

# Review Note – International Shipments of Waste Electrical and Electronic Equipment:

Illicit Exportation of Hazardous Waste Electrical and Electronic Equipment from the United Kingdom to non-OECD Countries in Contravention of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal



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## **1. Introduction**

As the market for consumer electronic products has shifted further away from the classical model of consumer durables into the digital age of throwaway devices, the extent and diversity of electronic waste or 'e-waste' has moved further up the political agenda of developed countries. In the European Union (EU) there have been several initiatives to deal with this growing problem in the form of Directives on Waste Electrical and Electronic Equipment (WEEE) and Restriction of Hazardous Substances (RoHS). Consequently the cost of environmentally sound disposal born by manufacturers has increased dramatically. This has led, over the years, to an increase in the volumes of such waste being exported to less developed countries (LDCs) such as China which has a large appetite for the raw materials which can be derived from this type of waste, and which has an enormous labour force of poor migrant workers who are willing to "endure the health risks to earn a few yuan and are exploited by profit-hungry entrepreneurs"<sup>1</sup>. The effect of this, for manufacturers in developed countries, is disposal routes which can be up to ten times cheaper.

This paper seeks to distil the extant legal framework in place, both nationally and internationally, to control the movement of such waste, and to analyse its function with particular regard to areas of potential abuse. Areas of particular relevance to these aims are the divergent implementation of EU law, the definition of waste, the classification of recovery processes and the requirement of mens rea with regard to offences under the Transfrontier Shipment of Waste Regulations 2007 (TFS). In addition, recent EU Directives, though not yet implemented nationally, will be considered with regard to their potential to remedy areas of weakness.

## **2. International Agreements**

### **2.1 Background**

During the 1980s the members of the Organisation of Economic Co-operation and Development (OECD) began work toward achieving a system to control the movement of hazardous wastes across its members' borders. This was in response to a growing awareness of uncontrolled and indiscriminate movement of toxic wastes which were known to be detrimental to human health and the environment. Following the decision, in 1984, that such movements should be controlled, eight Acts were adopted which covered waste identification, definition and control of transboundary movements of waste. Subsequently, these Acts formed the basis of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

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<sup>1</sup> Bodeen, C. (2007). *In 'e-waste' heartland, a toxic China*, *International Herald Tribune*, published on November 18, 2007.

As environmental laws governing the management of waste tightened in developed nations (such as the OECD nations), the associated costs of disposal became increasingly high. Compounded by the fact that global shipping was becoming increasingly accessible and many developing countries were desperate for foreign currency, the problem of export/import of hazardous wastes from developed countries to LDCs quickly grew. One such incident which is often cited as a key catalyst in the creation of the Basel Convention is the 1986 Khian Sea incident. A cargo barge named Khian Sea left Philadelphia in the United States loaded with 14,000 tonnes of toxic ash. Unable to unload the cargo in the planned country, a man-made island in the Bahamas, it travelled around the Atlantic looking, unsuccessfully, for a dumping ground. Eventually it was able to unload 4,000 tonnes near Gonaives in Haiti. The cargo was described to the authorities as “topsoil fertiliser” although it was far too poisonous to be used in that way. After receiving information from Greenpeace on the true nature of the waste, the Haitian government ordered that the ash be reloaded onto the barge. However, by this time the barge had already been able to leave the country. After its name was changed twice (first to Felicia then Pelicano) the ship eventually dumped the remaining 10,000 tonnes into the Atlantic and Indian Ocean.

The Khian Sea incident and others like it clearly illustrated the need for a global agreement which would stop countries like Haiti falling foul of these kinds of tactics. The Basel Convention was conceived as an international treaty designed to reduce the amount of hazardous waste travelling from developed countries to LDCs in this way. It sought to achieve this, essentially, by obligating parties to the Convention to prohibit, or otherwise not allow, the shipment of listed wastes to countries which have prohibited their importation. It also places obligations on party countries to reduce the generation of such wastes at their source in line with sound environmental policy. The Convention was adopted on 22nd March 1989 and came into force in 1992 and is the most comprehensive global environmental agreement aiming to control hazardous and other wastes.

With regard to the OECD, the more recent Council Decision C(2001)107/Final - Decision of the Council Concerning the Transboundary Movements of Wastes Destined for Recovery Operations is a revision of Council Decision C(92)39/Final, this decision was made in an effort to harmonise the OECD control system with the Basel Convention.

## **2.2 UNEP Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal**

The Basel Convention has 175 parties, including the UK. The Convention was adopted on 22nd March 1989 and introduced three basic principles:

1. Minimise the generation of hazardous waste.
2. Treat and dispose of hazardous wastes as close as possible to where they were generated.

### 3. Minimise the international movements of hazardous wastes.

The wastes covered by the convention are set out in a set of technical annexes which are supplemented by a provision that allows every party to the Convention to determine, by way of its national law, additional hazardous wastes. Article 2.4 goes on to define processes which should be considered as “disposal” as they are not processes which will lead to the possibility of “recovery” or “reuse”.

The Convention controls the movement of relevant wastes by applying a ‘Prior Informed Consent’ procedure. It is illegal to ship waste to and from any parties without such consent but punishable only through national law as the Convention contains no enforcement provisions. “It should be recognised that any country has the sovereign right to ban the entry or disposal of foreign hazardous wastes and any other wastes in its territory”. The Convention also obliges Parties to it to ensure that relevant wastes are managed and disposed of in an “environmentally sound manner”.

The Convention creates a ban on the export/import of wastes between Parties and non-Parties. The only exception to this is where the movement of waste is covered by another treaty which does not affect the Basel Convention. The United States is probably the most significant country not to ratify the convention, but has a number of agreements (crucially those of the OECD) which allow for the shipping of hazardous wastes to Basel Party countries.

#### **2.3 OECD Decision C(2001)107/Final**

The OECD is a unique forum in which the governments of thirty democracies work together to address the economic, social and environmental challenges of globalisation. During the 1980s the OECD conducted research into international traffic in hazardous wastes. In 1984 the OECD countries decided that exports and imports of such wastes should be controlled. The OECD initiated an intra-organisation system to control the transboundary movement of wastes destined for recovery operations between member states. Council Decision C(2001)107/Final created a control system that regulates the transboundary movement of wastes between member countries for recovery in an “environmentally sound and economically efficient manner”. This allows, among other things, for the OECD countries to their import/export relationships with countries like the United States that have not ratified the Basel Convention.

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

1. Green Control Procedure: for wastes that present low risk for human health and the environment and, therefore, are not subject to any other controls than those normally applied in commercial

transactions;

2. Amber Control Procedure: for wastes presenting sufficient risk to justify their control. Wastes subject to these control procedures are listed in Appendices 3 and 4 to Decision C(2001)107/Final.

These are the so-called Green and Amber lists of wastes. The controls of waste shipments are carried out by national competent authorities and Customs Offices as appropriate, through the use of notification and movement documents.

Amendments, which came into force on 20 November 2003, state that the “Basel lists” of wastes are incorporated into the “OECD lists” of wastes.

### **3. Legislative Framework**

#### **3.1 Waste Shipment Regulation (EC) No 1013/2006**

The Basel Convention and the OECD Decision C(2001)107/Final are implemented throughout the EU by Regulation (EC) No 1013/2006 (WSR). Formerly the movement of wastes were subject to controls under Regulation EEC/259/93, Regulation (EC) No 1013/2006 replaced this. This new regulation created more comprehensive enforcement actions and streamlined existing procedures. It also incorporated into EU legislation the amendments to the lists of waste annexed to the Basel Convention and the revision adopted by the OECD in 2001. Art 50 provides that:

*Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive ...*

While this new regulation is clearer than the old one, the controls on WEEE remain complex. Whether or not a waste shipment can occur will depend on factors such as the purpose for which the waste is being exported (recovery or disposal), the status of the country of both dispatch and destination (EU, OECD or non-OECD) and, if being moved for recovery, the classification of the waste (hazardous or non-hazardous).

The procedure set out by (EC) No 1013/2006 can be illustrated as follows:

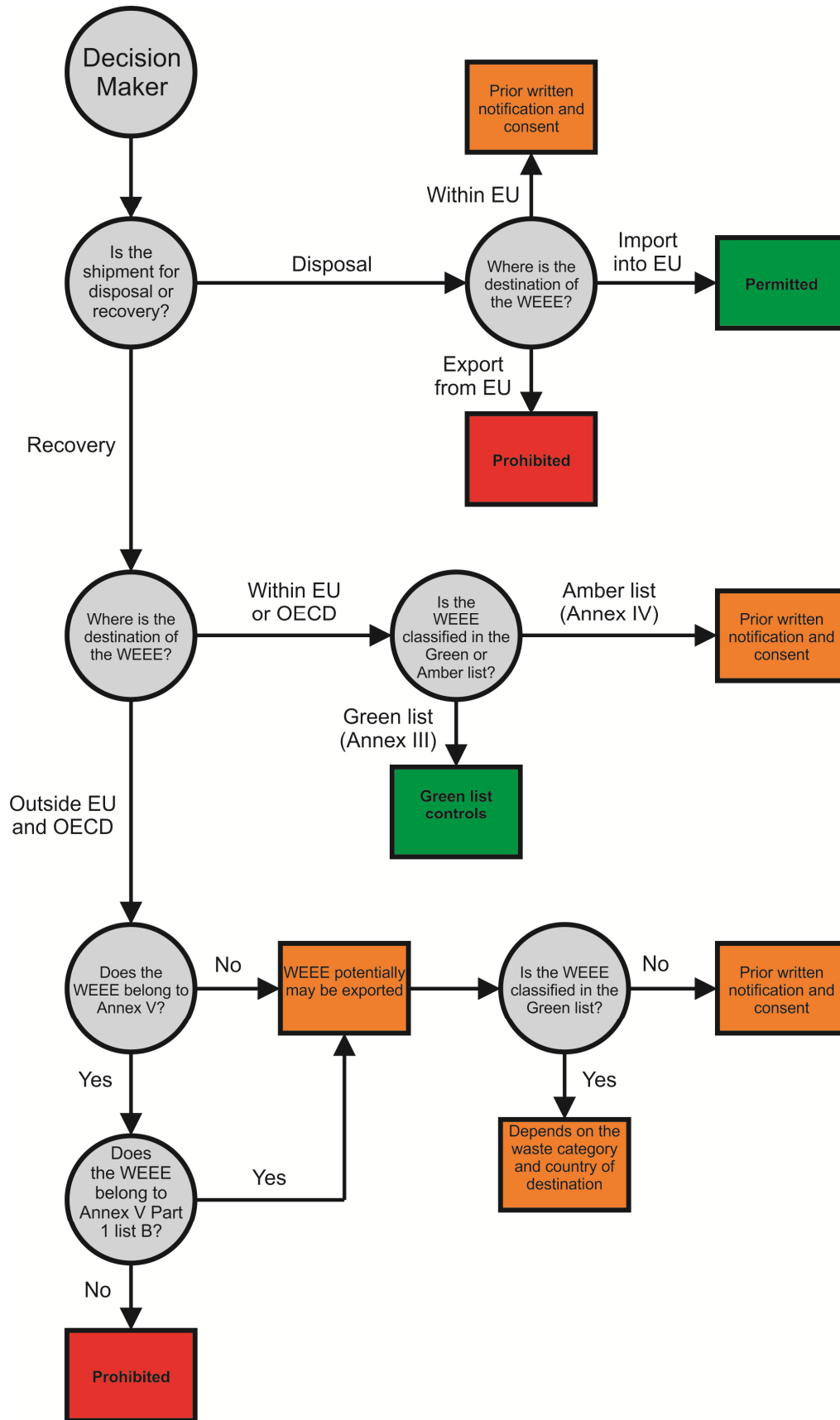


Figure 1: WSR Decision Tree

WSR has adopted a very similar traffic light system to that developed by the OECD. Thus shipments are divided into three categories:

1. **Prohibited (Annex V)** – movements are not permitted under any circumstances including almost all:
  - exports for disposal; and
  - exports of hazardous waste to developing countries (non-EU and non-OECD), even if for recovery.
2. **Notification controls (amber list control, Annex IV)** – the procedure for prior written notification and consent. These apply to all permitted imports and exports of:
  - Hazardous waste moving for recovery;
  - Any type of waste moving for disposal within the EU; and to
  - some imports and exports of non-hazardous wastes for recovery

Where these controls apply the exporter needs written permission before moving the waste and they must comply with a range of other requirements.

3. **Green list controls (Annex III)** – the procedure by which shipments are accompanied by specified information.

This is the lowest level of control and will only ever apply to some imports or exports of non-hazardous waste for recovery. Where these controls apply, exporters do not need any permission in the country of destination before moving the waste, however, they must still supply the required information.<sup>2</sup>

It is clear, then, that when exporting WEEE from the UK to LDCs it is of critical importance that a party can demonstrate that it is being sent for the purpose of “recovery” if it is to stand any chance of doing so legally. If this can be shown, it is then necessary to establish whether the waste resides in the amber or green list. This can be particularly problematic with regard to WEEE which has been partially dismantled and it is no longer clear what, if any, the hazardous nature of it is i.e. it is not possible to identify it on the lists. For example Annex IV (amber list) contains some ambiguous definitions such as ‘waste batteries not specified on list B containing Annex I constituents to an extent to render them hazardous’. Although the necessary levels of ‘Annex I constituents’ are elsewhere specified, it is clear that when dealing with an ever increasing diversity of products it will be difficult to accurately classify waste types.

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<sup>2</sup> Wang, J. Transboundary Shipments of E-Waste – A Global Problem. Delft, 2009.



### **3.2 Green List Regulations (EC) No 1418/2007**

If non-hazardous wastes are permitted to travel to non-OECD countries they are further regulated by (EC) No 1418/2007. These regulations implement the procedures chosen by the importing countries, and are regularly updated by transposing information received from the countries concerned.

### **3.3 Transfrontier Shipment of Waste Regulations 2007 (SI 2007 No 1711)**

WSR is automatically part of English law. Under article 288 of the Treaty on the Functioning of the European Union (TFEU), a Regulation is binding and directly applicable in Member States. That treaty obligation is given effect in English law by the European Communities Act 1972, under which all treaty and other Community obligations from time to time become part of English law without further enactment.

The Transfrontier Shipment of Waste Regulations 2007 (TFS) state that they were made under s2(2) of the European Communities Act 1972 . So too were amending regulations the following year (the Transfrontier Shipment of Waste (Amendment) Regulations 2008 (SI 2008/9)). Regulation 4(2) provides that expressions used in the UK Regulations that are also used in WSR “have the same meaning in these Regulations as they have in the Community Regulation”. General requirements for the shipment of waste under the UK Regulations include in s17 the protection of the environment. The role of this national statutory instrument is straight forward; it establishes the offences and penalties for non-compliance with WSR and designates the competent authorities for enforcement in the UK.

Section 17 provides: A person commits an offence if he fails to comply with Article 49(1) (the management of shipments of waste in an environmentally sound manner and without endangering human health).

Section 21 provides: A person commits an offence if he transports waste destined for disposal in a third country in breach of Article 34 (prohibition on export except, in certain circumstances, to EFTA countries Party to the Basel Convention).

Section 23 provides: A person commits an offence if, in breach of Article 36(1), he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply.

The legal position of those within the UK seeking to export waste from the UK can be illustrated as follows:

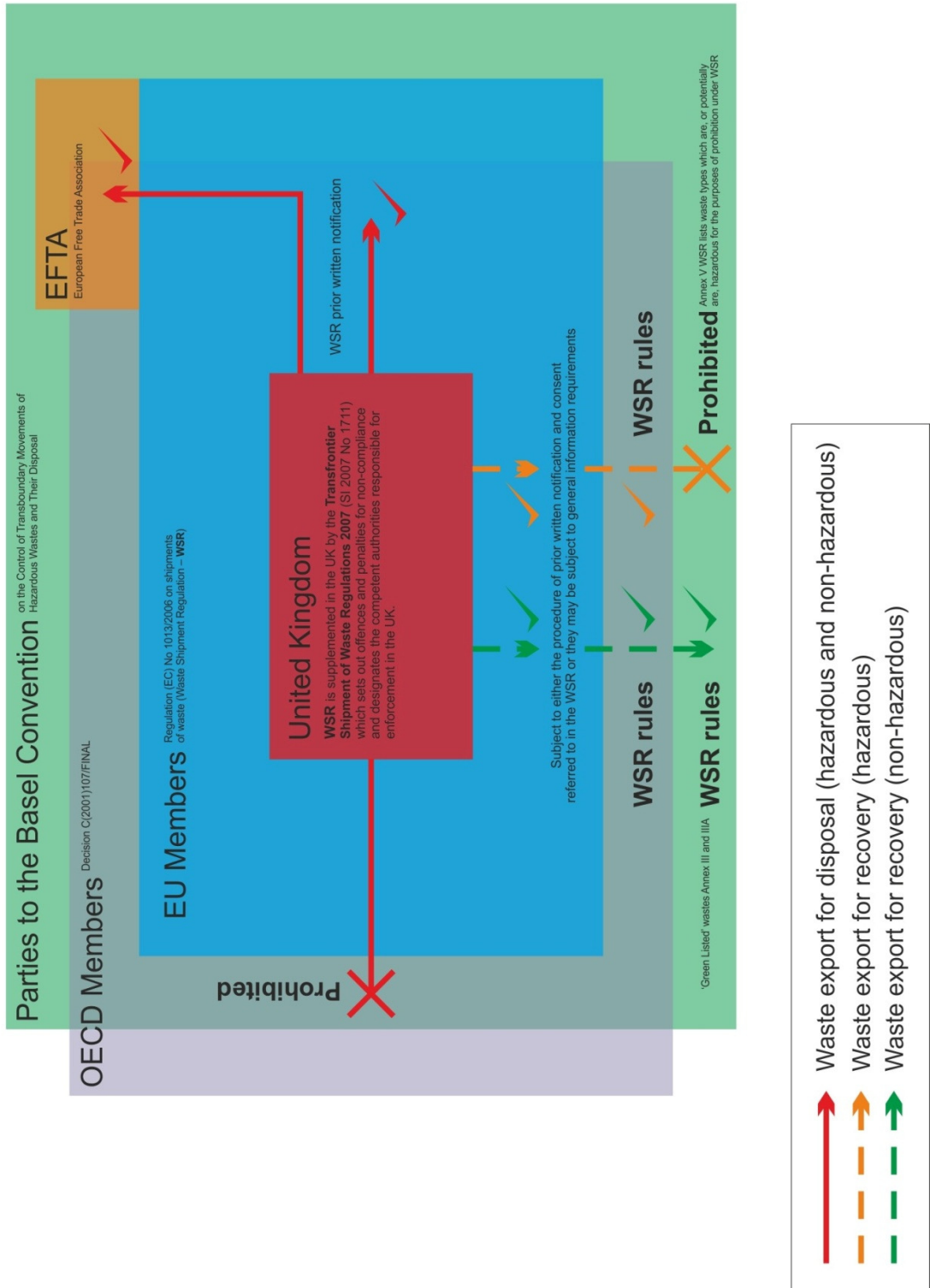


Figure 2: Legislative Framework Venn Diagram

## 4. Interpretation

### 4.1 General Principles of Interpretation

In the Court of Appeal case of **R v V**<sup>3</sup> it fell to the court to consider when the process of export for the purposes of WSR commenced and terminated. This was necessary to determine which parties could be prosecuted under TFS. In his judgement Cranston J stated that when interpreting EU law English courts do not use the ordinary principles of statutory construction, rather the principles of teleological construction established by the jurisprudence of the European Court of Justice (ECJ), citing the case of **HP Bulmer Ltd v J Bollinger SA**<sup>4</sup>. In **Bulmer** Lord Denning recognised the importance of adopting this approach in relation to EU law<sup>5</sup>:

*What are English courts to do when faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent... They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought of it.*<sup>6</sup>

As stated in **van Gend en Loos**<sup>7</sup>, it is necessary to consider “the spirit, the general scheme and the wording”. This formulation in **van Gend en Loos** was later supplemented by the requirement in **Continental Can Co. v Commission**<sup>8</sup> that “the system and objectives of the Treaty” be considered. It can be said that the ECJ adopted the teleological method of interpretation to give priority to the proclaimed objectives of the EU institutions<sup>9</sup>.

A case mentioned in **R v V** as being a good example of this approach, in a case decided on similar facts, is that of **Marius Pedersen A/S v Miljøstyrelsen**<sup>10</sup>. In this case the party which had collected waste from numerous sources before exporting it sought to maintain that the obligation to provide information required under Regulation 259/93 (the predecessor of EU Regulation 1013/2006 (WSR)) remained with the producer of the waste. This was, in fact, the literal interpretation and may well have been held to be the appropriate interpretation had it been decided using the common law methods of interpretation. However, the ECJ construed the language used in art.2(g) ‘in light of the imperative to interpret the Regulation in a manner which facilitated its object of furthering

<sup>3</sup> R v VK and Others [2011] EWCA Crim 2342.

<sup>4</sup> HP Bulmer Ltd v J Bollinger SA (No.2) [1974] Ch. 401.

<sup>5</sup> Gabriël A. Moens, John Trone. Commercial Law of the European Union, Springer; 2010 edition (May 6, 2010).

<sup>6</sup> HP Bulmer Ltd v J Bollinger SA (No.2) [1974] Ch. 401 at 425-426.

<sup>7</sup> NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen (26/62) [1963] E.C.R. 1.

<sup>8</sup> Europemballage Corp. & Continental Can Co. v. Commission, Case 6/72, (1973] E.C.R. 215, 243, 22.

<sup>9</sup> Nial Fennelly. Legal Interpretation at the European Court of Justice. Fordham International Law Journal. Vol 20, Issue 3, Article 4, 1996.

<sup>10</sup> Marius Pedersen A/S v Miljøstyrelsen (C-215/04) February 16, 2006 ECJ.

environmental protection’, thus it was decided that the expediency of acquiring this information from the actual producers of the waste was relevant to the assignment of liability, stating that:

*The situation was that the producer of the waste is unknown or that the number of waste producers is so great and the individual contribution of each of them so small that it would be unreasonable for each individually to be required to notify the transport of the waste may justify the licensed collector being considered as the notifier of a shipment of waste for recovery.*

This approach of seeking to further the object of EU law was applied in **R v V** when dismissing the defendants’ submission that waste consignments exported, by them, only became exports for the purposes of WSR when they left the final EU border, as WSR explicitly excludes ‘transport through the Community’. If the defendants’ submission had been successful then exports of waste stopped and inspected at national borders of EU Member States would not amount to a breach of the Regulations as it had not yet left the EU. This would only allow for prosecution where the waste had left and, therefore, would likely arrive at its destination. This situation would provide little to no preventative function and is clearly not in line with the ‘object’ of the Regulations.

*In our judgment, on the plain language, waste can be destined for recovery in a non-OECD decision country long before it reaches the point of leaving the Community. Secondly, the action of waste leaving the community has both a transactional and temporal character. In our judgment it is a process commencing once the waste is destined for that country at its point of origin, and continuing until the waste reaches its ultimate destination in the foreign country.*

## 4.2 Strict Liability

In **R v V** another of the defendants’ grounds for appeal was on the issue of proportionality, insomuch that the offence created by regulation 23 TFS was not within the scope of art 50 WSR. It was argued that, because TFS defines a ‘person involved’ more widely than those persons falling within the scope of ‘notifier’ for the purposes of WSR, TFS does not comply with the requirement that procedural safeguards be provided for the notifier. The defendant argued, therefore, that the scope of regulation 5 TFSR could include many types of party involved in the movement of such waste and that there is nothing in TFS to protect individuals who are not culpable for any harm caused by the wrongful shipment of waste from a potential two years’ imprisonment.

The court, in its judgment, first drew attention to the irrelevance of proportionality under EU law with respect to strict liability offences, as made clear in the case of **Anklagemyndigheden v Hansen & Son**<sup>11</sup>. The judge then assumed that strict liability was intended by the drafters of TFS, stating that the ‘phraseology’ of regulation 23 supports that conclusion and that the contrary had not yet been

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<sup>11</sup> Anklagemyndigheden (Public Prosecutor) v Hansen & Son (C-326/88) [1990] E.C.R. I-2911.

argued. Assuming, then, that an offence was one of strict liability, such a charge would not fail for reasons of proportionality for that reason. It was reasoned that in such a case the court has ample powers of discretion if a defendant has genuinely offended entirely without fault.

The offence being one of strict liability is clearly of crucial importance to the prosecution in such a case. This issue was considered in detail with regard to exports of WEEE in the case of **R v Ezeemo**<sup>12</sup>. In **Ezeemo** the defendants were charged with the s.23 TFS offence after containers of WEEE destined for Nigeria were intercepted in both the UK and Holland. On appeal, counsel for the defendants argued that it must be proved that the defendants knew that the containers contained waste and that they had “predetermined a course of events which would lead to the items undergoing a recovery process in a non-OECD country”. The court referred to the words of s.23 which do not make any reference to a requirement for any particular state of mind of a defendant, such as knowledge or suspicion. The offence merely requires that a defendant has transported waste from the EU which is prohibited by Art 36 WSR, destined for recovery, to a non-OECD country.

The judgement in **Ezeemo** goes on to discuss the presumption that an offence at common law or under statute requires mens rea, and that this is the case unless by necessary implication mens rea is excluded. The principles to be applied when considering ‘necessity’ were summarised by Lord Scarman in **Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong**<sup>13</sup>, the fifth of which states that:

*Even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.*

It was stated in **Ezeemo** that WSR creates a framework for the safe regulation of waste shipments and that the ‘scheme’ of TFS is to create a series of offences comprising breaches of the requirements of WSR. It was reasoned that all of the offences use the ‘language of close regulation in pursuit of the safe management and shipment of waste’ and that the offences were created for failure to either take a prescribed procedural step or for taking a step which is prohibited by the Regulations. This falls within the principle expounded by Lord Scarman in **Gammon**, accordingly the court in **Ezeemo** decided, in line with the court in **R v V**, that the offence was one of strict liability. It was recognised that one of the reasons for imposing strict liability was to promote greater vigilance among those who undertake activities which may cause harm to the public. There is an obligation, then, on those involved to inform themselves about what is being transported and where it is destined, and if they do not they are simply at risk of breach.

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<sup>12</sup> R v Ezeemo (Godwin Chukwenaeny) [2012] EWCA Crim 2064.

<sup>13</sup> Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong [1985] AC 1 (PC).

### 4.3 Definition of Waste

When seeking to enforce these measures, the obvious initial question to ask when confronted by a possible non-compliance is whether or not the material in question is actually waste for the purposes of WSR i.e. whether it is waste during its exportation. If material is merely a non-waste commodity then its shipment will not be subject to the controls of WSR. In **Ezeemo** the defence argued that because the parties had been selective in their collection of waste and had subjected the items to checks including electrical safety tests, that the items of WEEE<sup>14</sup> were now used EEE<sup>15</sup> (UEEE) and were no longer waste. As made clear in the case of **ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer**<sup>16</sup> the concept of what waste is under EU law is that defined in the Waste Framework Directive (WFD)<sup>17</sup>. The definition under WFD requires that a holder of material ‘discards or intends to discard’ that material before it becomes waste, in **Ezeemo** it was argued that neither had occurred. The court referred to the judgment in **R (OSS Group Limited) v Environment Agency and DEFRA**<sup>18</sup>, in which it was held that the use of this subjective test, while useful when examining the product in the hands of the ‘producer’ of waste, may not be appropriate to define the status of the material in the hands of a subsequent holder of the material for recycling or re-processing, stating at paragraph 109:

*The Court of Justice solves this problem by inferring an intention to discard the substance from objective indicators; in doing so it has regard both to all the factual circumstances and to the aim of the waste Directive.*

It is clear from that statement that the ECJ, in practise, will subordinate the subjective test prescribed by WFD. The court in **Ezeemo** accepted the position taken by the court in **OSS**, which amounts to the application of a series of ‘objective indicators’, having regard to the policy aims of WFD, rather than the intention of the holder at any particular time. The application of this test demands that waste must continue to be treated as such until ‘acceptable recovery or recycling has been achieved’.

This objective level of treatment necessary to render the waste non-waste is one which must be left, ultimately, to the jury to decide upon as a matter of fact, as in the Northern Ireland Court of Appeal case of **Department of the Environment v Felix O'Hare and Another**<sup>19</sup>. Considering the range and variety of electrical and electronic equipment which arises in the waste stream, it is clearly an

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<sup>14</sup> WEEE, according to the definition in Article 3(b) of Directive 2002/96/EC on waste electrical and electronic equipment (WEEE), means electrical or electronic equipment which is waste within the meaning of Article 1(a) of Directive 2006/12/EC, including all components, subassemblies and consumables which are part of the product at the time of discarding.

<sup>15</sup> See definition in Article 3(a) of Directive 2002/96/EC.

<sup>16</sup> **ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer** C – 418/97, [2002] QB 646.

<sup>17</sup> Directive 2008/98/EC on waste.

<sup>18</sup> **R (OSS Group Limited) v Environment Agency and DEFRA** [2007] EWCA Civ 611, [2008] Env LR 8.

<sup>19</sup> **Department of the Environment v Felix O'Hare and Another** [2007] NICA 45.

onerous task for a jury to undertake. There is, then, a clear requirement for guidance, not only for the courts but for both the regulating authority (Environment Agency) and those potentially engaged in the export of waste to non-OECD countries, on what amounts to ‘acceptable recovery or recycling’, to enable an exporter to draw an objective distinction between WEEE and UEEE.

The Revised Correspondents' Guidelines No 1 on shipments of waste electrical and electronic equipment (WEEE) to apply under WSR were agreed by the waste shipment correspondents of the EU Member States and represents their common understanding of how WSR should be interpreted. However, it must be noted that this guidance document is not legally binding as any binding interpretation comes under the sole jurisdiction of the ECJ. The document merely attempts to assist all those involved to draw the distinction. Section 6 provides that:

*EEE becomes WEEE if its holder discards it, or intends or is required to discard it. To make this judgement it is necessary to examine the history of an item on a case by case basis. However, there are characteristics of electrical and electronic equipment that are likely to indicate whether it is waste or not.*

In ***Ezeemo*** the judge directed the jury to these guidelines as a suggested basis for their assessment of the facts in this regard, stating that:

*...if you are looking for something that provides you with a basis upon which you can make a decision whether or not electrical items have been shown to be functional you may well take the view that the revised correspondence guidelines... provide you with that basis.*

Despite the clear reliance of the court on this guidance in its direction to the jury, it is yet to be seen exactly which aspects of the document are given particular importance. The guidance given in the document is extensive and of a technical nature, potentially placing an impracticable burden on industry if all the recommendations are to be adhered to. It is in this regard that efforts should be made by the Environment Agency to give clear and specific advice to those wishing to export material which was once waste. This would likely avoid some unnecessary actions being brought against exporters who may otherwise have satisfied the objective standard.

## 5. Conclusion

It is clear from the case law that the UK courts have adopted the ECJ's teleological approach to interpretation, with regard to waste shipment law, by systematically removing any defence based on a defendant's state of mind or subjective opinion. Neither can a defendant claim that they were lacking mens rea nor can they claim that they, subjectively, understood the WEEE to have been rendered non-waste by the application of their own arbitrary process. However, the position regarding what waste is in law remains unclear and is likely to be the cause of the most inconsistency in enforcement. As discussed, the matter is ultimately one of fact for a jury to decide upon with only highly technical guidance provided by the European Commission on what is desirable. And while the Environment Agency may seek to increase consistency of the application of desired standards, exporters are not in breach of the regulations, per se, by not applying them. Thus a determined exporter of WEEE may continue to export what they consider to be non-waste by virtue of the application of any standard they desire, while the onus to prove that this standard falls short of that required by law remains with the Environment Agency with what is arguably an unacceptable level of certainty.

Germany, the country which led the field in best available technology for WEEE recycling, has been far more proactive with regard to standardising the requirements for shipment of WEEE. Germany's Ministry of Environment, in the Baden-Württemberg region, has published guidance<sup>20</sup> based on the Correspondents' Guidelines. This guidance essentially informs any prospective exporter of WEEE of the criteria which will be applied during inspection of the goods by the relevant authorities. The guidance also provides inspection authorities with decision making aids for assessing functionality, document requirements in the country of destination, packaging and the general condition of the equipment. This is a clear attempt to operationalise the requirements prescribed in the Correspondents' Guidelines, putting the onus to apply the standards on industry and the regulatory authorities rather than lay jurors who very likely have little technical knowledge of the equipment they are being asked to classify.

The recent recast of the WEEE Directive includes some sections which create a process in terms of 'minimum requirements' that a member state should require from an exporter before they are permitted to export what was formerly WEEE as EEE. However, these will not become effective until transposed into UK legislation. While they are clearly based on the Correspondents' Guidelines they are of a less technical nature and appear to represent a more common sense approach which would be more easily applied by a jury. For example the straight forward requirement that the exporter present evidence of the transfer of ownership stating that the equipment is fully functional. This requirement would, in theory, prevent parties from evading a country of destination's duty regimes.

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<sup>20</sup> Enforcement guidance for the shipment of waste of the Working Group of the German Federal States and the Federal Government on Waste. Vollzugshilfe zur Abfallverbringung der Bund/Länder-Arbeitsgemeinschaft Abfall (Mitteilung 25).



Therefore, if an exporter attempts to export waste as non-waste, the recipient would be liable for the duty as if it were a non-waste commodity, presumably of a much higher value. Whether or not an exporter is able to present this evidence is a far more simple matter of fact for a jury to consider. This pragmatic approach may prove to be more effective than an assessment of the process to which the waste was subjected.

## References

### Cases

- Anklagemyndigheden (Public Prosecutor) v Hansen & Son (C-326/88) [1990] E.C.R. I-2911.
- ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer C – 418/97, [2002] QB 646.
- Department of the Environment v Felix O'Hare and Another [2007] NICA 45.
- Europemballage Corp. & Continental Can Co. v Commission, Case 6/72, (1973) E.C.R. 215, 243, 22, [1973] 1 C.M.L.R. 199, 223.
- Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong [1985] AC 1 (PC).
- HP Bulmer Ltd v J Bollinger SA (No.2) [1974] Ch. 401.
- Marius Pedersen A/S v Miljøstyrelsen (C-215/04) February 16, 2006 ECJ.
- NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen (26/62) [1963] E.C.R. 1.
- R (OSS Group Limited) v Environment Agency and DEFRA [2007] EWCA Civ 611, [2008] Env LR 8.
- R v Ezeemo (Godwin Chukwena) [2012] EWCA Crim 2064.
- R v VK and Others [2011] EWCA Crim 2342.

### Legislation

- Act on the monitoring and control of transboundary shipment of waste, Abfallverbringungsgesetz of 19 July 2007, BGBl. I p. 1462 - [http://www.gesetze-im-internet.de/bundesrecht/abfverbrg\\_2007/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/abfverbrg_2007/gesamt.pdf).
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal - <http://www.basel.int/portals/4/basel%20convention/docs/text/baselconvention-text-e.pdf>.
- Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0056:0075:EN:PDF>.
- Directive 2008/98/EC on waste - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:312:0003:0030:en:PDF>.
- Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0088:0110:en:PDF>.
- Directive 2012/19/EU on waste electrical and electronic equipment - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:197:0038:0071:en:PDF>.
- European Communities Act 1972 (c. 68) - [http://www.legislation.gov.uk/ukpga/1972/68/pdfs/ukpga\\_19720068\\_en.pdf](http://www.legislation.gov.uk/ukpga/1972/68/pdfs/ukpga_19720068_en.pdf).
- OECD Decision C(2001)107/Final - [http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130520.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130520.pdf).
- Regulation (EC) No 1013/2006 on shipments of waste - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:190:0001:0098:EN:PDF>.
- Regulation (EC) No 1418/2007 concerning the export for recovery of certain waste listed in Annex III or IIIA to Regulation (EC) No 1013/2006 of the European Parliament and of the Council to certain countries to which the OECD Decision on the control of transboundary movements of wastes does not apply - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:316:0006:0052:EN:PDF>.
- Transfrontier Shipment of Waste (Amendment) Regulations 2008 (SI 2008/9) - [http://www.legislation.gov.uk/uksi/2008/9/pdfs/uksi\\_20080009\\_en.pdf](http://www.legislation.gov.uk/uksi/2008/9/pdfs/uksi_20080009_en.pdf).

Transfrontier Shipment of Waste Regulations 2007 (SI 2007/1711) -  
[http://www.legislation.gov.uk/ukxi/2007/1711/pdfs/ukxi\\_20071711\\_en.pdf](http://www.legislation.gov.uk/ukxi/2007/1711/pdfs/ukxi_20071711_en.pdf).

Treaty on the Functioning of the European Union - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

### Books

Alan E, Boyle and Michael R, Anderson. Human Rights Approaches to Environmental Protection. (London: Clarendon, 1998).

Brown and Kennedy. The Court of Justice of the European Communities, 5<sup>th</sup> Edition. (London: Sweet and Maxwell, 2000).

Fairhurst, J. Law of the European Union, 9th Edition. (Harlow: Pearson, 2012).

O’Neil, A and Coppel, J. EC Law for U.K. Lawyers. (London: Butterworths, 1994).

Gabriël A. Moens and John Trone. Commercial Law of the European Union, 2010 edition (London: Springer, 2010).

Hedemann-Robinson, M. Enforcement of European Union Environmental Law: Legal Issues and Challenges. (Oxon: Routledge-Cavendish, 2007).

### Articles

Bodeen, C. In 'e-waste' heartland, a toxic China, International Herald Tribune, published on November 18, 2007.

Fennelly, N. Legal Interpretation at the European Court of Justice. Fordham International Law Journal. Vol 20, Issue 3, Article 4, 1996.

Organization for Economic Cooperation and Development (OECD), Emerging Risks in the 21st Century: An Agenda for Action, Paris: OECD Publications Service, 2003.

Okaru, V. The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries. Fordham Environmental Law Review. Vol 4, Issue 2, Article 6, 2011.

### Reports

ETAGIW. Report on analysis of the implementation/enforcement of Annex VII and Article 18 and 49-50 of the Waste Shipment Regulation in all Member States, including a summary report of national provisions. Brussels, 2011. Report No. ENV.G.4/SER/2009/0027.

Sander, K; Schilling, S. Transboundary shipment of waste electrical and electronic equipment/electronic scrap – Optimization of material flows and control. Hamburg, 2010. Report No. UBA-FB 001331/E.

Wang, J. Transboundary Shipments of E-Waste – A Global Problem. Delft, 2009.

### Information Notes

Revised Correspondents' Guidelines No 1 on shipments of waste electrical and electronic equipment (WEEE). [http://ec.europa.eu/environment/waste/shipments/pdf/correspondents\\_guidelines\\_en.pdf](http://ec.europa.eu/environment/waste/shipments/pdf/correspondents_guidelines_en.pdf).

Handlungsanleitung für die Zusammenarbeit der Zolldienststellen und Abfallbehörden im Rahmen der Verbringung von Abfällen - [http://laga-online.de/laganeu/images/stories/pdfdoc/veroeffentlichungen/Handlungsanleitung%20Zoll\\_02\\_2008.pdf](http://laga-online.de/laganeu/images/stories/pdfdoc/veroeffentlichungen/Handlungsanleitung%20Zoll_02_2008.pdf).

Vollzugshilfe zur Abfallverbringung der Bund/Länder-Arbeitsgemeinschaft Abfall (Mitteilung 25) - [http://laga-online.de/laganeu/index.php?option=com\\_content&task=view&id=22&Itemid=35](http://laga-online.de/laganeu/index.php?option=com_content&task=view&id=22&Itemid=35).



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This review document on the transfrontier shipment of waste electrical and electronic (WEEE) has been prepared to assist all who are at some stage involved in the disposal of WEEE whether by reason of any of the following activities: reuse, recycling or as end of life waste. This review document and specific information on national and international law can be downloaded from the website at [esynergysgroup.co.uk](http://esynergysgroup.co.uk)

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