The EU Waste Shipment Regulation
Outline

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Slide 3 gives an overview of developments in EU waste management, slides 4-6 illustrate key features concerning waste shipments. Sources are the report by the European Environment Agency “Waste without borders in the EU” (2009) and the Commission report on the implementation of Regulation (EEC) No 259/93 from 2001-2006.
Slide 4 shows the growth in the number of notified waste shipments from 1997-2005, mostly within the EU. What shipments require notification (more precisely: “prior written notification and consent”) will have to be explained later (cf. slide 9). Note that this category does not only include shipments of hazardous wastes but also shipments of certain other wastes and even “green-listed” wastes where an import country outside the OECD requires the notification procedure.
Slide 5 shows the main exporters and importers of notified waste within the EU, calculated per capita of population. Note that “export” and “import” in this case means the same as “shipment out of” and “into” the individual Member State, while in strictly legal terms “export” and “import” denote only shipments from the EU to non-EU countries and vice versa. The position of the Netherlands as top exporter (and also significant importer) in this sense has partly to do with Rotterdam being Europe’s biggest seaport. Some other Member States with high per capita exports, like Ireland and Luxembourg, are countries with a relatively small population and few facilities for waste disposal or recovery of hazardous wastes on their own territory. Germany, on the other hand, is a state with a network of highly developed disposal and recovery facilities which attracts waste imports from other EU and non-EU countries. Likewise, Belgium has a disproportionately high number of installations for waste recovery, not least cement kilns where waste is co-incinerated.
A comparison of the quantities in slide 4 and slide 6 reveals that all notified shipments together represent only a fraction of the waste shipments worldwide: They amounted to approx. 9 million tonnes in 2005, whereas waste paper shipments out of and within the EU alone kept growing from around 15 to 20 million t between 2004 and 2007. More shipment data, also on waste plastics (3.5 m. t in 2007) and scrap metals (40 m. t in 2007), are contained in the above-mentioned EEA report of 2009. The growth, particularly of exports of recyclable green-listed wastes to Asia, continued until the autumn of 2008 when the world economic crisis caused a temporary collapse of market prices and thus a drop in shipments for recycling. This development is statistically not yet reported.
Slide 7 illustrates the relevant international and EU law in a simplified form. “UNEP” stands for the United Nations Environment Programme, a (semi-autonomous) sub-organisation of the UN under whose auspices the “Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal” was adopted in 1989. The Basel Convention itself, like other international conventions, has several organs of its own, the most important being the Conference of the Parties and the Secretariat (in Geneva). Apart from the Convention itself, the Conference of the Parties has, during its up to now nine meetings, adopted a number of important decisions like the so-called Basel Ban decision of 1994 (Decision III/1) which prohibits the export of hazardous wastes from EU and OECD countries to non-OECD countries but, due to an insufficient number of ratifications, has so far not entered into force. Nevertheless, the Basel Ban has been transposed by the EU in the Waste Shipment Regulation (originally Regulation [EEC] No 259/93) and thereby become binding on all EU Member States.

The Waste Shipment Regulation, now Regulation (EC) No 1013/2006 (“WSR 2006”), transposes the international law on waste shipments adopted by the Conference of the Parties of the Basel Convention and by the Organization of Economic Cooperation and Development (OECD) which groups currently 33 (mainly Western industrial) states. Besides, the Waste Shipment Regulation contains additional provisions laid down by the EU for shipments within, out of and into the EU. Apart from the current Regulation (EC) No 1013/2006, the EU has adopted a second law, Regulation (EC) No 1418/2007, which specifically covers shipments of green-listed non-hazardous wastes for recovery from the EU to non-OECD countries.
It should be noted that Title II applies „mutatis mutandis“ also to some provisions in other titles of the Regulation (see e.g. Art. 44).

Key provision is Art. 3 which outlines the overall procedural framework.

Title VII covers a wide range of provisions which are mostly relevant for the functioning of the Regulation as a whole, in particular Art. 49 (the central obligation to protect the environment / practise environmentally sound management = „ESM“), Art. 50 (enforcement in Member States) and the following articles which provide for the institutions (competent authorities, waste shipment correspondents, etc) and organisational arrangements to implement the Regulation.

In the following slides, Regulation (EC) No. 1013/2006 on shipments of waste will be abbreviated to „WSR“ or „WSR 2006“. 
Art. 1 of WSR 2006 defines the scope of the Regulation. It basically applies to shipments of waste across borders, i.e. between EU MS, into and out of the Community and from a country outside the EU through the Community to another destination outside its borders (transit). The Regulation is not applicable to waste shipments exclusively within a MS but, on account of Art. 33, MS are obliged to establish an appropriate system for the supervision and control of waste shipments within their jurisdiction that should be coherent with the Community system established by the Regulation.

Art. 1(2) excludes certain wastes and shipments from the scope of the Regulation, in particular waste generated on board vehicles, trains, aeroplanes and ships (until offloading), as well as shipments of radioactive waste, animal by-products, waste waters and decommissioned explosives. Newly added in 2009 were shipments of carbon dioxide for the purpose of geological storage (“CCS”). The reason in most of these cases is that the shipments are covered by more specific legal regimes. In addition, the new Waste Shipment Regulation (WSR) has exempted imports into the Community generated by armed forces or relief organizations in situations of crisis, peacemaking or peacekeeping operations from its formalities, in order not to complicate and slow down the emergency work of those organizations.

There is also a de minimis limit of 20 kg below which shipments of waste for recovery do not fall under notification or information requirements (cf. Art. 3.2 WSR).

The legal basis of WSR 2006 chosen by the European Parliament and the Council was Article 175(1) of the Treaty establishing the European Community, i.e. the article on measures for environmental protection. The Commission had proposed a dual legal base – Art. 175 and Art. 133, i.e. also the article on a common commercial policy – because it regarded the export and import rules of the WSR as having a trade purpose apart from an environmental one, and also because this would have given the Community and the Commission itself a stronger position vis-à-vis the MS. The Commission therefore took legal action and asked the ECJ for annulment of the Regulation based on a single legal base. The ECJ, however, decided on 8.9.2009 (Case C-411/06) that Parliament and Council were right to choose just Art. 175 as legal basis because, both by its objective and content, the WSR aimed primarily at protecting human health and the environment against potentially adverse effects of cross-border shipments of waste.

The Court thereby distinguished the case on the WSR from Cases C-94/03 and C-178/03 where it had annulled the decision of the Council for approval of the Rotterdam Convention (on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade) as well as Regulation (EC) No 304/2003 which implemented that convention. Here the ECJ had ruled that the commercial component of the Rotterdam Convention and of Regulation 304/2003 was not purely incidental, so that the relevant EU measures needed to be founded on a dual legal base.

Today, under the Treaty of Lisbon, the legal basis for the WSR would be Art. 192 and not Art. 207 of the TFEU.
The control system is “new” in so far as Regulation (EC) No 1013/2006 has simplified somewhat the procedures that were in place until July 2007 under Regulation (EEC) No 259/93. That regulation provided mainly for three different lists of waste ("green", "amber" and "red") with differing variations of notification and consent associated to them. The three colours have been replaced essentially by a two-tier system of notification procedure on the one hand and information requirements on the other.

In addition, however, one should not neglect prohibitions as the most restrictive alternative of the control system. The possibility to prohibit certain waste exports and imports and especially limitations on waste movements for disposal were always a feature of waste shipment law. With the implementation of the so-called Basel Ban, which became binding in the EU in early 1998, the Community prohibited additionally any export of hazardous waste for recovery to countries to which “the OECD Decision” does not apply.

The *OECD Decision* meant originally the decision of the OECD Council of 30 March 1992 on the control of transfrontier movements of wastes destined for recovery operations, later to be replaced by Decision C(2001)107 Final of the OECD Council. The meaning of the term “countries to which the OECD Decision applies” is essentially the same as “OECD member countries”. A notable exception is Liechtenstein, to which the OECD Decision applies although it is not a member country of the OECD.
Slides 10 and 11 show the basic procedure of prior written notification and consent as laid down in Art. 4 of WSR 2006. For details see this provision. The essential idea is that competent authorities in the countries of dispatch and destination and in potential transit countries should be notified of the waste shipment and all its relevant details, and should all give their consent, before the shipment starts. The notification has to be in writing, using standardized forms, and contains information in particular on the exporter (notifier), importer (consignee), waste generator, carrier and facility for disposal or recovery, on the type and quantity of the waste, its hazard characteristics, the time of shipment etc. The notification form has to be accompanied by a number of other documents, notably a copy of the contract between notifier and consignee, and evidence of a financial guarantee or equivalent insurance covering the costs of a potential take-back. The consent of the competent authorities concerned, as a rule, also has to be given in writing on the notification form. Only in the case of transit countries and for exports to OECD countries outside the EU is tacit consent allowed.

While the notification document and copies of it are sent to the competent authorities concerned for assessment and consent, the movement document 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 (cf. no. 5 and 6 of Annex IC to WSR 2006 = Specific instructions for completing the notification and movement documents). The purpose of the movement document is to facilitate inspections and in particular spot checks en route.

Some EU Member States, such as Germany, are currently changing the notification procedure for waste shipments from the traditional paper system to electronic communication, a format that is envisaged as an alternative in Art. 26(2) of WSR 2006.
Notification procedure (2)

CA of dispatch — CA of destination — CA of transit

Notifier

requests additional info or acknowledges notification within 3 days, informs other CAs

supplies additional info

assesses notification + decides within 30 days:
- written consent with or without conditions
- objections

no objection of CA of transit = tacit consent

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The “information procedure” is, strictly speaking, not a procedure but signifies only the obligation to carry certain documents together with the waste shipment for a potential inspection by competent authorities. The information requirements are listed in Art. 18 of WSR 2006 and apply to shipments of green-listed waste for recovery of more than 20 kg (cf. Art. 3.2) as well as shipments of waste destined for laboratory analysis and not exceeding 25 kg (cf. Art. 3.4 of WSR 2006). The main travel document is an information form as specified in Annex VII to WSR 2006, completed and signed by the person who arranges the shipment (equivalent to the “notifier” in the notification procedure) and by the recovery facility or the laboratory when the waste in question is received. It has to be supplemented by a copy of the contract between those two persons or facilities.
Slide 13 presents the annexes to WSR 2006 which are currently relevant in practice. The main document forms are contained in Annexes IA, IB and VII and explained and/or supplemented by Annexes IC and II.

Annexes III and IV are the crucial lists of “green” and “amber” wastes relevant for the decision whether a shipment within the EU needs to be notified or just accompanied by information documents. Annex IIIA supplements this by a short list of waste mixtures which may be treated as “green” on the basis of agreement in comitology that they would not impair environmentally sound recovery, and which resulted in a Commission Regulation of April 2009 (No 308/2009).

Annex V consists of three parts and contains several lists of wastes relating to exports to non-EU countries and specifying whether a waste falls under the export prohibition (Basel Ban) or not. For that purpose the relevant Annexes VIII and IX to the Basel Convention are copied here, as well as the European Waste List (EWL) contained in Commission Decision 2000/532/EC. Wastes marked in the EWL with an asterisk (*) are considered to be hazardous and as such also fall under the export ban.

Readers may be confused by the fact that there are not only various lists but also different types of codes (entries) for wastes: Apart from the EWL system, which consists of six-digit numbers (e.g. “20 03 01”) organized under two-digit chapters and four-digit groups, there exist the Basel Convention codes composed out of the letter A (for hazardous wastes) and B (non-hazardous) and a four-digit number (e.g. “B3010”), as well as some codes retained from the old OECD system which was composed out of two letters and three digits (e.g. “GC010”). On top of this, the Basel Convention provides for a list of waste categories with a Y-code which may be relevant especially for certain wastes – such as mixed waste collected from households (“Y46”) – which are not necessarily hazardous but whose transboundary shipment nevertheless requires notification. The international organizations and the EU have in the last decade tried to simplify and harmonize their waste lists but have so far succeeded only to a limited extent.

Annex VIII lists a number of guidelines on environmentally sound management of waste. This relates to Art. 49 of WSR 2006 which provides for a general obligation of all undertakings involved in the shipment of waste to ensure that the waste is managed without endangering human health and in an environmentally sound manner throughout the period of shipment and during its recovery and disposal.
Slides 14 and 15 contrast the grounds for objection that apply to shipments of waste for disposal with those in case of shipments for recovery. Several grounds are identical in both cases, e.g. what is called here “bad record”, signifying more precisely that the notifier or the consignee has previously been convicted of illegal shipment or some other illegal act in relation to environmental protection, or has repeatedly failed to comply with certain articles in connection with past shipments.

A special ground for objections to shipments for disposal – marked in red – is that the planned shipment or disposal would not be in accordance with measures taken to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels. New grounds for objection added under WSR 2006 (thus also marked in red) are e.g. the fact that the waste will be treated in a facility which is covered by Directive 96/61/EC (the so-called IPPC Directive), but which does not apply best available techniques as defined in that Directive, as well as the assumption that the waste concerned will not be treated in accordance with legally binding environmental protection standards established in Community legislation. In addition, the fact that the waste is mixed municipal waste collected from private households has been explicitly inserted as a possible ground for objection.
Objections to shipments of waste - Grounds for objection (2)

- Shipments for recovery (Article 12)
  - Violation of Directive 2006/12/EC (e.g. waste management plan)
  - National legislation on environmental protection, public order / safety, health protection (related to actions in objecting country)
  - Lower treatment standards at destination (unless EU legislation etc)
  - Bad record of notifier / consignee
  - Conflict with international conventions
  - Doubtfulness of recovery (ratio of recoverable waste etc.)
  - Failure to apply best available techniques (IPPC Directive)
  - Violation of binding EU environmental protection standards / recycling obligations

(Continued from slide 14)

Likewise, concerning waste shipments for recovery, the failure to apply best available techniques under the IPPC Directive and the violation of binding EU environmental protection standards have been newly added to the list of possible grounds for objection. On top of this, Art. 12(1)(c) of WSR 2006 provides now for objections based on the ground 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, for example that it would take place under lower treatment standards than in the country of dispatch.

This ground which is subject to a number of complicated limitations and exceptions has been and still is highly controversial between advocates of a free internal market and those who fear “eco-dumping” in poorer EU Member States.
For sake of completeness participants should be aware that there exist some arrangements in the Regulation which are meant to simplify burdensome procedures in unproblematic cases. For example, under Art. 13 of WSR 2006, the notifier may submit a general notification to cover several shipments if the waste has essentially similar characteristics and is shipped via the same route to the same consignee and the same facility. Under Art. 14 of the Regulation, a competent authority of destination may decide to issue a “pre-consent” for a specific recovery facility within its jurisdiction that it regards as environmentally sound. The pre-consent is issued for a specific period, and the facility in question may also benefit from the consent of the other competent authorities being granted, in cases of general notification, for three years instead of the normal one year for standard notifications.

On the other hand, the EU has shifted its attention in the new Waste Shipment Regulation to a more effective enforcement by the Member States. The provisions on financial guarantee and on take-back obligations in case of a failed or illegal shipment have been clarified. Moreover, Art. 50 of WSR 2006 enhances various instruments of enforcement, such as penalties which have to be “effective, proportionate and dissuasive”, as well as inspections of establishments and spot checks of shipments. Member States are now under a legal obligation to perform such inspections and spot checks and also to cooperate bilaterally or multilaterally with each other in order to facilitate the prevention and detection of illegal shipments. For this purpose, Member States have to designate not only their competent authorities and one or more correspondents (responsible for informing and advising persons or undertakings making enquiries) but also those members of their permanent staff responsible for cooperation against illegal shipments, and focal points for the physical checking of waste shipments.

The “waste shipment correspondents”, as they are commonly called, have an important role as they meet regularly to discuss questions of implementation and sometimes prepare comitology decisions or adopt “Correspondents’ Guidelines” on the interpretation or implementation of certain WSR provisions.
The EU system of control distinguishes sharply between exports to OECD and non-OECD countries. Whereas exports of green-listed waste for recovery within the OECD are essentially liberalized and may take place with normal commercial travel documents plus the EU information document under Annex VII to WSR 2006, the waste exports to non-OECD countries are made dependent on the specific import rules of those countries. In order to obtain definite information about such rules, the Commission has addressed to all countries concerned a catalogue of questions and presented them with four possible alternatives: (a) a complete prohibition (import ban), (b) the notification procedure as foreseen in the Basel Convention and the European WSR, (c) no controls at all, and (d) other control procedures under national law. An example for such national procedures is the pre-shipment inspection and registration of importers required by China for its waste imports.

The answers to the Commission’s questionnaire have been incorporated in a special Commission Regulation of 29 November 2007, No 1418/2007. This regulation is frequently updated after new or amended answers from non-OECD countries have arrived. The last amendment (as of November 2010) was published as Commission Regulation (EC) No 837/2010 of 23 September 2010 and contains information on the import rules of Andorra, China, Croatia and India.
The list mentions only the main problems and current points of discussion. More can be found in the Frequently Asked Questions (FAQ) paper published by the Commission in September 2010 under http://ec.europa.eu/environment/waste/shipments/pdf/faq.pdf.

For waste shipment authorities (unlike for industry) the key problem in practice is not one that concerns “end of waste” but the “beginning of waste”, i.e. the question how to distinguish used products from waste when they are exported e.g. to Africa or Russia. This is the case particularly with vehicles and electrical or electronic equipment. For the latter type of exports, the waste shipment correspondents have attempted to draw the line in a Correspondents’ Guideline (No 1) that is available on the internet at http://ec.europa.eu/environment/waste/shipments/guidance.htm. Whereas this Guideline is not legally binding, the Commission draft for the revision of the WEEE Directive envisages the incorporation of the Guideline’s inspection criteria into the binding Annex of the Directive.

More disturbing for European industry are the different control standards and differing interpretations of the WSR that are practiced by Member States, thus distorting EU-wide competition.

For businesses interested in free movements of waste for recovery within the EU, the additional grounds for objection especially relating to “lower treatment standards” constitute a problem. This point in particular can be expected to produce cases for the future jurisprudence of the ECJ.

Another problem for industry, especially dealers and brokers of metal scrap, is the fact that the information document under Art. 18 and Annex VII of WSR 2006 openly discloses the identity of the waste producer to the final recovery facility, which may lead to the broker being sidelined in future by producer and consignee. Metal trade representatives are thus strongly in favour of amending the Regulation and/or establishing confidentiality clauses in Community law that do not exist at the moment.

The issue whether a notifier needs a business address, residence or registration in the country of dispatch is a constant point of discussion. It highlights the conflict between free trade principles and the interest in effective control of waste shipments, a conflict that cannot be easily resolved.

The last point on the slide refers especially to a controversy that occurred in past years between Germany and some new MS in relation to illegal waste shipments from Germany organized by a collusion of persons in the country of dispatch and at the destination. This rather frequent constellation and the question how to
share the costs of take-back under Art. 24 of WSR 2006 have so far not been finally resolved.
Slide 19 lists a number of measures that are frequently mentioned by the Commission in discussions on how to improve implementation of the WSR in practice. A Commission Action Plan to that effect was finalized but not yet published.

An important tool in this context is better cooperation by Member States. The key institution for multilateral cooperation which was established already in the early 1990s is IMPEL, the European Union Network for the Implementation and Enforcement of Environmental Law, and specifically its cluster on Transfrontier Shipment of Waste (IMPEL-TFS). IMPEL is now a registered non-profit association under Belgian law. Its activities might be seen on the website indicated on slide 20.

Guidance also plays a role, by the Commission (who may adopt relevant measures under Art. 59 of WSR 2006) as well as by individual Member States and by the waste shipment correspondents in the form of Correspondents’ Guidelines (weblink see note to slide 19).

The Commission has started in 2007 a series of awareness-raising events for waste shipment inspectors and other staff in different Member States. The results of those workshops and the current programme may be derived from the website http://www.bipro.de/waste-events/ship/shipment.htm. The BiPro website also contains other useful information on the WSR and its implementation in general.

Infringement proceedings against MS are the Commission’s strongest instrument to ensure proper implementation, but in waste shipment law where complaints are rare concerning insufficient enforcement, it is currently more seen as a last resort when other channels – as mentioned above – are exhausted.

Nevertheless, the Commission is considering additional instruments, such as legally binding criteria for waste shipment inspections and even a separate Waste Implementation Agency that would have responsibilities in the field of waste shipments. A feasibility study of such an agency has been finalized and published on the Commission website under http://ec.europa.eu/environment/waste/pdf/report_waste_dec09.pdf.

In addition to the internet links at EU or international level, there are various information sources (internet, books, guidance documents etc.) at national level. Some links to national internet sources are listed on the Commission website at [http://ec.europa.eu/environment/waste/shipments/links.htm](http://ec.europa.eu/environment/waste/shipments/links.htm).