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Training module

HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE WITH EU WASTE LAW

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Waste Shipments, Landfill and Incineration.

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- Conclusions
HISTORICAL PERSPECTIVE OF EUROPEAN WASTE LAW

INsofar as it bears relevance to today's topic
Some general remarks regarding the development of the waste sector and waste markets:

OECD Decision C (2001)107

- Handling of waste is a relevant economic issue. An economic approach of handling of waste can contribute to development of the sector and financial support can ensure a valuable business in this field.

- After some severe environmental accidents regarding the handling of waste, for example the 'Seveso accident' in Italy (41 barrels with highly contaminated waste substances wandering around in Europe) it became obvious to the public to set a legal framework for transboundary movement of waste aiming at a balanced regulatory framework securing the environment and public health as well as the economic interests of the sector.

- This objective was finally reached by the adoption of the Basel Convention, introducing a harmonised global system on the movement and environmentally sound management of waste.
From the beginning the focus was more on waste streams rather than on waste materials.

As we can see today – also thinking of the currently debated Circular Economy Package, focussing on waste materials rather than on waste streams (municipal waste, commercial waste, etc.) makes sense from an environmental point of view.
- Economic instruments such as taxes may be preferred in theory.

- Some difficulties with the issue of waste handling arise from other aspects, such as attitudes like “not in my backyard” or “not in my term of office”.

- Legal basis for possible EU Regulations may differ from subject to subject - for waste shipment the legal basis is the environmental title of the Treaty.
WASTE HIERARCHY AND RELATED KEY DEFINITIONS - DO THEY MATTER FOR WASTE TRADE?
The waste hierarchy laid down in Article 4 of the Waste Framework Directive (WFD) represents one of the governing principles of European waste legislation.

In order to strengthen waste prevention and recycling efforts, the amendment of the WFD in 2008 split up the hierarchy into a five step hierarchy. On the level of „recycling“ two further steps were introduced: „preparation for re-use“ and „other recovery“.

Prevention as defined in Article 3 (12) WFD means: measures taken before a substance, material or product has become waste, that reduce:
(a) the quantity of waste, including through the re-use of products or the extension of the life span of products;
(b) the adverse impacts of the generated waste on the environment and human health; or
(c) the content of harmful substances in materials and products;

With regard to waste shipment operations the distinction of recovery and
disposal operations remains the decisive aspect.
Looking closer at Article 4, especially paragraph 2, it becomes clear, that application of the hierarchy does not follow a stiff order but that it might be justified departing from the order if necessary.

Application of the waste hierarchy has to follow the concept of life-cycle thinking, meaning that waste treatment options have to be reflected on the basis of their overall impact along the life cycle and choosing the option with the best overall environmental outcome.

Furthermore Member States have to take into account the general environmental protection principles of precaution and sustainability, technical feasibility and economic viability as well as other matters such as human health or social impacts.

In addition, boundaries of each step along the hierarchy may shift, i.e. between re-use and preparation for re-use.

A close look renders obvious that application of the hierarchy in practice is anything but trivial.
Reflecting the value of the hierarchy following aspects may be stated:

First, the hierarchy takes effects on the local planning decisions regarding waste management and waste treatment capacities. According to Article 28 WFD, Member States are obliged to establish national and/or regional waste management plans.

Those plans shall cover the entire geographical territory of the Member State concerned and shall set out:
- an analysis of the current waste management situation in the geographical entity concerned;
- the measures to be taken to improve environmentally sound preparing for re-use, recycling, recovery and disposal of waste;
- an evaluation of how the plan will support the implementation of the objectives and provisions of the WFD.

Second, the hierarchy guides the decision on the specific treatment of waste which has as well consequences on the possibilities of waste shipment to certain treatment facilities.
The hierarchy has therewith implications on trade options of waste.
WASTE TRADE - CROSS BORDER APPROACH
The most important legal basis for waste shipment operations in Europe is Regulation (EC) No. 1013/2006 (Waste Shipment Regulation, WSR).

The Regulation adopted in 2006 further developed the former Waste Shipment Regulation (EC) No 259/93/EC, which had set the legal framework on trans-frontier shipment of waste in Europe.

The development of Regulation (EC) No 1013/2006 (WSR) took into consideration the ongoing discussions at international level (OECD and Basel Convention) and transposed the Convention into the European Law.

The main and predominant objective and component of the Regulation is the protection of the environment.

Legal basis of the WSR is Article 192 of the Treaty on the Functioning of the European Union (TFEU). Of course, the national measures reaching further are still possible but they are not routine.
The Regulation’s scope foresees a wide range of wastes as well as exemptions. This legal act is not applicable to radioactive wastes as well as other wastes, such as wastes generated on board of ships, for example. Other fields are listed in Article 1 paragraph 3 of the WSR.

The notion of waste addressed in the WSR is based on the definition of the waste in the Waste Framework Directive (WFD) 2008/98/EC (see Article 3).

Problems, associated with the definition of waste are outside the scope of this presentation but it can be stated that questions on the status of waste play a role, i.e. regarding reverse logistics of products as an element of EPR schemes. The status of those products can also be a relevant question relating to transboundary movement of waste.

Other questions, for example, whether a ship is a waste or not, have been discussed already earlier between IMO and the EU.
What is the steering mechanism of the WSR?

Regulation (EC) No 1013/2006 foresees two different procedures:

- the procedure of prior information consent (PIC) applying to all shipments of wastes intended for disposal and shipments of hazardous and semi-hazardous wastes intended for recovery that are on the orange or amber list;
  and,
- the 'information only' procedure applying to non-hazardous wastes intended for recovery that are green listed.

Various prohibitions are furthermore included in Annex V, reflecting the former red list.
Some of the essential changes of WSR (2006) in comparison to elements of the former Regulation are:

- Article 5 WSR has tightened the requirements regarding the contract and the obligations addressed.

As you can find in Article 5, the contract shall include obligations:

- on the notifier to take the waste back if the shipment or the recovery or disposal has not been completed as intended or if it has been effected as an illegal shipment,
- on the consignee to recover or dispose of the waste if it has been effected as an illegal shipment,
- Article 15 has inserted provisions regarding interim recovery and disposal,
- Regulation maintains a wider range of possibilities for Member States when opposing wastes destined for disposal compared to opposition of wastes for recovery.
– As it will be explained further below self-sufficiency and proximity may only be called upon for transboundary shipments of wastes destined for disposal.
Please let us now take a look at the leading case-law on the WSR since the adoption of the Regulation in 1993:

- **Case C-203/96 - Dusseldorp**

The question was whether shipment of wastes for recovery may be objected by the competent authority with the argument of self-sufficiency and proximity. The Court ruled that if not foreseen for reason of environment or exceptions foreseen by Article 30 (former Article 36) of the Treaty of the European Union any objection for shipment of waste for recovery based on the argument of self-sufficiency and proximity constitutes an export prohibition.

- **A little bit more detailed clarification was provided by the Court in Case C-209/08 Sydhavnens**

Regulations foreseeing legal or factual export prohibitions by determining that collection of non-hazardous waste (in this case construction and demolition waste) is only permitted by a couple of companies. The Court clarified that unless there is a suspicion of environmental risk or risk for human health, such regulation cannot be justified on the basis of Article 30.
- Case C- 324/99 DaimlerChrysler

The case arose from a States' regulation in Germany obliging holders of hazardous waste to dispose their waste in a certain treatment facility in Hamburg. Daimler Chrysler objected because the treatment and final disposal of waste in the facility were quite expensive. The main question the Court had to decide on was whether the WSR establishes a harmonised system on shipments of waste at the European level. If yes, there would be no space for further scrutiny if the national Regulation implementing the European legal act is in line with the Treaty of the European Union. On 13 December 2001 the Court decided that a national export prohibition in place and in compliance with the set European legal framework does not provoke further examination if the national regulation is as well in line with the prescription of the Treaty of the European Union. The Court argued with the objective of the WSR aiming at a high level of environmental protection, stressing that the Regulation has been put in place to guarantee the protection of the environment. The conditions under which shipments of waste are permitted are to be regarded as complete and harmonised.
In 1999 a company named EU Wood Trading notified of a shipment of wood waste for export for recovery to a company situated in Italy. A short analysis of the waste that was added to the notification documents revealed that the waste had a higher concentration of lead and arsen than accepted by the German competent authority. Therefore the competent authority of dispatch in Germany objected to the shipment.

One of the important questions the Court had to decide on was what criteria my be laid down for the decision of objection to a shipment. On 16 December 2004 the Court decided that for the decision on objection the competent authority may refer to national standards of recovery treatment. For the decision of objection the competent authority of the country of dispatch may refer not only to circumstances lying within the geographic sphere of the competent authority but also to the national treatment standards. The shipment of waste has always to be evaluated as a whole process.

Case C- 215/04 – Pedersen
In this case a Danish company, collecting electronic waste, wanted to ship this waste for recovery to Germany. The competent authority in Denmark objected to the export of the shipment. In short the Court confirmed, as it was ruled in EU-Wood Trading, that the competent authority of dispatch has the right to object the shipment taking into account the circumstances of the treatment operation of the waste.

Case C-292/12 Ragn Sells

This case involved several questions covering matters of WFD and procurement, free movement of goods and services and abuse of dominant position.
Summary and main elements of the development of the Court rulings regarding the WSR:

- The WSR refers to definitions of the WFD. Regarding possibilities for objection against shipments, the definitions of self-sufficiency and proximity show that they are not entirely clear and leave some space for interpretation.

- After the Court’s judgement in Daimler Chrysler case, the relationship between the Regulation and the Treaty of the EU remains unclear especially in the application of the exception referring to national waste management plans.
With regard to treatment standards, the Court clarified the conditions for objection as laid down in Article 12 paragraph 1(c).

Nevertheless the question of when and how far extraterritorial criteria may be considered for objection to a planned shipment is not yet resolved completely.

Please take a look at the excerpt of Article 12 on the next slide, providing some of the wording of the Regulation.
WASTE TRADE - CROSS BORDER APPROACH

Article 12(1) c:

- that the planned shipment or recovery would not be in accordance with national legislation in the country of dispatch relating to the recovery of waste, including where the planned shipment would concern waste destined for recovery in a facility which has lower treatment standards for the particular waste than those of the country of dispatch, respecting the need to ensure the proper functioning of the internal market.

- This shall not apply if
  (i) there is corresponding Community legislation, in particular related to waste, and if requirements that are at least as stringent as those laid down in the Community legislation have been introduced in national legislation transposing such Community legislation;
  (ii) the recovery operation in the country of destination takes place under conditions that are broadly equivalent to those prescribed in the national legislation of the country of dispatch,
  (III) the national legislation in the country of dispatch, other than that covered by (I), has not been notified in accordance with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information Society services, where required by that Directive, or

- (…)

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Transboundary movement of waste touches a number of other issues regarding waste management.

To name a few:

- Definitions remain a challenge in certain cases (reverse logistics)
- “End of waste” status can be difficult to determine and is not necessarily harmonised at the EU level
- EoW Regulations (EU) exist for metal and copper scraps, glass cullet.
- As far as no EoW Regulation exist the decision on EoW status has to be taken in accordance to Article 6 WFD.

The Implementation of WSR is as well as other Environmental law supported by IMPEL (network for Implementation of Environmental law).

Furthermore enforcement of the WSR is supported by the Guidelines of the Correspondents that can be found on the EU website:
http://ec.europa.eu/environment/waste/shipments/guidance.htm
WASTE TRADE IN THE EU - IMPORTERS

The following data shows the waste importing countries for final waste treatment within the EU Member States and Norway.
WASTE TRADE IN THE EU - EXPORTERS

The following data shows the waste exporting countries for final waste treatment within the EU Member States and Norway.

[Bar chart showing export data for various countries, with values for each country labeled.

Source: Raw data from Eurostat 2012]
LANDFILLS AND WASTE
LANDFILLS

- Landfill Directive: 1999/31/EC, as amended

defines landfill as:

“landfill” means a waste disposal site for the deposit of the waste onto or into land (i.e., underground), including:
- internal waste disposal sites (i.e., landfill where a producer of waste is carrying out its own waste disposal at the place of production), and
- a permanent site (i.e., more than one year) which is used for temporary storage of waste, but excluding:
  - facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere, and
  - storage of waste prior to recovery or treatment for a period less than three years as a general rule, or
  - storage of waste prior to disposal for a period less than one year;
LANDFILLS

- Varying duties for three classes of landfill: hazardous; non-hazardous; inert waste.
- Some types of waste banned altogether: e.g. tyres, hospital waste
- National plans need to work towards a serious reduction of biodegradable municipal waste going to landfill (see also the EC’s Circular Economy proposals on food waste)
- Member States may go further and some, in particular Germany, have done so (OK-ed by CJEU in C-6/03 Deponiezweckverband Eiterköpfe)
LANDFILLS

- Article 10’s provision on the full internalisation of the cost of the landfill (including aftercare for 30 years) has direct effect per CJEU C-172/08 Pontina Ambiente.
Incineration

- Troubled history in view of the waste hierarchy.
- Previous Directives on non-hazardous and hazardous waste, brought together into Directive 2000/76/EC, now included in the IED (Industrial Emissions Directive) 2010/75/EC. Chapter VI is especially relevant for emissions limits.