R12' or 'R13' is therefore probably not always interim recovery.

Annex II B to WFD introduces the recovery operations R 12 (Exchange of wastes for submission to any of the operations numbered R 1 to R 11) and R 13 (Storage of wastes pending any of the operations numbered R 1 to R 12 excluding temporary storage, pending collection, on the site where it is produced). The wording of Article 2 of WSR leaves space

for three different understandings of the categorization of these two operations for the purpose of shipments.

Article 2(7) of WSR says:

“‘interim recovery’ means recovery operations R 12 and R 13 as defined in Annex II B to the WFD”.

Following Article 2(6) of WSR,

“‘recovery’ is as defined in Article 1(1) (f) of Directive 2006/12/EC”.

Whereas following Article 1(1) (f) of the WFD,

“‘recovery’ shall mean any of the operations provided for in Annex II B”,

in this understanding, *all* categories of recovery treatment operations of the WFD including R 12 and R 13 would be regarded as recovery operations.

Three possible interpretations are supposable for the purpose of application of the WSR:

1. R 12 / R 13 operations are always “recovery”;
2. R 12 / R 13 operations are sometimes “recovery” and sometimes “interim recovery”;
3. R 12 / R 13 operations are always “interim recovery” which is a specific case of recovery for which the general rules for recovery only apply if no specific rules are laid down in WSR.

Whereas for both the first and the second interpretation of Article 2 of WSR, severe problems with consistency of legislation and conflicts with the overall protective aim of the WSR occur (if the first interpretation would be appropriate, Article 2(7) of WSR would be redundant; against the second interpretation, it can be argued that the WSR does not provide any distinction or any guidance which type of wastes for which R12/R13 operations are foreseen should be regarded as destined for “interim recovery” and which types of wastes should be destined for “recovery”), the third interpretation is clearly in line with the general aim of Waste Shipment legislation.

- The rules on interim recovery were included into WSR to ensure that the specific dangers arising from exchange and storage of waste are adequately dealt with.
- This is in line also with the specific rules for exchange and accumulation of wastes destined for recovery operations as provided in Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on the control of transboundary movements of wastes destined for recovery operations. Following recital 5 of WSR, one aim of the revision of WSR was to incorporate the OECD Decision C(2001)107/Final.

Thus, R 12 / R 13 operations are always interpreted as “interim recovery operations” in the meaning that they are a specific case of recovery for which the general rules for recovery only apply if no specific rules are laid down in WSR.

**Consequently**, a shipment destined for 'R12' and 'R13' is always destined for interim recovery in the meaning that they are a specific case of recovery for which the general rules for recovery only apply if no specific rules are laid down in WSR.

#### **4.3. Is interim recovery limited to the notification procedure?**

*Keywords: Procedure; Treatment operations; Article 18 procedure; Interim recovery*

As pointed out in the answer to the previous question (see Section 4.2), the WSR introduces the following approach for shipments of waste destined for interim recovery operations: For wastes destined for these operations, the specific rules as laid down in WSR apply; if there are no specific rules, the general rules for recovery apply. For the question whether the notification procedure applies to wastes destined for recovery operations R 12 / R 13, this means that:

1. for wastes destined for recovery for which the notification procedure of Article 4-17 of WSR has to take place (e.g. wastes in the meaning of Article 3(1) b of WSR), notification procedure applies similarly to wastes destined for interim recovery with the additional requirements of Article 15. Following Article 15 (a) and (b), the competent authorities of the countries of dispatch and of destination must consider both the conditions of interim recovery and the conditions of final recovery
2. for wastes referred to in Article 3(2) and (4) of WSR, i.e. waste for which the procedure of Article 18 of WSR has to take place, no specific rules are introduced for wastes destined for interim recovery. Following the assumption that if there are no specific rules for interim recovery operations in place in the WSR, the general rules for recovery operations apply, this would lead to a general possibility to ship wastes of this kind using the Article 18 procedure

However, in this context, the judgment of 25 June 1998 (Beside, Case C-192/96) the European Court of Justice has to be considered. The Court had *inter alia* to decide on the question:

“What is the minimum evidence that the competent authority must normally require, in the absence of notification, in order to establish that the “green waste” is intended for recovery”.

The Court stated that

“given that the storage of a batch of 'green waste' is not regarded as a recovery operation unless it takes place pending such an operation, such evidence must relate to the final recovery operation, even if it is to take place outside the Community.

(...) In order to take account of the objective of environmental protection underlying the Regulation, the competent authorities must, as a general rule and as a minimum, be able to require, in relation to 'green waste' intended for recovery and not subject to notification, the information mentioned in Article 11 of the Regulation.”



In other words, the Court stated that the storage of waste may only be regarded as a recovery operation if it is evident that the foreseen final treatment of the waste is a recovery operation complying with legal requirements.<sup>13</sup>

This is in line with the idea behind Article 15 (a) and (b) of WSR that not only the interim recovery operation but also the subsequent recovery treatment operations have to be submitted to control and authorization.

**4.4. Is R 12 / R 13 interim recovery (article 2 (7)) coupled with the notification procedure and R 12 / R 13 recovery (article 2 (6)) with the information procedure of Article 18 of the EU WSR?**

*Keywords: Procedure; Treatment operations; basic definitions; Article 18 procedure; Interim recovery; term "recovery" of Waste Framework Directive*

As shown in the answer to the previous question (see Section 4.3), there is no distinction between R 12 / R 13 in the meaning of Article 2(7) and R 12 / R 13 in the meaning of Article 2(6) but a uniform approach of the WSR for shipments of waste destined for interim recovery as a specific case of recovery for which the general rules for recovery only apply if no specific rules are laid down in WSR.

**4.5. How should proof of a notification contract concluded between the notifier and consignee be provided to the relevant authorities? How should proof of a contract concluded between the producer, new producer or collector and the broker or dealer, in the event that the broker or dealer acts as notifier be provided to the relevant authorities?**

*Keywords: Procedure, Proof of contracts*

Article 4(2), 4(3) and Article 4(4) of the WSR specify the information to be provided by the notifier to the competent authority.

In respect to the proof of a notification contract between the notifier and consignee for the recovery or disposal of the waste “evidence of a contract (or a declaration certifying its existence)” shall be supplied (Annex II, part 1, 22.).

In respect to the proof of a contract concluded between the producer, new producer or collector and the broker or dealer, in the event that the broker or dealer acts as notifier “a copy

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<sup>13</sup> This Court ruling was related to former Regulation (EEC) 259/93 which meanwhile has been repealed. However, it has to be taken in mind that the procedure of Article 11 Regulation (EEC) 259/93 applied to “waste for recovery listed in Annex II” (“Green list of wastes”) and thus covers the same constellation as Article 18 WSR. The objective of environmental protection remains identical in the WSR with regard to former Regulation (EEC) 259/93. Consequently, the arguments the Court have an identical impact for shipments to which the Article 18 procedure applies.

of the contract or evidence of the contract (or a declaration certifying its existence)” shall be supplied (Annex II, part 1, 23.)

If requested by any of the competent authorities concerned, the notifier shall supply a copy of the contracts referred to in Part 1, points 22 and 23. (Annex II, part 3, 12.).

The waste shipment regulation makes it legitimate for competent authorities to choose the option they like.

As a practical solution an internet based platform providing the information required by competent authorities would be very helpful. A tool already existing on an OECD level is the “Database on Transboundary Movement of Wastes destined for Recovery Operations” (see <http://www2.oecd.org/waste/index.asp>)

This interactive database aims at facilitating the paperwork of all parties involved in transboundary movements of wastes by providing the necessary information to complete the forms. The database includes practical information and specific requirements or provisions for each country. However, the information provided in this data base up to now is limited.

**4.6. Annex II, Part 1, No. 14 of WSR indicates the possibility to provide information in possible alternative routings. Are there any restrictions in describing more than one transport route in a notification dossier, as long as the starting point and the final destination stay the same?**

*Keywords: Procedural requirements; notification procedure; request for one route and no alternative*

The WSR requires in the notification documents information on the routing of an intended waste shipment. According to Annex II, Part I, No. 14 of WSR the information on the intended routing (point of exit from and entry into each country including customs offices of entry into and/or exit from and/or export from the Community) and intended route (route between points of exit and entry), including possible alternatives, also in case of unforeseen circumstances, has to be included.

The information has to be included in block 15 of the notification document (provided in Annex IA of WSR). Annex 1C, para 26 of WSR includes the specific instructions for completing block 15 of the notification document.

Additionally the WSR includes the possibility to submit a general notification. Such general notification may be submitted by the notifier to cover several shipments, in the case of the conditions given in Article 13 (1) of WSR are fulfilled.

In the case of unforeseen circumstances Article 13 (2) of WSR lays down the specifications for alternative routing.

The wording of Annex II, Part I, No. 14 of WSR leaves space for three different understandings:

1. The term “including possible alternatives” exclusively relates to the second sentence and to the intended route *between* points of exit and entry.
2. The term “including possible alternatives” relates to the whole point of the part also allowing alternatives of the routing including alternatives for the points of exit and entry.
3. It is possible to prepare several notification documents (with alternatives in routing and routes) to a single intended shipment.

***Option 1: Description of alternatives for route only***

Annex II, part 1, No. 14 of WSR specifies that, beside the information of exact points of exit and entries (routing) information on the “*intended route (route between points of exit and entry)*” should be “*supplied on, or annexed to, the notification document.*”

The same is declared in the specific instructions for completing the notification and movement document given in Annex 1C, para 26 of WSR.

As a conclusion, the WSR leaves not only the possibility but even requires alternatives for the routing within a country (between a point of entry and exit).

***Consequently***, the restriction to describing only one possible transport way within one country (to the point of exit of the country of dispatch, between the points of entry and exit for transit countries and from the point of entry of the country of destination to the final destination) would not be in line with the WSR.

***Option 2: Description of alternatives for route and routing***

It is not obvious that the term „including possible alternatives“ in Annex II, part 1, No. 4 of WSR is only connected to the second sentence of the part or as it is meant to include the description of alternatives in the routing also. Arguments against such a reading are given in two positions within the WSR:

4. The notification document for transboundary movements/shipments of waste (Annex 1A of WSR) provides in block 15 (c) space for the entry of only *one* point of exit for the country of dispatch, *one* point of entry and *one* point of exit for transit countries and one point of entry for the country of destination.

In addition the requested the information cannot only be provided *on* the notification document but also can be *annexed to it*; the template for the notification document gives an indication of the initial intention of the law, only leaving space for one possibility.

5. The instructions for completing the notification document (1C, para 26 of WSR) requires to provide information about the intended route between points of exit and entry, including possible alternatives, also in cases of unforeseen circumstances, in an annex.”

This phrase is clearly separated (structured as an own sentence) from the first part of para 26 in which the specifications for the information regarding the points of exit and entry are

given. This leads to the interpretation that the description of alternatives is exclusively meant for the route between points of exit and entry.

Also in the case of general notification it is stated very clear in Article 13 (1) (c) of WSR that the route of the shipment as indicated in the notification document is the same.

Besides the possible consequences of the inclusion of alternatives for the entire transport way could be far reaching. The description of alternative routing for the entire transport way including the changes of points of exit and entry could lead to a change of competent authorities involved. Also the question would arise how to restrict the number of indicated alternatives, e.g. would it be possible to include the whole list of border-crossings and customs offices of a country by including an entire list of names and codes to the annex of the notification dossiers?

The most obvious argument for the restriction of the inclusion of alternatives for the entire transport way though is the main objective of the WSR in recital 1 and Art. 1. of WSR. The control of shipments of waste nonetheless will be unfeasible or at least more difficult if the description of alternatives for the entire transport way only setting a point for starting and a final destination.

Member States' authorities have stated that this interpretation of WSR would lead to unnecessary administrative burden, particularly in case of Member States where only one competent authority is in place and where many of the transports are carried out via seaports with the involved companies being forced to follow a flexible approach with regard to transport routes. In this context, it should be noted that binding interpretation with respect to this issue is not in place so far.

However, in line with the arguments above, restrictions in describing more than one transport route in a notification dossier, when only the starting point and the final destination stay the same, are in line with the WSR.

### ***Option 3: Preparation of several notification dossiers***

Finally the possibility to deliver more than one notification dossier with the alternative routing including in additional notification(s) is considered.

The WSR does not address the topic of preparing several notification dossiers for one waste shipment.

However, the main objective is stated in Recital 7 of WSR as the supervision and control of shipments of waste in a way which takes account of the need to preserve, protect and improve the quality of the environment and human health.

For this reason a notification dossier for a shipment of waste has to be prepared with the intention that, regarding Annex IC, para 6 of WSR providing the competent authorities concerned with the information they need to assess the acceptability of proposed waste shipments. It also provides space for them to acknowledge receipt of the notification and, where required, to consent in writing to a proposed shipment.

Preparing several notification dossiers for one shipment would hamper this intention.

*Consequently*, preparing more than one notification dossier for one transport of waste is not in line with the WSR.

**4.7. According to Annex II, Part 3, No. 2 of WSR, competent authorities can request a copy of the permit issued in accordance with the IPPC Directive. What should this practically mean taking into account that permits of operation facilities can be very complex and that they are issued in the language of the country of destination? What does this mean for plants for which permits have been issued under a different legislation (e.g. outside the EU)?**

*Keywords: Procedure, Permits of treatment facilities*

According to Annex II, Part 3, No. 2 of Regulation (EC) No 1013/2006 competent authorities can request as additional information and documentation a copy of the permit issued in accordance with Articles 4 and 5 of Directive 96/61/EC. The IPPC Directive 2008/1/EC (ex-Directive 96/61/EC) stipulates in Article 4 that Member States shall take the necessary measures to ensure that no new installation is operated without a permit issued in accordance with this Directive. Article 5 defines requirements for the granting of permits for existing installations. Consequently for both, new and existing IPPC installations within the Community a permit must be granted before operating in accordance with the national implementation of the Directive.

Of course, the permits may vary in terms of the overall page number, times of amendment, languages and based legislations depending on the installation type and the country where the installation is operated. Within the Community they may not vary in terms of general requirements defined in Directive 2008/1/EC.

For exports from the European Community it should be ensured that the waste is managed in an environmentally sound manner throughout the period of shipment and including recovery or disposal in the country of destination. The facility which receives the waste should be operated in accordance with human health and environmental protection standards that are broadly equivalent to those established in Community legislation, whereby related non-binding guidelines on environmentally sound management can be found in Annex VIII of Regulation (EC) No 1013/2006 (Guidelines adopted under the Basel Convention, Guidelines adopted by the OECD, Guidelines adopted by the International Maritime Organisation, Guidelines adopted by the International Labour Organisation). The possibility for competent authorities to request the permit of an installation within or outside the Community should ensure that the waste is managed and operated in an environmentally sound manner (especially throughout the recovery/disposal process in the receiving installation).

Annex II, Part 3, No. 2 of WSR should practically be seen as possibility to clarify specific questions concerning the notification process. E.g. if there is a lack of clarity concerning the capacity of an installation, the request should be focused on that (part of the) permit or accompanying amendment that deals with the granted capacity of the installation.

Concerning different languages, Article 27 of WSR stipulates that the notifier shall provide the competent authorities concerned with authorised translation(s) into a language which is acceptable to them, should they so request.

**4.8. What kind of proof can a competent authority request in order to release the financial guarantee associated with the prior written notification and consent procedure?**

*Keywords: Procedural requirements; release of the financial guarantee*

**Background:** Some stakeholders complain that there exist regional authorities in Member States which ask for a full copy of the movement document including front and back pages and that both pages are stamped and signed. When thousands of such forms need to be processed that way, it appears to be confusing and cause a lot of burden to companies. This seems to be worse when the requirements differ from state to state.

The financial guarantee or equivalent insurance shall be released when the competent authority concerned has received the certificate referred to in Article 16(e) or, where appropriate, in Article 15(e) as regards interim recovery or disposal operations for the relevant waste. It is doubtful whether Block 19 of the movement document should be filled in and stamped and signed before or after copying the movement document.

It is the position held here that the competent authorities can request in order to release the financial guarantee associated with the prior written notification and consent procedure

- signed (but not stamped) copies of the movement document with block 19 completed;
- signed copies of certificates according Article 15(e) outlined in the Correspondents guidelines No 3<sup>14</sup>.

**4.9. How the movement forms in the shipment of wastes requiring notification should be handled in the case of discontinued shipments, where more than one mode of transport (e.g. trucks, train, ships) is involved in a shipment?**

*Keywords: Procedure; notification procedure; movement documents; procedure in case of discontinued shipments*

As regards Article 4(1) of the WSR the notification document (set out in Annex IA of the WSR) and the movement document (set out in Annex IB of the WSR) shall be submitted by the notifier.

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<sup>14</sup> CORRESPONDENTS' GUIDELINES No 3 Subject: Certificate for subsequent non-interim recovery or disposal according to Article 15(e) of Regulation (EC) No 1013/2006 on shipments of waste

Some parts of the movement document have to be completed by the notifier at the time of notification, while others are required to be filled in after the consents from the competent authorities have been received (Annex IC, para 32 of WSR).

The question arises is: How should the movement forms be filled out and handled in the case of several transport modes involved and the load is split into several transports (e.g. from truck to ship to truck) referred to as “discontinued shipments”? Two options can be discussed.

- (1) *Several movement documents* for the divided loads of one intended shipment will be filled in.
- (2) *One movement document* for the spitted loads of one shipment of waste will be filled in and used on the transport as a copy?

***Option 1: Filling in several movement documents for spitted loads of one waste shipment***

Article 16 of WSR lays down, that the movement document, or, in the case of a general notification, the movement documents shall be completed by the undertakings involved.

Furthermore Block 2 of the movement document (Annex IB of WSR) requires the information on the serial/total number of shipments. The specific instructions for filling in the movement document (included into Annex IC para 34 of WSR), says that, for a **general notification** for multiple shipments, the **serial number of the shipment and the total intended number of shipments** indicated in block 4 in the notification document (e.g. ‘4/11’ for the fourth shipment out of eleven intended shipments) has to be entered. **In the case of a single notification ‘1/1’** has to be entered.”

This means that the possibility of filling in several movement documents is only given in the frame of a general notification laid down in Article 13 of the WSR.

Such general notification may be submitted by the notifier to cover several shipments, fulfilling the three conditions laid down in Article 13 (1) of WSR. In the case that a load of shipment of waste is divided on several transports all three conditions are fulfilled. It is the same type of waste (a) shipped to the same consignee and facility (b) taking the same route (c).

**Consequently**, the filling in of several movement documents for discontinued shipments is possible in the frame of a general notification procedure laid down in Article 13 of WSR. The possibility of filing in several movement documents for a single notification procedure is not given in the Waste Shipment Regulation.

***Option 2: Applying one movement document for spitted loads of one waste shipment***

The movement document is included in Article IB of WSR. The specific instructions for completing the notification and movement document ( Annex IC, para 6 of WSR) lays down the purpose of the movement document as, the document which is intended to travel with a consignment of waste **at all times from the moment it leaves the waste producer to its arrival at a disposal or recovery facility** in another country.

In the case of the involvement of different carriers block 8 in the movement document (included into Annex IB of WSR) leaves space for the information of three different carriers. When more than three carriers are involved, appropriate information on each carrier should be attached to the movement document and upon each successive transfer of the consignment, the new carrier or carrier's representative taking possession of the consignment will have to comply with the same request and also sign the document. A copy of the signed document is to be retained by the previous carrier.

The intention of the movement document is, to give all persons (authorities, facility of dispatch and facility of disposal or recovery and the carriers) the possibility to fill in the regarded information. For that purpose the movement document is handed over from one carrier to the next and each carrier has to include the related information, sign the document and send a copy back to the notifier.

**Consequently**, it has to be assured that the movement document accompanies the shipment at all time of the transport. Therefore the use of a single movement document for more than one transport mode (e.g. for several trucks) is not in line with the WSR.

However practical solutions are needed for the exceptional case that a notified load (e.g. ship container) will be divided into several smaller loads (e.g. off-loading to smaller trucks). In this case it could be practical to allow using a single movement document in copy. Still the original information has to be given at *all* single transports. According to the movement document in Annex IB, block 2 especially the weight of a single transport has to be inserted. Looking at the specific instructions for filling in the movement document (Annex IC para 36 of WSR) specifies that the actual weight in tonnes of the waste and wherever possible, copies of weighbridge tickets have to be given.

When using copies of the movement documents to accompany an actual transport, the information of the actual weight of the single transport and the total weight of the whole transport is required. Also it should be indicated how many transports are involved (e.g. number 1 out of 3) and where the rest of the load is transported (e.g. number of plate of trucks transporting the rest of the load).

**Consequently**, when more than one mode of transport is involved in a shipment, the transports in general have to be addressed within separate notifications requiring one movement document for each transport or within a general notification of Article 13 of the WSR.

The use of copied movement document at the location of off-loading from one to another transport mode should be possible **only in exception**. Then it should be required that the document includes the information of actual and total load of the waste shipment and the remaining rest of the shipment by specific information.



**4.10. What procedural requirements may be used for importing wastes that are listed in Annex IIIB (including potential future entries) of the waste shipment regulation, into the European Community from an OECD country?**

*Keywords: Procedural requirements for Annex IIIB wastes*

***Case A: Import destined for recovery***

According to Article 44 Title II of the WSR “shipment within the Community with transit through third countries” shall apply with the adaptations and additions listed in Article 44 (2) and (3). Article 44 refers to all wastes destined for recovery, including potential future waste entries listed in Annex IIIB.

In the case that Article 44 (4) would require the prior written notification for all wastes destined for recovery it could be expected that this significant discrepancy to the provisions of Title II of WSR would be mentioned explicitly (see Article 38(2) (b) for exports of wastes listed in Annex IIIB to OECD-Decision countries).

By that, Article 44 applies for both, imports where the notification procedure has to be executed (wastes classified under one single entry listed in Annex IV and IVA) and imports where Article 18 applies (wastes classified under one single entry listed in Annex III, IIIA and IIIB). In the adaptations and additions of Article 44 there are defined specific single provisions related to the procedure of notification (e.g. defined in Article 44 (4) (a)). These related provisions apply only for those imports where the notification procedure has to be executed because of the requirements of Title II of the WSR.

As potential future waste entries listed in Annex IIIB are “additional green listed waste awaiting inclusion in the relevant Annexes to the Basel Convention or the OECD Decision as referred to in Article 58(1) (b)” and Article 44 deals with “waste destined for recovery” these imports presumably are subject to the requirements of Article 18 according to Article 3(2) (a).

***Case B: Import destined for disposal***

Imports into the Community of waste destined for disposal from an OECD Decision country without fulfilling an exception defined in Article 41 are prohibited.

If not prohibited, according to Article 3 (1) (a) the notification procedure has to be executed for all wastes destined for disposal operations.

***Consequently***, for potential future waste entries of Annex IIIB of the WSR, which will be imported into the European Community from an OECD country and are destined for recovery, Article 44 defines the procedural requirements and refers to the procedure stipulated in Title II of the WSR under consideration of the adaptations and additions listed in paragraph 2 and 3 of Article 44 of the WSR. Imports destined for disposal into the European Community from an OECD country without fulfilling an exception defined in Article 41 are prohibited. If not prohibited, according to Article 3 (1) (a) the notification procedure has to be executed for all wastes destined for disposal operations.

**4.11. What procedural requirements may be used for importing wastes that are listed in Annex IIIB (including potential future entries) of the waste shipment regulation, into the European Community from a non-OECD country, party to the Basel Convention?**

*Keywords: Procedural requirements for Annex IIIB wastes*

**Case A: Import destined for recovery** (answer amended in July 2012)

Article 45 of the WSR stipulates “*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*“. For imports into the Community from countries to which the OECD Decision does not apply and which are also Party to the Basel Convention and which were destined for recovery, Article 42 which defines the procedure for waste destined for disposal, shall apply *mutatis mutandis*.

Article 42 of the WSR stipulates “*Procedural requirements for imports from a country Party to the Basel Convention or from other areas during situations of crisis or war*“. According to paragraph 1 of Article 42 “*Where waste is imported into the Community and destined for disposal from countries Parties to the Basel Convention, the provisions of Title II shall apply mutatis mutandis, with the adaptations and additions listed in paragraphs 2 and 3*“.

One could expect that the reference in Article 45 to Article 42 is made only to consider equal time frames (in case of notification) for recovery as for disposal for imports from a non-OECD country party to the Basel Convention (see Article 42(2) (a)).

As in Article 42 the provisions of Title II on intra-community shipments applies *mutatis mutandis*, this means that that the application of Title II to imports from non-OECD countries for recovery makes the application of Article 18 possible. Therefore no notification should be required for imports from non-OECD countries for recovery of wastes listed in Annex IIIB.

Rules, like stipulated for exports of green-listed wastes destined for recovery (see Article 36 to 38), do not exist.

**Case B: Import destined for disposal**

Imports into the Community of waste destined for disposal from a non OECD Decision country, Party to the Basel Convention, without fulfilling an exception defined in Article 41 are prohibited.

If not prohibited, according to Article 3 (1) (a) the notification procedure has to be executed for all wastes destined for disposal operations.

The WSR does not give an answer if the reference of Article 45 to Article 42 intends to demand notification procedure for imports of green-listed wastes destined for recovery into the EU from a non-OECD country party to the Basel Convention. There are two possible answers in respect with the two given argumentation lines.

Imports destined for disposal into the European Community from an OECD country without fulfilling an exception defined in Article 41 are prohibited. If not prohibited, according to Article 3 (1) (a) the notification procedure has to be executed for all wastes destined for disposal operations.

**4.12. If a notifier proceeds with several notifications per year, is there a possibility to establish one single annual financial guarantee for all the relevant shipments concerned?**

*Keywords: Procedure, Financial guarantee for several shipments*

The WSR does neither include nor exclude explicitly the possibility to establish one single annual financial guarantee for several shipments per year (except in the case of a general notification (Article 13 (1) WSR) which is not in the scope of the question).

The wording of several Articles (e.g. Art. 6(5)) indicates that for each notified shipment a financial guarantee or equivalent insurance is required.

The practical handling of a single annual financial guarantee for several different notified shipments could be difficult or impossible for the competent authorities as the competent authority of dispatch has to approve the financial guarantee or equivalent insurance, including the form, wording and amount of the cover (Article 6 (4)). This is an important risk for Competent Authorities who are in first line in case of illegal or unachieved transfer.

- In the case that several notifications are carried out within a year and notified “not at once” and are covered by one financial guarantee or equivalent insurance the costs for transport, of recovery, disposal or storage for 90 days, probably will not be available at the date of the first notification. Further these calculations depend on the type of waste, the type of treatment, packaging, etc. which make a calculation even more complex. For each new notification the competent authority would have to check if this shipment still is covered by the one financial guarantee or equivalent insurance.
- In the case that several notifications are carried out within a year and notified “at once” and are covered by one financial guarantee or equivalent insurance the approval of the costs might be possible.

In order to guarantee that all shipments are covered by the financial guarantee or equivalent insurance it shall be ensured, that the amount of the cover does not change within the year.

In both cases the single financial guarantee or equivalent insurance shall be released when the competent authority concerned has received the last certificate referred to in Article 16(e) or, where appropriate, in Article 15(e) as regards interim recovery or disposal operations for the notified shipments covered.

**4.13. What procedure is necessary for the shipment of 'green-listed' waste for recovery from a non-EU country to another non-EU country transiting through the Community?**

*Keywords: Procedural requirements for Annex III wastes*

(answer amended in July 2012)

Title VI of the WSR regulates the “*Transit through the community from and to third countries*” whereby Article 47 deals with “*Transit through the Community of waste destined for disposal*” and Article 48 deals with “*Transit through the Community of waste destined for recovery*”.

If the transit of waste is destined for recovery and Article 48 applies, there is a differentiation made between OECD and non-OECD countries concerned.

- a. Article 48 (1) stipulates: “*Where waste destined for recovery is shipped through Member States from and to a country to which the OECD Decision does not apply, Article 47 shall apply mutatis mutandis.*”

Article 47 stipulates: “*Where waste destined for disposal is shipped through Member States from and to third countries, Article 42 shall apply mutatis mutandis, with the adaptations and additions listed below:...*”.

Article 42 of the WSR stipulates “*Procedural requirements for imports from a country Party to the Basel Convention or from other areas during situations of crisis or war*”. According to paragraph 1 of Article 42 “*Where waste is imported into the Community and destined for disposal from countries Parties to the Basel Convention, the provisions of Title II shall apply mutatis mutandis, with the adaptations and additions listed in paragraphs 2 and 3*”.

According to Title II, Article 3(2) (a), for wastes listed in Annex III (‘green-listed’) the procedure of Article 18 applies.

Notification requirement could not be expected for these wastes because of the reference to Title II of the WSR.

- b. Article 48 (2) stipulates: “*Where waste destined for recovery is shipped through Member States from and to a country to which the OECD Decision applies, Article 44 shall apply mutatis mutandis, with the adaptations and additions listed below:...*”.

According to paragraph 1 of Article 44 “*Where waste destined for recovery is imported into the Community from countries and through countries to which the OECD Decision applies, the provisions of Title II shall apply mutatis mutandis, with the adaptations and additions listed in paragraphs 2 and 3*”.

Thus, Title II of the WSR “*shipment within the Community with transit through third countries*” with the adaptations and additions listed in Article 44 (2) and (3) shall

apply also for transit through the Community from and to a country to which the OECD Decision apply for waste destined for recovery. According to Title II, Article 3(2) (a), for wastes listed in Annex III ('green-listed') the procedure of Article 18 applies.

- c. Article 48 (3) stipulates: "*Where waste destined for recovery is shipped through Member States from a country to which the OECD Decision does not apply to a country to which the OECD Decision applies or vice versa, paragraph 1 shall apply as regards the country to which the OECD Decision does not apply and paragraph 2 shall apply as regards the country to which the OECD Decision applies.*"

See argumentation line in (a) and (b).

**Consequently**, The application of Article 18 for the shipment of 'green-listed' waste through Member States from and to a third country is possible.

**4.14. Should shipments of hazardous waste transiting through the Community and destined to a country, to which the OECD Decision does not apply, be considered an illegal shipment?**

*Keywords: Procedural requirements for Annex III wastes*

According to the "Basel Convention Ban Amendment" the Parties agreed in the Second Meeting of the Conference of the Parties (COP – 2) in March 1994 to an immediate ban on the export of hazardous wastes from OECD to non-OECD countries. At COP-3 in 1995 it was proposed that the Ban be formally incorporated in the Basel Convention as an amendment (Decision III/1).

The Amendment to the Basel Convention (Decision III/1), adopted at the Third Meeting of the Conference of the Parties at Geneva on 22 September 1995, stipulates:

*Article 4 A:*

- 1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.*
- 2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1 (i) (a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterized as hazardous under the Convention.*

According to the recital (3) and (4) of the WSR the Community is Party of the Basel Convention since 1994 and the amendment to the Basel Convention, as laid down in Decision III/1 of the Conference of the Parties, was approved on the behalf of the Community by

Council Decision 97/640/EC. Recital (4) stipulates: “*Regulation (EEC) No 259/93 was amended accordingly by Council Regulation (EC) No 120/97*”.

To be in line with the approved “Basel Convention Ban Amendment” shipments of hazardous waste transiting through the Community and destined to a country to which the OECD Decision does not apply, should be considered as illegal shipment even not mentioned explicitly in the WSR.

**4.15. Is the import of green or hazardous waste from Kosovo to Germany for the purpose of laboratory analysis possible under the WSR? If yes what shipment procedure should apply?**

*Keywords: Procedural requirements; Wastes destined for laboratory analysis; areas during situations of crisis; Kosovo*

Title V of the WSR regulates imports of waste into the community from third countries.

According Chapter 1 and Chapter 2 imports of wastes from third countries for disposal as well as for recovery are prohibited even the waste is explicitly destined for laboratory analysis.

However several exemptions are stipulated in Article 41 (1) and Article 43 (1) leading to following conclusions:

- There is no exemption from prohibition of importing waste in the meaning of Article 41(1) (a), (b), (c) and Article 43(1) (a), (b), (c), (d) respectively. It is not unambiguous if Kosovo is an area where, on exceptional grounds during situations of crisis, peacemaking, peacekeeping or war, no bilateral agreements or arrangements pursuant to points (b) or (c) (of Article 41 WSR) can be concluded or where a competent authority in the country of dispatch has either not been designated or is unable to act.
- The export of wastes generated by the Kosovo Troops (KFOR) of the North Atlantic Treaty Organization (NATO) in Kosovo (Serbia and Montenegro) during the deployment of KFOR/NATO troops to Germany for environmentally sound management is possible based on the agreement between Germany and the KFOR/NATO concluded in 2000. However these exports are excluded under the provisions of WSR.

In the following two cases are discussed:

- 1) Kosovo is a country
  - a. with which the Community, or the Community and its Member States, can conclude bilateral or multilateral agreements or arrangements compatible with Community legislation and in accordance with Article 11 of the Basel Convention;

- b. or with which Germany (an individual Member State) can conclude bilateral agreements or arrangements in accordance with paragraph 2 (of Article 41 WSR);
- 2) Kosovo is regarded as an area where, on exceptional grounds during situations of crisis, peacemaking, peacekeeping or war, no bilateral agreements or arrangements pursuant to points (b) or (c) (of Article 41 WSR) can be concluded or where a competent authority in the country of dispatch has either not been designated or is unable to act.

In both cases the national legislation of the non EU countries, where the waste is shipped through before imported into the EU, has to be observed.

**Case 1:**

To enable imports from third countries – not Member of the EU and OECD and not Party to the Basel Convention – into the community, an agreement in line with Article 41 (1) (b) or (c) respectively with Article 43 (1) (c) or (d) can be concluded. It is obvious and obligatory that such an agreement shall be concluded before the import with the intention to recover or dispose waste within the EU – including imports for the purpose of laboratory analysis – takes place.

Bilateral or multilateral agreements or arrangements entered into in accordance with Article 41 paragraph 1(b) and (c) respectively Article 43 paragraph 1(c) and (d) shall be based upon the procedural requirements of Article 42.

Procedural requirements defined in Article 42 for imports of waste into the Community refer to Title II of the WSR whereby Article 3 (4) stipulates:

*“Shipments of waste explicitly destined for laboratory analysis to assess either its physical or chemical characteristics or to determine its suitability for recovery or disposal operations shall not be subject to the procedure of prior written notification and consent as described in paragraph 1. Instead, the procedural requirements of Article 18 shall apply. The amount of such waste exempted when explicitly destined for laboratory analysis shall be determined by the minimum quantity reasonably needed to adequately perform the analysis in each particular case, and shall not exceed 25 kg.”*

Consequently, the import of green or hazardous waste from Kosovo to Germany for the purpose of laboratory analysis under the provisions of the WSR is possible, if an agreement in line with Article 41 (1) (b) or (c) respectively with Article 43 (1) (c) or (d) has been/is concluded. These shipments shall be subject to the procedural requirements of Article 18.

**Case 2:**

The procedural requirements for imports from areas during situations of crisis or war are laid down in Article 42.

Paragraph 1 of Article 42 only mentions imports from countries Parties to the Basel convention. However there is an adaptation mentioned under Article 42 (2) (b) that in the

cases referred to in Article 41(1)(d) involving situations of crisis, peacemaking, peacekeeping or war, the consent of the competent authorities of dispatch shall not be required.

The consent of the competent authorities of dispatch is required only for wastes subject to the procedure of prior written notification and consent notification procedure. According Article 3 (4) this procedure is not required for wastes explicitly destined for laboratory analysis. Consequently Title II Article 3 (4) shall be applied (see Case 1).

The import of green or hazardous waste from Kosovo to Germany for the purpose of laboratory analysis under the provisions of the WSR is possible. These shipments shall be subject to the procedural requirements of Article 18.

**4.16. What procedure governs the import of green-listed waste destined for recovery into the EU from a non-OECD country party to the Basel Convention?**

*Keywords: Procedural requirements for Annex III wastes*

(answer amended in July 2012)

As referred to in Article 45 of the WSR, Article 42 which defines the procedure for waste destined for disposal, shall apply *mutatis mutandis* for imports of wastes listed in Annex III ('green-listed') into the Community from countries to which the OECD Decision does not apply and which are also Party to the Basel Convention and which are destined for recovery.

According to paragraph 1 of Article 42 "*Where waste is imported into the Community and destined for disposal from countries Parties to the Basel Convention, the provisions of Title II shall apply mutatis mutandis, with the adaptations and additions listed in paragraphs 2 and 3*".

One could expect that the reference in Article 45 to Article 42 is made only to consider equal time frames (in case of notification) for recovery as for disposal for imports from a non-OECD country party to the Basel Convention (see Article 42(2) (a)).

By that Title V, Chapter 1, Article 42 refers to Title II of the WSR "shipment within the Community with transit through third countries" and Title II deals with both wastes destined for recovery and waste destined for disposal.

According to Title II, Article 3(2) (a), for wastes listed in Annex III ('green-listed') the application of Article 18 is possible.

Rules, like stipulated for exports of green-listed wastes destined for recovery (see Article 36 to 38), do not exist. In case of disagreement on classification issues between the competent authorities of dispatch and of destination Article 28 applies.



**4.17. Shall the “date of transmission of the acknowledgement” as referred to in Article 9 of the WSR be understood as the date when the acknowledgement is received by the competent authority of transit?**

*Keywords: Time frame for taking a decision by the competent authorities concerned, transmission of the acknowledgement*

It might happen that the acknowledgement is not delivered to the competent authority of transit so that the written decision cannot be taken and delivered within the 30 days time frame by the competent authority of transit.

In any way, according to Article 8 (2) of the WSR not sending an acknowledgement to the competent authorities concerned (including the competent authority of transit) would be against the provisions of the WSR.

In some Member States, e.g. Germany it seems to be possible to deliver a written decision before the acknowledgement from the competent authority of destination was received.

According to Article 9 (1) of the WSR competent authorities concerned shall have 30 days following the date of transmission of the acknowledgement by the competent authority of destination to take a decision. In the question it is asked, if the date of dispatch or the date of delivery within the transmission is the starting date for the 30 days time frame.

There are different wordings used in the WSR regarding the defined time periods. Compared to Article 7(4) and Article 8(3) where the wording indicates the beginning of the time period (...within 30 days of receipt of the notification...) there is no indication given in Article 9(1), Article 10 (1), Article 11(1) and Article 12(1) (...within 30 days following the date of transmission of the acknowledgement of the competent authority of destination...).

There are some arguments to prefer the date of dispatch on which the acknowledgement has left the competent authority of destination as starting point for the 30 days time frame:

- If not, it would be possible that there are different deadlines for the 30 days time frame regarding the different competent authorities concerned.
- Clarification in Case C-215/04 (Party Pedersen) by the ECJ to provisions defined in Article 7(2) of Regulation (EEC) No 259/93: *The period in Article 7(2) of Regulation No 259/93 begins to run when the competent authorities of the State of destination have sent the acknowledgement of receipt of the notification, irrespective of the fact that the competent authorities of the State of dispatch do not consider that they have received all of the information set out in Article 6(5) of that regulation. The effect of the expiry of that time-limit is that the competent authorities can no longer raise objections to the shipment or request additional information from the notifier.*
- For the competent authority of destination the transmission act is finished on the date of dispatch.

On the other hand one could argue that the term “transmission” includes the overall process beginning with the dispatch and finished by receiving the acknowledgement.

Even it isn't clearly indicated by the wording of the WSR, there are good arguments that the 30 days time frame begins to run when the competent authority of destination has sent the acknowledgement.

**4.18. Regarding the duration of a contract, does it explicitly mean that the period of validity of the contract shall be at least one year following the date of the last shipment indicated in block 6 of the Notification document and two years when one interim and one subsequent non-interim operation are notified?**

*Keywords: Procedural requirements; duration of contract*

According to Article 5 of WSR, all shipments of waste for which notification is required shall be subject to the requirement of the conclusion of a contract between the notifier and the consignee for the recovery or disposal of the notified waste. Article 5(2) says that

“The contract shall be concluded and effective at the time of notification and for the duration of the shipment until a certificate is issued in accordance with Article 15(e), Article 16(e) or, where appropriate, Article 15(d). (...)”

According to Article 15 and 16 of WSR, the respective certificates have to be submitted at certain deadlines:

- In case of non-interim treatment, ***no later than one calendar year*** following ***receipt*** of the waste (Article 16(e))
- In case that 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, ***no later than one calendar year*** following ***delivery*** of the waste, (Article 15(e))
- In case of other interim treatment than mentioned in Article 15(e) ***no later than one calendar year*** following ***receipt*** of the waste (Article 15(d))

Following these provisions, there is no general deadline of two years in case of interim treatment of the waste.

Note that: In all cases, a shorter period in accordance with Article 9(7) might be indicated by the Competent Authorities.

Article 5 (2) of the WSR sets out requirements for the validity of the contract. It clarifies that the entire operation of notification, shipment and recovery/disposal of wastes submitted to notification procedure has to be covered by an effective contract until its termination, i.e. until the completion of the last step – the issue of a certificate in accordance with the cited provisions of Article 15(e), Article 16(e) or, where appropriate, Article 15(d).

**4.19. If during transmission of the notification the competent authority of dispatch informs other competent authorities concerned that it considers the notification not properly completed (but properly carried out), is the competent authority of destination bound by that information and is obliged to wait and not send the acknowledgement according to Art. 8(2) WSR until the competent authority of dispatch informs according to last sentence of Art. 8(1) WSR that the requested information and documentation has been received and that the notification is considered properly completed?**

*Keywords: Procedural requirements; notification procedure; bindingness of opinion of one CA*

The background of the problem raised in the inquiry is that the competent authority of dispatch in deciding the question, whether a notification is properly carried out in the sense of Article 4(2) point 2 WSR does not consider information as contained in Annex II, part 3 at all. The consequence is that the competent authority of dispatch might have the opinion that further information or documentation is necessary after having transmitted the notification to the competent authority of destination. The proper way of communicating this consideration is a request for further information or documentation as laid down in Article 8(1) WSR.

In case the competent authority of dispatch, after having transmitted the notification to the competent authority of destination, has issued a request in the sense of Article 8(1) WSR because

- it considers the notification is properly carried out in the sense of Article 4(2) point 2 WSR but
- it does not consider the notification properly completed in the sense of Article 4(2) point 3 WSR e.g. because it considers that further information or documentation as addressed in Annex II, part 3 is needed,

it is arguable whether the competent authority of destination might, nevertheless, consider the notification properly completed and subsequently send an acknowledgement in the meaning of Article 8(2) WSR to the notifier and copies to the other competent authorities concerned.

With regard to this question, two interpretations of Article 8(2) WSR are supposable:

- The competent authority of destination solely decides whether the notification has been properly completed, in taking this decision it might consider or not a request in the meaning of Article 8(1) WSR by the competent authority of dispatch;
- A request in the meaning of Article 8(1) WSR always binds the competent authority of destination in a way that the authority may not issue an acknowledgement as addressed in Article 8(2) WSR.

Article 8(2) WSR is directly related to Article 4(2) point 3 WSR which defines the standard what the competent authority of destination has to examine. Following this Article, the Authority has to affirm that “any additional information and documentation requested in

accordance with this paragraph and as listed in Annex II, Part 3” have been supplied by the notifier. “In accordance with this paragraph” is to be understood as a reference to the first sentence of 4(2) point 3 WSR (“If requested by any of the competent authorities concerned, the notifier shall supply additional information and documentation.”)

Thus, the competent authority of destination has to examine in the framework of Article 8(2) WSR whether any requested additional information and documentation has been submitted by the notifier. It has no mandate to examine whether the request for additional information was reasonable from its point of view or not.

For the submission of the requested information, the WSR does foresee that the information is to be sent to the competent authority which has requested the information and that it is subsequently sent to the competent authority of destination. If, as described in the inquiry, the competent authority of dispatch has not informed the other involved competent authorities in the meaning of Article 8(1) WSR that the requested information has been submitted, it can be implied that the information has not been submitted so far. Consequently, the question to be examined requested (Has the requested additional information and documentation been submitted by the notifier?) must not be affirmed by the competent authority of destination.

Taking this in mind, the second of the two outlined interpretations of Article 8(2) WSR is to follow and, *consequently*, if during transmission of the notification the competent authority of dispatch informs other competent authorities concerned that it considers the notification not properly completed (but properly carried out), the competent authority of destination is bound by that information and is obliged to wait and not to send the acknowledgement according to Art. 8(2) until the competent authority of dispatch informs according to last sentence of Art. 8(1) that the requested information and documentation has been received and that the notification is considered properly completed.

**4.20. Is it admissible to lay down more detailed provisions regarding the notification (which shall certainly be in line with the provisions stipulated in Regulation 1013/2006) in the national legislation even if the main rules are already stipulated in the directly applicable Regulation?**

*Keywords: Basic questions; procedural requirements; Detailed provisions in national legislation additional to WSR requirements*

*Administrative provisions not addressed in WSR*

The WSR does provide a number of administrative procedural rules to govern the process of shipments of waste in which authorities from different countries are involved (e.g. Title II, chapter 5). However, the system is not exclusive. For administrative procedural questions which are not addressed in the WSR, EU Member States have to apply their national procedural regulation in order to comply with Article 4(3) of the Treaty on the European

Union<sup>15</sup> (a similar provision was laid down in Ex-Article 10 of the Treaty establishing the European Community (“TEC”)):

“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.”

*Additional protective measures in the meaning of Article 193 of Treaty on the Functioning of the European Union*

Article 191 to 193 of Treaty on the Functioning of the European Union (“TFEU”) (Ex-Article 174 to 176 TEC) read

„Article 191 (ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

(...)”

Article 192 (ex Article 175 TEC)

(1) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

(...)

(4) Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy. (...)

Article 193 (ex Article 176 TEC)

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.”

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<sup>15</sup> This draft reply follows the wording and the structure of the Treaties regarding the European Union as amended by the Treaty of Lisbon which entered into force on 1 December 2009 (see Consolidated Versions Of The Treaty On European Union and The Treaty On The Functioning Of The European Union (OJ 2008/C 115/01)). Note that for clarity reasons, provisions in the version valid until December 2009 are also indicated in parentheses and the prefix “Ex- ...”.

The legislative basis of WSR is Article 192 TFEU (ex Article 175 TEC).<sup>16</sup>

Following this, additional procedural requirements set by Member States are basically and generally admissible if they in fact aim to protect the environment and if they do not exceed the requirements as set out by Article 193 TFEU (ex Article 176 TEC), the named “compatibilities with the treaties” being understood particularly regarding the prohibition of quantitative restrictions on imports and exports as laid down in Articles 34 and 35 (ex-Articles 28 and 29 TEC). National legislation setting out procedural standards with regard to waste shipment legislation has to meet this standard.

One should note that a non-binding provision demanding the notifier to submit a set of copies (e.g. stating that “It should be worked towards that usually, the necessary set of copies is submitted together with the notification”) is without any doubt in line with European law.

Where the additional requirement taken by a Member State is a **more stringent protective measure**, this must be **compatible with the Treaty** on the Functioning of the European Union and fulfil the conditions of article 193. Where the requirement is not a more stringent measure but a measure executing the obligations laid down in the WSR, this measure must be compatible with and proportionate to the objectives of the Regulation.

**4.21. Does the term “any natural or legal person under the jurisdiction of that Member State...” in the definition of the “notifier” under Article 2(15) of WSR, presuppose that the notifier has to have a business address in the Member State, where the shipment is dispatched from?**

*Keywords: Definition of notifier, Need of business address/seat, Free movement of services*

No indication is given in the WSR and especially in Article 2 (15) of the WSR if the notifier has to have a business address in the Member State, where the shipment is dispatched from.

In order to analyse the question put above, the following terms have to be clarified:

- The term “*business address*” as mentioned in the question is understood as registered business address needed to e.g. set up a branch office.
- Regarding the understanding of the “territorial principle” the term “*natural or legal person under the jurisdiction of that Member State*” gives legal authority for a state to exercise jurisdiction in a case, due to location of the crime. This doesn’t demand a business address of the criminal in the state concerned.

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<sup>16</sup> Please note that the claim of European Commission that the European Court of Justice should annul the regulation due to an alleged infringement of the EC Treaty resulting from the choice by the Parliament and the Council to base the regulation solely on Article 192 TFEU (Ex-Article 175 TEC) and not jointly on Articles 207 TFEU (Ex-Article 133 TEC) and Article 192 has recently been dismissed by the Court (Judgement of the Court of 8 September 2009, C-411/06).

Further on, it has to be asked if any need for the notifier to have a business address in the Member State, where the shipment is dispatched from would be against other European Regulations.

The fact that there are additional expenses to set up an additional branch office for notifier, not based in the Member State a shipment originates from, would force the argumentation line A that there should be no need for a business address regarding the free movement of services. Article 49 and Article 56 of the Treaty on the Functioning of the European Union (TFEU) supports this argumentation line A.

On the other hand it could be argued that a need for a business address supports the enforcement of the WSR e.g. in case of illegal shipment. Article 17 (1) (e) of Directive 2006/123/EC and Article 191 (2) of the Treaty on the Functioning of the European Union (TFEU) supports this argumentation line B.

In general these provisions might be justified on environmental grounds in order for a position to be taken on the compatibility with the Treaty on the Functioning of the European Union.

The question put above was discussed in the Meetings of the waste shipment correspondents of 18./19.09.2008 and 16.01.2009 in Brussels whereby the conclusions force following statement:

There is no indication given in the WSR that the notifier has to have a business address in the Member State, where the shipment originates from. While recognising that national requirements applied to persons intending to ship waste to another Member State pose a restriction on the free movement of services under Article 56 of the Treaty on the Functioning of the European Union (TFEU) which might be justified on environmental grounds, a case-by-case assessment in each situation would be required in order for a position to be taken on the compatibility with the TFEU. The Court of Justice had in its case-law so far interpreted restrictively the possibility for justifying such restrictions on the free movement of services and it was noted that derogations must be in conformity with the principles of necessity and proportionality. It is for the national authorities in each specific case to demonstrate that these conditions are fulfilled.

**4.22. With reference to the new waste framework directive 2008/98/EC, which recovery operation(s) shall describe the newly introduced operation “preparing for re-use”?**

*Keywords: Definition for R/D Codes; new WFD*

From Article 3 point (13) and (16) of the WFD it can be derived, that “preparing for re-use” is a recovery operation for waste whereby the waste may ceases to be waste and “re-use” is an operation whereby the products or components originated from a waste are used again for the same purpose for which they were conceived.

The WFD clearly distinguishes between “preparing for re-use” and “recycling”. Consequently the recovery operations R3, R4 and R5 (Recycling/reclamation...) would not correctly

describe the recovery operation “preparing for re-use”. Further on, for the “preparation for re-use” of technical appliances such as used electronic equipment the operation R4 should not be used, even the main component by weight may be metal for several waste streams as R4 is restricted to “metal and metal compounds” only.

According to Article 6 of the WFD certain specified waste shall cease to be waste within the meaning of point (1) of Article 3 when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with several defined conditions. There is no indication given in the WFD that preliminary operations (mentioned in R12 including pre-processing such as, inter alia, dismantling, sorting, crushing, compacting, pelletising, drying, shredding, conditioning, repackaging, separating, blending or mixing) prior to final recovery are excluded from operations which allow waste to cease to be waste.

There is no indication given in the WFD at which process status end-of-waste criteria have to be fulfilled, except after any recovery operation.

A recovery operation may be as simple as the checking of waste to verify that it fulfills the end-of-waste criteria (Recital point (22) second indentation WFD).

The recovery operation R12 “Exchange of waste for submission to any of the operations numbered R1 to R11” can include preliminary operations prior to recovery including pre-processing such as, inter alia, dismantling, sorting, crushing, compacting, pelletising, drying, shredding, conditioning, repackaging, separating, blending or mixing prior to submission to any of the operations numbered R1 to R11.

The list of pre-processing is not exhaustive. The operations “checking”, “cleaning” or “repairing” could be included in the list. However, usually repairing activities include also dismantling and sorting (of appliances which are not worth to repair), which are already mentioned in the list.

Consequently, the newly introduced operation “preparing for re-use” shall be described by the recovery operation(s) R12. There is no indication given in the WFD at which process status end-of-waste criteria have to be fulfilled, so that waste prepared for re-use can cease to be waste after R12.

**4.23. Should the shipment of waste destined for backfilling be regarded as shipment for recovery? / What is the appropriate operation to correctly describe backfilling operations?**

*Keywords: Treatment operations; Backfilling as disposal or recovery*

Article 2 of WSR defines the terms “disposal” and “recovery” with a reference to Article 1(1) of WFD and, by this, to Annex II of WFD.



“Backfilling” is not included in one of the lists provided by the annexes of WFD. As a starting point, it seems possible to classify “backfilling” as an operation D1, D3 or D12 as well as an operation R5 and R10.

Indeed, the revised WFD mentions the term “backfilling” in the context of the definition of the term “Recycling” in Article 3(17) and, particularly interesting for the present question, in connection with the targets laid down in Article 11(2):

“(…) Member States shall take the necessary measures designed to achieve the following targets: (…)

(b) by 2020, the preparing for re-use, recycling and other material recovery, including backfilling operations using waste to substitute other materials, of non-hazardous construction and demolition waste excluding naturally occurring material defined in category 17 05 04 in the list of waste shall be increased to a minimum of 70 % by weight. (…)”

Out of the wording of Article 11, it could be deduced that within the revised WFD, “backfilling” is not to be regarded as “recycling” but may be regarded as a type of “material recovery” which would suggest seeing the operation R5 as the appropriate operation to describe backfilling. Currently, there are efforts taken at EC level to further define the term “backfilling”; however, this definition would be a non-binding interpretation of the Directive. However – and independently that it should be noted that Member States have to comply with the provisions of the revised WFD according to its Article 40 only by 12 December 2010 – it remains still unclear, which operation exactly is meant by the term “backfilling” in the revised WFD and which requirements do have to be fulfilled to make an operation being a “backfilling” in this sense.

In this context, the judgment of 27 February 2002 (ASA, Case C-6/00) of the European Court of Justice<sup>17</sup> has to be considered. The Court had *inter alia* to decide on the questions “whether the deposit of waste in a disused mine necessarily constitutes a disposal operation within the meaning of D 12 of Annex II A to the [*sc. Waste Framework*] Directive or whether such deposits must be assessed on a case-by-case basis to determine whether the operation is a disposal or a recovery within the meaning of the Directive and, in that case, what criteria should be used to make the assessment.”

The Court concluded that: “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 serves a useful purpose in replacing other materials which would have had to be used for that purpose.”

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<sup>17</sup> See OJ C 109, 4.5.2002, p. 5. The Court ruling in full text is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0006:EN:HTML>

These considerations may be transferred for the present constellation. It should be noted that the Court ruling is reflected by the “recovery” definition as introduced by Article 3 of Directive 2008/98/EC:

“(15) ‘recovery’ means 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. Annex II sets out a non-exhaustive list of recovery operations.”

Taking this in mind, the answer to this question is: whether “backfilling” is to be classified as a disposal operation (most obvious possibilities would be operations D1, D3 and D12) or as a recovery operation (most obvious possibilities would be operations R5 and R10) and whether a shipment of waste destined for backfilling actually is a shipment for recovery or for disposal, **depends on the specific circumstances of the planned operation and is to be assessed on a case-by-case basis**

- (i) in light of the objectives of the Directive and
- (ii) ECJ case law establishing that the essential characteristic of a waste recovery operation is that the principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources.”

**4.24. Do the Mining Waste Directive’s provisions on placing waste other than extractive waste used for filling in excavation voids mandatorily mean that a backfilling operation fulfilling these criteria always has to be considered as a disposal operation in the meaning of WSR and WFD, or is it possible that a backfilling operation with waste other than extractive waste in an excavation void can be regarded as a recovery operation?**

*Keywords: Treatment operations; Backfilling as disposal or recovery; consistency with Mining Waste Directive*

Article 10(2) of Mining Waste Directive 2006/21/EC reads “(Landfill) Directive 1999/31/EC shall continue to apply to the waste other than extractive waste used for filling in excavation voids as appropriate.”

What was intended to be expressed in Article 10(2) is not that placing of waste other than extractive waste into excavation voids would without any alternative always have to be considered as a D1 operation. What was intended to be expressed was that there are no *specific* measures introduced by the Mining Waste Directive for this constellation whereas, if the other preconditions are in place, the Landfill Directive 1999/31/EC applies. Consequently, the question whether an operation where waste is filled in an excavation void actually is to be classified as a D1 operation or not, does not exclusively depends on Article 10(2) of Mining Waste Directive.

*Consequently*, the Mining Waste Directive's provisions on placing waste other than extractive waste used for filling in excavation voids do not mandatorily mean that a backfilling operation fulfilling these criteria always has to be considered a disposal operation in the meaning of WSR and WFD. It is possible that a backfilling operation with waste other than extractive waste in an excavation void can be regarded as a recovery operation.

## **5. BASIC DEFINITIONS, MISCELLANEOUS**

### **5.1. What do the definitions of “producer” (Article 2(9)) and “notifier” (Article 2(15) (a) (ii)) mean for waste streams which arrive at a waste treatment plant after collection and which are subsequently shipped for export untreated because they are already in the shape required by the receiving plant – Does such a plant become the new waste producer for the following process if a transboundary shipment to a further waste treatment takes place? How do the WSR definitions apply in the case of a transboundary shipment of waste streams from one waste treatment facility to another?**

*Keywords: Basic definitions; Definitions of waste 'producer' and 'notifier'; waste streams from one waste treatment facility to another*

To fulfil the definition of a notifier in the meaning of Article 2(15) (a) (ii) of WSR, the operator of an interim treatment facility

- must carry out pre-processing, mixing or other operations resulting in a change in the nature or composition of a waste;
- must be licensed for this type of operation;
- must carry out this operation prior to shipment.

It is arguable whether

- (1) an interim treatment facility only fulfils this definition if the shipped waste actually has been treated in the facility before or
- (2) whether it is sufficient that the waste enters and leaves the facility without a treatment whereas interim treatments are regularly performed within the facility.

A definitive answer to this question is not provided in the Waste Shipment Regulation or the Waste Framework Directive.

The wording of Article 2(9), however, relates to “*this*” waste and not generally to waste which is rather in favour of the first interpretation: If it would be sufficient that waste is regularly treated within the facility in question and if it would be indifferent whether the waste load which is intended for shipment is actually treated or not, one would rather expect another wording.

Further, the categories of “licensed collector”, “registered dealer” and “registered broker” are introduced in Article 2(15) of Waste Shipment Regulation. Waste collectors, brokers and dealers are actors in the waste shipment area who regularly organize the transfer of waste without treating the waste on their own. For these actors, specific preconditions and specific consequences are introduced within the Waste Shipment Regulation. It would be systematically rather convincing to apply these rules for an actor who transboundarily ships waste without having treated it himself.

*Consequently*, it is supposed that only an interim treatment facility which is changing the nature or composition of the waste with carrying out pre-processing, mixing or other operations does fulfil the definition of a notifier in the meaning of Article 2(15) (a) (ii).

**5.2. Is it acceptable and compliant with WSR, that a company acting as a broker or a dealer but not taking any physical control of waste, be considered a consignee of a waste in the meaning of the definition stipulated in Article 2(14) of the regulation?**

*Keywords: Basic definitions; term "consignee" in WSR*

The starting point is the definition of “consignee” under Article 2 of WSR which reads: “(...)

14. ‘consignee’ means the person or undertaking under the jurisdiction of the country of destination to whom or to which the waste is shipped for recovery or disposal (...)”

The wording of Article 2(14) (“to whom or to which the waste is shipped for recovery or disposal”) suggests that there has to be a physical control by the Consignee over the waste. This understanding of the wording of Article 2(14) is for example shared by the Internal Guidance Document of the German Working Group of Federation and Federal States.<sup>18</sup>

Further, the WSR foresees that brokers or dealers may act as notifier but only in circumstances described in its Article 2(15), provided that further requirements have been fulfilled, such as a written authorization by the original producer, new producer or licensed collector. It is neither specified in the WSR that the same scheme applies to the consignee, nor is “broker” or “dealer” included in the definition of a "consignee".

On the other hand, No. 15 of Annex IC to the WSR – which was introduced into WSR by Commission Regulation (EC) No 669/2008 of 15 July 2008 and which aims at providing necessary explanations for completing the notification and movement documents under the Basel Convention, the OECD Decision C(2001)107/FINA and the WSR –lays down that

“Normally, the consignee would be the disposal or recovery facility given in block 10. In some cases, however, the consignee may be another person, for

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<sup>18</sup> Bund-/Länderarbeitsgemeinschaft Abfall (LAGA), Vollzugshilfe zur Verordnung (EG) Nr. 1013/2006 des Europäischen Parlaments und des Rates vom 14. Juni 2006 über die Verbringung von Abfällen (VVA) und zum Abfallverbringungsgesetz vom 19. Juli 2007 (AbfVerbrG) , Issue 2 February 2008, p. 11.

example a dealer, a broker, or a corporate body, such as the headquarters or mailing address of the receiving disposal or recovery facility in block 10. In order to act as a consignee, a dealer, broker or corporate body must be under the jurisdiction of the country of destination and possess or have some other form of legal control over the waste at the moment the shipment arrives in the country of destination.”

This paragraph explicitly states that a dealer or a broker may act as a consignee and even specifies the conditions under which this is deemed appropriate. Further, one could argue that several provisions of the WSR already make a distinction between “consignee” and “facility” (e.g. Article 13(1), Article 50(3)).

Finally, it has to be taken in mind that the paragraph of Annex IC in question is identical with the “Revised notification and movement documents for the control of transboundary movement of hazardous wastes and instructions for completing these documents” as adopted by the Eighth Conference of the Parties of the Basel Convention in 2008<sup>19</sup> and with the respective document at OECD level (see e.g. “Guidance Manual for the Control of Transboundary Movements of Recoverable Wastes” (2009), p. 74<sup>20</sup>).

One could claim that this proves that the Commission has been acted entirely within their powers granted by Article 58 to take account of changes agreed under the Basel Convention and the OECD Decision and that, following the general legislative rule “*lex posterior derogat legi priori*”, paragraph 15 of Annex IC being the younger provision would be preferable to an understanding on Article 2(14) as outlined above.

On the other hand, it could equally be pointed out that one purpose of Annex IC is in fact the synchronization with Basel Convention and OECD Decision and that its wording is rather broadly (as pointed out in the introductory part of Annex IC ) to cover a number of national legal waste management schemes. Following this idea, it could be stressed that the document is not necessarily compatible with every detail of EC waste legislation and would have no impact on every detail of understanding.

It can be concluded that there are good arguments in favour of both

- the position that a company acting as a broker or a dealer but not taking any physical control of waste can be considered a consignee of a waste under the WSR and
- the opposite position that a such a company must not be considered a consignee of a waste

A definitive, unambiguous answer is not provided by the WSR.

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<sup>19</sup> Document available at <http://www.basel.int/meetings/sbc/workdoc/techdocs.html>.

<sup>20</sup> Document available at <http://www.oecd.org/dataoecd/57/1/42262259.pdf>.

**5.3. Regarding Annex IC to WSR, to which situations does the sentence of paragraph 15 of Annex I to Commission Regulation (EC) No 669/2008 of 15 July 2008 “or have some other form of legal control over the waste” refer?**

*Keywords: Basic definitions; term "consignee" in WSR*

For the understanding of paragraph 15 of Annex IC of WSR, please take into consideration the answer above, particularly the fact that one purpose of Annex IC is the synchronization with Basel Convention and OECD Decision and that its wording is rather broadly (as pointed out in its introductory part) to be able to cover a number of national legal waste management schemes and its different understandings of the term “possession of waste”.

It might be added that the wording “or have some other form of legal control over the waste” did in fact exist in the chapter “Instruction for completing the notification and movements documents” within an OECD Council Decision as early as February 2002<sup>21</sup>, i.e. even before the WSR entered into force.

**5.4. How should a company handling the transport, reloading and storage for the same waste be regarded: as a transporter, a collector, or an interim recovery facility?**

*Keywords: Definition of transport, collection and storage; Storage within the transport vs. treatment; R/D Codes*

**Background:** 'Green' listed waste is transported from Member State A to a non-OECD country using a port of another Member State (Member State B). The waste is first shipped by truck to an inland location in Member State B and then reloaded into ship containers which are then transported by road to the port and are then loaded onto a ship. A part of this waste has to be stored for a couple of days within this shipment at the reloading point in Member State B because not enough ship containers are available.

A shipment of waste is a transport of waste and starts after the collection of the waste.

At the beginning of the shipment no temporary storage – no interim recovery – of the waste was intended. A part of the waste under consideration is stored due to an interruption of the transport for a couple of days until containers become available and not stored in order to gather, sort and/or mix the waste for the purpose of transport.

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<sup>21</sup> Addendum 1 to Decision C(2001)107 Concerning the Revision of Decision C(92)39/Final on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, p. 10, see <http://www.oecd.org/dataoecd/29/45/2089503.pdf>

Companies only handling the transport including reloading and storage of the same waste for the purpose of the transport shall be regarded as “**carriers**”.

No information is given in the WSR how long a waste can be stored at a reloading point within the shipment. According to Article 15 of the WSR an interim recovery has to be completed at latest one year after receipt of the waste.

If the storage of the waste at the reloading point as described in the background information is intended as an interim recovery R13 at the beginning of the shipment then the shipment would end at that point and a new shipment has to be arranged from Member State B to the non-OECD country. In this case the storage at the facility carrying out the interim recovery would be regarded as interim recovery facility.

**5.5. What if, in the case above, the waste which finally is loaded into containers does not originate from the same source (e.g., trucks from different producers/starting points bring the waste into Member State B) – How should a company handling the transport, reloading and storage in this case be regarded: as transporter, collector, or interim recovery facility?**

*Keywords: Definition of transport, collection and storage; Storage within the transport vs. treatment; R/D Codes*

The “shipment” of the green listed waste to a non-OECD country via Member State B started in Member State A. The storage in Member State B takes place during the shipment due to an inadequate capacity of ship containers at the place of reloading. The mixing of wastes stemming from different sources in member state B shall be in line with the WSR.

In the case considered, the waste is not stored in order to gather, sort and/or mix the waste for the purpose of transport. It is just stored due to restricted transport capacity. During the time of storage a mixing of similar wastes is possible if the information provided in the Annex VII documents (or in the notification and movement documents) specifies materially the shipment.

Consequently, companies handling the transport, reloading and storage, including mixing with similar wastes (if the information provided in the Annex VII documents (or in the notification and movement documents) specifies materially the shipment) for the same waste cannot be regarded as “collectors”.

The mixing of the similar waste (in line with the WSR) within a shipment can be regarded as an assembly for transport. Consequently, companies loading similar waste into a container from different sources during a transport interruption of a couple of days shall be regarded as “carriers”.

No temporary storage – no interim recovery – of the waste was intended at the beginning of the shipment. An interruption of a transport and the storage of waste for a couple of days and a mixing of the waste stored with similar wastes (mixing in line with the WSR) until containers become available cannot be regarded as “interim recovery”.

According to Article 15 of the WSR an interim recovery has to be completed at latest one year after receipt of the waste. However no information is given how long a waste can be stored at a reloading point during the shipment.