



To the European Commission
DG Environment

Via WSRevaluation@trinomics.eu

Rotterdam, April 25, 2018

Re : Public Consultation on the Evaluation of the Waste Shipment Regulation

Dear Sir, Madam,

By means of this letter, the *European Network of Prosecutors for the Environment ENPE* would like to contribute to the Public Consultation on the Evaluation of the Waste Shipment Regulation.

ENPE is a formal not for profit association by Belgian law with its seat in Brussels. Its aim is to contribute to protecting the environment by supporting the operative work of environmental prosecutors and to contribute to protecting the environment by supporting the implementation and enforcement of national, European and International environmental law by environmental prosecutors, having particular regard to the protection of public health, the desirability of achieving sustainable development and the prevention of organised crime in the field of the environment. More information on ENPE can be found on its website www.environmentalprosecutors.eu.

In order to fulfil its obligations under a LIFE+ programme 2015 – 2020, ENPE has established four working groups for its activities, one of which is the Working Group on Waste, specifically the Waste Shipment Regulation. This contribution to the consultation fits in with the objectives and activities of this Working Group.

General remarks

It is important to note that this reaction to the consultation results from the prosecutor's perspective. The comments and suggestions offered have therefore regard chiefly to the enforcement aspects of the WSR. In general, it must be noted that regulations such as the WSR appear not to have been drafted with a specific view on enforcement. This is important, for the risk of non compliance in the area of waste management has been recognized throughout the history of the subject. Besides comments from the enforcement point of view, two further suggestions for improvement of the WSR are offered in this letter.



A second remark of a more general character is that prosecutors' experience shows that there is a lack of uniformity of approach to the WSR across the EU. How uniformity is achieved in practice may be very difficult. Networks like ENPE and IMPEL aim to assist with this, but these networks cannot in themselves be the solution to this problem.

Concerning interpretation of terminology

There are numerous examples of difference in interpretation of relevant terms not only between Member States, but also between authorities within Member States. One way of encouraging uniformity would be to clarify on EU level differences of opinion in interpretation.

One important example is the question what the term *export* means. The United Kingdom and the Netherlands, for instance, would appear to take a different view to Sweden. Case law in both the United Kingdom and the Netherlands has taken the view that an export means the action of leaving the community in that an export takes place long before it has left the national jurisdiction. Sweden, on the other hand, would appear to suggest that an export has only taken place once the consignment has left Swedish jurisdiction.

The term *shipment* is not fully defined in the WSR. In the ECJ *Wood Trading* case (C-2002/277) a 'shipment' is a shipment in its entirety in that it starts at the point of loading and continues until its recovery in the destination country. This ruling pre-dates the 2006 version of the WSR as it ruled on the definition of shipment in the 1993 version of the Regulation. The meaning of 'shipment' in the WSR 2006 would appear to be narrower than that of EU *Wood Trading*, although it does include a planned shipment.

The definition of *dealer/broker* as part of that of *notifier* can be problematic. Firstly, it refers to a person *under the national jurisdiction of a country*. Prosecutors encounter numerous instances of registered brokers or people arranging shipments based in countries outside those of dispatch or even outside the Union. It becomes difficult or almost impossible to enforce against such a broker/person. Some Member States require the broker/person to have a physical presence in the country of dispatch, such as a registered office with employees, but not all Member States do so. This definition could be amended to include an actual physical presence in the country of dispatch. If this were not possible, another solution to this problem should be sought.

Secondly, the definition refers to a registered dealer or registered broker. A broker or dealer could argue that as they are not registered they are not the notifier for the purposes of the definition.

Concerning accessibility, references, and internal coherence of EU legislation

EU law is very difficult to navigate and relationships between parts of EU legislation are not always clear. On occasion, this proves an obstacle to effective enforcement. The following examples can be given.

For enforcement practitioners, the Annexes to the WSR are difficult to handle. To determine whether material is Green List one is referred to Annex III that then refers to Annex V and its introductory notes then Part 1 List B. This can probably be made simpler. Likewise,



consolidating the Green List Regulations would be very useful. Commission Regulation 2007/1418 can also be difficult for prosecutors to work with. A clear view on all existing restrictions in third countries is not easy to obtain.

Article 2 (6) WSR defines the essential term *recovery* via a reference to Article 1 (1)(f) of *Directive 2006/12 on waste*. This Directive, however, has been repealed by *Directive 2008/98 on waste*. As a result of this, the reference in the WSR to the new Waste Directive is unclear. More specifically, it is unclear how recovery in the WSR relates to Article 3(15) – 3(18) of Directive 2008/98.

Through *Regulation (EU) 2014/660*, the WSR term *illegal shipment* has been extended by amendment of Article 50. It is not clear how these extensions relate to the definition of 'illegal shipment' in Article 2 (35) WSR. In the Netherlands, only illegal shipments as defined in the latter Article are criminal offences.

Waste ships are a category of waste with a high risk of threatening the environment and labour conditions, as the recent *Sea Trade* case in the Netherlands shows. ENPE foresees difficulties with how the *Ship Recycling Regulation 2013/1257* will interact with the WSR in the future. Ships flying an EU flag are now excluded from the scope of the WSR. So an EU flagged shipped could be exported as hazardous waste to a third country but no longer be in breach of Article 36. Instead there may be a breach for not recycling a ship at an approved facility.

Further, Directive 2008/99 (also see below) requires that categories of violations of the WSR shall be sanctioned with criminal penalties. Neither Directive 2008/99 nor the Ship Recycling Regulation, on the other hand, requires the same for violations of the Ship Recycling Regulation.

The interaction between the WSR and the *Animal By-Products Regulation 2009/1069* is also problematic. In practice, it may be difficult to distinguish which regulation applies.

The legal force of the *Correspondents' Guidelines* can in some cases be made clearer. The guidelines are in principle merely guidance and not legally binding. The updated Guideline on WEEE, however, is more or less completely inserted into Annex VI to the *WEEE Directive 2012*. These guidelines are therefore a legal requirement under the WEEE Directive but not under the WSR. A simple way to avoid any argument or confusion would be to replicate Annex VI to the WEEE Directive as an Annex to the WSR.

Concerning sanctioning

It is not a new insight that sanctioning practices for WSR violations differ widely between Member States. This hinders effective, proportionate and dissuasive sanctioning and is an obstacle to the level playing field. It appears to be caused by three factors.

Firstly, enforcement authorities in the Member States do not take into account sanctioning practices in other Member States. For criminal enforcement, ENPE aims to contribute to harmonization of sanctioning through its database with national criminal sentences, but this in itself cannot be a sufficient remedy.



Secondly, in most Member States, legal persons can be – and in practice are – criminally sanctioned for WSR violations, but in some they cannot.

Thirdly, it can be questioned whether sanctioning authorities in Member States are sufficiently aware that both the WSR in Article 50, Section 1 and *Directive 2008/99 on the protection of the environment through criminal law* in Articles 3(c), 5 and 7 require effective, proportionate, dissuasive and, in important categories of cases, criminal sanctions for WSR violations.

Two further suggestions

Making it a requirement of the WSR that the *Annex VII document* must be sent to the competent authorities concerned prior to shipment, at least the competent authority of dispatch, would strengthen the authorities' information position. This could be done electronically. At the moment the document just has to accompany the shipment.

Repatriation by the competent authority of dispatch is an expensive process. It may be reconsidered whether the system of financial guarantees is a sufficient remedy.

Finally

The above reflects the great importance that ENPE attaches to the enforcement of EU environmental legislation. I trust that it is of relevance for your evaluation of the WSR. ENPE and its Working Group on Waste will be glad to provide any additional information that you may require.

Yours Sincerely,

Rob de Rijck
Vice-President
European Network of Prosecutors for the Environment