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REVIEW

Remarks on the Waste Framework Directive

Ludwig Krämer

Chinese e-waste legislation,
current status and future development

Martin Streicher-Porte/ Katharina Kummer/ Xinwen Chi et al.

The EU Waste Shipment Regulation
and the need for better enforcement

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Quality and Speed of Administrative Decision-Making
Proceedings: Tension or Balance?

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Locus standi for environmental NGOs in Germany:
The (non)implementation of the Aarhus Convention by the
'Umweltrechtsbehelfsgesetz'

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Editorial

Waste law was, in 1975, one of the first environmental issues to be regulated by the European Community. The Waste Framework Directive has served as an important harmonisation instrument for about 30 years without substantial change. Now, a new directive has been adopted and must be transposed into national law by the end of 2010. Moreover, a comprehensive jurisprudence of the Court of Justice has influenced national waste law in the last years. Around 60 waste-related EU legal acts have been adopted in the last decades to cope with an estimated 2.6 billion tonnes of waste generated in the European territory each year. Finally, the transboundary shipment of waste was given new legal ground in 2006. Reason enough for the current issue of *elni Review* to lay its main focus on waste law.

This issue of *elni Review* (1/2010) includes valuable insights into this matter, on the basis of the following contributions:

In an article entitled “Remarks on the Waste Framework Directive”, *Ludwig Krämer* comments on the directive, in particular on those provisions where the legal situation has changed from previous legislation.

“Chinese e-waste legislation, current status and future development” is the subject of the article by *Martin Streicher-Porte, Katharina Kummer, Xinwen Chi, Stefan Denzler and Xuejung Wang*. This article provides detailed insights on several environmental laws and regulations concerning both waste of electrical and electronic equipment as well as the production of electrical and electronic equipment in China.

“The EU Waste Shipment Regulation and the need for better enforcement” by *Thomas Ormond* discusses the background of waste shipment law, traces the recent developments in waste trade and legislation and sets out current problems and issues.

Beside waste law this issue of *elni Review* also deals with two subjects which are both relevant to the current environmental debate: The article “Quality and Speed of Administrative Decision-Making Proceedings: Tension or Balance?” by *Chris Backes and Sander Jansen* reflects the prevailing tensions concerning administrative decision-making: the necessity of speedier procedures – resulting from the economic crisis – the quality of the proceedings and the rights of citizens.

Further *Gerhard Roller* addresses the legal role of NGOs in court proceedings in Germany in an article entitled “Locus standi for environmental NGOs in Germany”.

Moreover, this edition of *elni Review* covers the recent developments concerning the debates about the EU Waste Implementation Agency, as well as the latest news about the Commission warning the UK about the unfair cost of challenging decisions.

The next issue of the *elni review* will focus on environmental law in developing and emerging countries. Contributions on this issue are very welcome. Please send contributions on this topic as well as other interesting articles to the editors by mid-July 2010.

Nicola Below/Gerhard Roller

April 2010

ELNI-VMR-VVOR congress

on Friday 17th September 2010
at **Ghent University, Belgium**

**“Talking about the environmental effects
of industrial installations:
the European Directive on Industrial
Emissions”**

On the occasion of the upcoming recast of the European Directive on Industrial Emissions, the Environmental Law Network International, the Vereniging voor Milieurecht (VMR) and the Vlaamse Vereniging voor Omgevingsrecht (V.V.O.R.) are co-organising a congress on IPPC, IED, and all possible and impossible questions in this field..

At the end of the day, there will be an unforgettable ELNI birthday party!

Please confirm your participation at:
<http://www.omgevingsrecht.be>

More information on this event can be found in this issue
of *elni Review* on page 39.

The EU Waste Shipment Regulation and the need for better enforcement

Thomas Ormond

1 Introduction

The European Community regulation on shipments of waste which was adopted in May 2006 is now in application since 12 July 2007.¹ Although one of the more voluminous instruments of EU environmental law – with 64 articles and 9 annexes – it was intended as a means of better legislation in comparison with the old Waste Shipment Regulation dating from 1993.² The main purpose of the revision was to transpose recent changes of international law into EU legislation, as well as to harmonise, restructure and streamline the legal text in order to achieve greater clarity. Another objective, not least due to later insertions by the European Parliament during legislative proceedings, was to strengthen effective enforcement on various levels.³ However, against a rising tide of waste shipments or dubious “used goods” ending up as waste in developing countries, the EU regulation has yet to prove that it is an effective instrument of environmental protection on an international scale.

2 The background to waste shipment law

At the outset of waste shipment legislation were drums with chemical residues and contaminated soil from the clear-up at the Seveso disaster site, drums that left Italy on secret paths and were later to surface in a derelict French storehouse. When the then European Economic Community issued a regulation (No 84/631) in order to control hazardous waste shipments within its borders, industry sought other outlets and the world became aware of toxic chemicals being dumped on the coasts of Africa or wandering from port to port. As an answer to “Seveso” and to scandals associated with the names of cargo ships like “Karin B” or African towns like Koko, the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal was adopted in 1989. A strict control regime was set up under which cross-border shipments of toxic wastes should be subject to prior written notification and consent of all states concerned. A later amendment to the Basel Convention – the so-called “Basel Ban” amendment of 1995 – even attempted to prohibit all hazardous waste exports from OECD to non-OECD countries. It has so far not

entered into force, however, due to an insufficient number of ratifications. While the European Community transposed the export ban into its Waste Shipment Regulation No. 259/93 as from 1998, other major OECD states like Japan, Canada or Australia, and even many developing countries like Brazil, the Philippines or South Africa, have refused to join the “Ban” which they see rather as an obstacle to trade and development.⁴

3 Recent developments in the waste trade

Illegal movements of dangerous chemicals to poor countries are not entirely a thing of the past, as the “Probo Koala” incident of 2006 has shown where the ship of that name offloaded a toxic mixture of oil and sulphur compounds in the capital of Ivory Coast, thus causing the death of 17 people and the poisoning of food, water and soil on a large scale.⁵ However, such spectacular cases are nowadays rare and rather untypical for the international waste trade which mostly deals with other types of materials and creates different problems.

The overall development of this trade in the last decade has been marked by rapid growth, fuelled by the industrial boom in China and other emerging economies in Asia, as well as by the increasing number of waste-to-energy plants and recycling facilities in Europe. According to data from the European Environment Agency, the amount of hazardous waste generated in the EU did not change significantly (a figure of 66 million tonnes is given for the year 2005), but the shipments of such waste within the EU or to and from non-EU countries increased to 13 % of the whole in 2005, compared to 5 % in 1997.⁶ At least 98 % of notified waste shipments out of the EU-15 between 2001 and 2005 were destined for other EU or EFTA

¹ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12 July 2006, p. 1.

² Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L 30, 6 February 1993, p. 1. The regulation was amended several times between 1994 and 2001.

³ For details see the PreLex website: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=183890

⁴ Cf. website of the Basel Convention Secretariat: www.basel.int and the account at:

http://en.wikipedia.org/wiki/Basel_Convention#Basel_Ban_Amendment.

The Convention itself has been so far ratified by 172 UN members. Notable non-parties are the USA, Afghanistan and the Iraq.

⁵ See the report (A/HRC/R/26/Add.2) of the UN Special Rapporteur Okechukwu Ibeanu to the UN Human Rights Council of 3 September 2009, published e.g. at www.scribd.com/doc/19839945/AHRC1226Add2 and the well-informed Wikipedia article at http://en.wikipedia.org/wiki/2006_C%C3%B4te_d'Ivoire_toxic_waste_du_mp.

⁶ EEA Report No 1/2009, „Waste without borders in the EU?“ (published at: <http://www.eea.europa.eu/publications/waste-without-borders-in-the-eu-transboundary-shipments-of-waste>), at p. 9; cf. Commission report of 24 June 2009, COM(2009) 282 final, and annex, SEC(2009) 811, published at: <http://ec.europa.eu/environment/waste/shipments/reports.htm>.

countries.⁷ About 20 % of the shipped amounts were waste for disposal – mainly incineration –, while the bulk of waste went for recycling, use as fuel or other forms of recovery.⁸ A large part (approx. 40-50 %) of the notified waste in these statistics are in fact mixed household waste and incineration residues and thus not hazardous but “*other wastes*” in the sense of the Basel Convention.⁹

The quantity of notified waste exports from the EU to non-OECD countries is very small and comprises by definition only non-hazardous waste for which the import country nevertheless prescribed the notification procedure. Moreover, notified waste shipments in general represent only a minor fraction of the overall waste trade. According to the latest available figures (for the year 2007), notified shipments within and out of the EU of about 11 million tonnes compared to shipments in the order of 40 million tonnes of scrap metal, 20 million tonnes of waste paper and 3.5 million tonnes of light-weight but voluminous plastic waste.¹⁰

Not at all contained in these statistics are the exports of what is declared to customs as “used goods”, especially electrical and electronic equipment (EEE) and second-hand cars. While the shipment of e-waste to non-OECD countries is in general prohibited, due to the hazardous components usually contained in such material, the export of used computers or TV sets is in principle allowed. The problem here lies in the potentially high proportion of used products that are in fact not functioning any more and so should be seen as waste. Recent studies and reports from West Africa suggest that the waste quota among imported EEE could be as high as 80 %.¹¹ This e-waste is most often treated with dangerous and environmentally harmful methods, and the unrecyclable components frequently end up in uncontrolled dumps. A similar problem exists with end-of-life ships from Europe which are imported into South Asian countries in defiance of the notification rules of the Basel Convention and disman-

tled under life-threatening conditions and with pollution of soil, water and natural habitats.¹²

4 Legislative answers: Fewer procedures but stricter rules

The EU Regulation of 2006 attempted to simplify the legal regime for waste shipments within, out of and into the European Union especially by merging the former “amber” and “red” lists of mostly hazardous wastes into one list of wastes that are subject to a unified notification procedure. Under this procedure, the waste producer, holder or other person who intends to carry out the shipment normally has to submit a prior written notification with standard forms, additional information, a contract and a financial guarantee to the competent authority of dispatch, which passes the documents on to the authorities of destination and transit. The notifier then has to await the written consent of those authorities before starting the shipment. The new regulation limited the possibility of “tacit consent”, which is to be assumed after a certain time has elapsed following the notification, to exports into other OECD countries and to the case where the competent authority of transit does not answer within a 30-day period. The time limits for written consent and for the completion of the disposal or recovery operation were harmonised to 30 days and 1 year, respectively.

Like before, only so-called “green-listed” non-hazardous wastes intended for recovery may be shipped across borders without prior written notification and consent. They have to be accompanied, however, by certain information. The 2006 Regulation here introduced additional requirements - based on OECD rules - but also a minimum threshold of 20 kg, thus exempting for instance motorists who carry small quantities of such waste from one country to another from the formalities of the regulation. A similar exemption applies to waste destined for laboratory analysis.

Art. 1(3) of Regulation No 1013/2006 also extended the exemptions from its scope for certain types of waste and shipments: As before, this applies to waste categories covered by more specific legal regimes, like waste generated on board vehicles, trains, aeroplanes and ships (until offloading), radioactive waste, animal by-products, waste waters and decommissioned explosives. To this the new regulation added shipments of waste from the Antarctic into the Community as well as imports of waste generated by armed forces and relief organisations in situations of crisis, peacemaking or peacekeeping. The latest exemption, added in 2009, concerns shipments of carbon

⁷ COM(2009) 282 final, see *supra* note 6, p. 7.

⁸ EEA Report No 1/2009, see *supra* note 6, op. cit.

⁹ COM(2009) 282 final, see *supra* note 6, pp. 6-7.

¹⁰ EEA Report No 1/2009, see *supra* note 6, p. 16.

¹¹ Estimate by Ghana expert Mike Anane, interviewed by the magazine DER SPIEGEL, see: <http://www.spiegel.de/panorama/gesellschaft/0,1518,665030,00.html>; cf. “How Europe’s Discarded Computers Are Poisoning Africa’s Kids”, <http://www.spiegel.de/international/world/0,1518,665061,00.html>; the Greenpeace study “Poisoning the Poor”, <http://www.greenpeace.org/international/news/poisoning-the-poor-electroni> and the BAN report “Digital Dump” of 2005, <http://www.ban.org/BANreports/10-24-05/documents/SummaryofFindings.htm>.

¹² Cf. Ormond, “Enforcing EU environmental law outside Europe? The case of ship dismantling”, in: elni Review 1/2009, p. 13.

dioxide for the purpose of geological storage (“CCS”).¹³

For the information accompanying green-listed waste, as well as for the notification procedure concerning other wastes, Regulation 1013/2006 introduced new forms. The new law allows and encourages also the use of electronic communication (with digital signature) for notification and movement documents.

5 More grounds for objections to waste shipments

One of the controversial amendments of the old regulation, but also of the original Commission proposal, was the extension of possible grounds for objections by the competent authority of dispatch to shipments of waste for recovery. The new regulation now explicitly allows the authority for the area where the shipment should start to refuse permission for it on the ground that the recovery facility in the country of destination has lower treatment standards for the particular waste than those of the country of dispatch. This “ecology objection” is not entirely new, as the European Court of Justice accepted it in the “EU-Wood-Trading” case¹⁴ already in interpretation of the former law, but its explicit mentioning helps to clarify the legal situation and makes it easier for Member States with high environmental standards to stop waste shipments to other countries. One should, however, not overlook that the discretion of the dispatch authority is somewhat limited by the obligation to respect “*the need to ensure the proper functioning of the internal market*”. Besides, the objection may not be raised if there is corresponding Community legislation on these standards, if 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, or if that legislation has not been duly notified to the EU Commission and the other Member States.

Also several other environmental grounds of objection – e.g. the failure to apply best available techniques in an IPPC facility – are now explicitly enumerated in Art. 12 of Regulation No 1013/2006.

On the whole, this may reduce “eco-dumping” of waste in the European Union but could also discourage the development of certain EU recycling markets that would be beneficial for the environment.

A further limitation to the movement of waste for recovery in the Community was introduced by the provision that shipments of mixed municipal waste

collected from private households to recovery or disposal facilities shall in all cases be subject to the rules for shipments of waste for disposal. In this way, for mixed household waste, the principles of proximity and self-sufficiency have been extended to recovery operations. This stricter regime for mixtures on the one hand secures waste flows to feed existing incinerators and enhance investment security in such facilities. On the other hand, in situations where there are no such facilities or planned investments, it can encourage more separate collection, sorting and recovery of household waste by restricting export for energy recovery.

6 Emphasis on effective enforcement

Not least because of amendments by the European Parliament, the new Regulation on shipments of waste puts a strong emphasis on effective enforcement. Art. 50 points to penalties, inspections of establishments and undertakings, and spot checks on shipments of waste as appropriate measures. The penalties for infringements of the regulation must be “*effective, proportionate and dissuasive*”. Checks on shipments shall include the inspection of documents, the confirmation of identity and, “*where appropriate*”, physical checking of the waste. A more extensive proposal in the European Parliament to prescribe minimum quota for physical inspections as the most effective enforcement tool was, however, turned down in the legislative process.

Multilateral or bilateral cooperation to facilitate the prevention and detection of illegal shipments has been made a general obligation on Member States. They also have to identify those members of their permanent staff responsible for the cooperation, as well as the focal points for the physical shipment checks. This obligation strengthens the role of IMPEL, the voluntary EU Network for the Implementation and Enforcement of Environmental Law, which links together inspectors and enforcement authorities from most Member States and whose “TFS cluster” deals with trans-frontier shipments of waste.¹⁵ The extension of this efficient network to waste shipment authorities from all Member States could be an important step in improving enforcement of the law against illegal waste traffic in the EU.

Better implementation was also the objective behind clearer and more precise rules on procedure, financial guarantees and take-back of illegally shipped waste, as well as the additional measures envisaged in Art. 59 of the regulation. These measures, which may be adopted by the Commission in comitology procedure, include for example guidelines for the cooperation of competent authorities with regard to illegal shipments, fur-

¹³ Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide ..., OJ L 140, 5 June 2009, p. 114.

¹⁴ ECJ, Judgment of 16 December 2004 in case C-277/02, EU-Wood-Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH.

¹⁵ See website http://ec.europa.eu/environment/impel/impel_tfs.htm.

ther clarification of procedural requirements and guidance concerning undefined legal terms.

7 Dispute about the legal basis

Regulation No 1013/2006, as adopted by the European Parliament and the Council in June 2006, was based exclusively on Art. 175(1) of the EC Treaty, i.e. on the provisions concerning environmental legislation (now Art. 192 of the Treaty on the Functioning of the European Union – TFEU -). The Commission had proposed a joint legal basis for this act, namely Art. 175(1) and the Treaty provision on a common commercial policy, Art. 133 (today Art. 207 TFEU). While Council and Parliament held that environmental protection was the primary objective of the regulation, and the effects on international trade only incidental, the Commission maintained the position that major parts of the regulation deal with the limitation and control of trade, and so initiated legal proceedings in the European Court of Justice. The view of the Commission got some support from decisions of the Court concerning the adoption of a regulation on imports and exports of dangerous chemicals and the conclusion of the Rotterdam (PIC) Convention on this subject, in which the relevant Council decision and the regulation were annulled on account of their insufficient legal basis.¹⁶

However, the ECJ dismissed the action in its judgment of 8 September 2009 and ruled that the aim of the regulation was not a commercial one but to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment. The EU measures implementing the Rotterdam Convention were held to be not comparable, since their commercial components could not be regarded as secondary, while Regulation No 1013/2006 did not contain such components to a recognizable degree.¹⁷

8 Recent amendments and supplementing legislation

Since 2006, the Waste Shipment Regulation has been amended and supplemented several times. Editorial mistakes had to be corrected¹⁸ and the forms for notification and movement documents and for the information to accompany shipments of green-listed waste were adapted to changes agreed under the Basel Convention.¹⁹ Annexes IC and IIIA which had been left

blank in the original regulation were filled in to supplement specific instructions for completing the notification and movement documents (Annex IA and Annex IB) and to add a list of mixtures of green-listed wastes not classified under one single entry that should be subjected only to information requirements.²⁰ Moreover, as under the Waste Shipment Regulation of 1993, a separate regulation was adopted covering specifically the prohibitions or control procedures to be applied to exports of green-listed non-hazardous wastes to non-OECD countries. This Commission Regulation No 1418/2007²¹ is updated regularly in order to take into account recent answers by non-OECD countries concerning their rules on import of green-listed wastes.²²

9 Implementation problems and current points of discussion

While the problem of “end of waste” was very much on the mind of industry and the makers of the new Waste Framework Directive²³ in the last years, the key problem for waste shipment authorities in practice is the “beginning of waste”, i.e. the question how to distinguish used products from waste when they are exported e.g. to Africa or the Eastern neighbours of the EU. This is the case particularly with vehicles and electrical or electronic equipment. For the latter type of exports, the Member States’ waste shipment correspondents have attempted to draw the line in a Correspondents’ Guideline (No. 1) of 2007.²⁴ Whereas this guideline is not legally binding, the Commission draft of 2008 for the revision of the WEEE Directive envisages the incorporation of the guideline’s inspection criteria into the binding annex to this directive.²⁵

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

European Parliament and of the Council on shipments of waste, for the purposes of taking account of technical progress and changes agreed under the Basel Convention, OJ L 309, 27 November 2007, p. 7.

²⁰ Commission Regulation (EC) No 308/2009 of 15 April 2009 amending, for the purposes of adaptation to scientific and technical progress, Annexes IIIA and VI to Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste, OJ L 97, 16 April 2009, p. 8.

²¹ Of 29 November 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, OJ L 316, 4 December 2007, p. 6.

²² See Commission Regulations (EC) No 740/2008, OJ L 201, 30 July 2008, p. 36, and No 967/2009, OJ L 271, 16 October 2009, p. 12.

²³ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste, OJ L 312, 22 November 2008, p. 3 (see Art. 6).

²⁴ Published e.g. on the Commission website at: <http://ec.europa.eu/environment/waste/shipments/guidance.htm>.

²⁵ Proposal of 3 December 2008, COM(2008) 810 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0810:FIN:en:PDF>.

¹⁶ Judgments of 10 January 2006 in cases C-94/03 and C-178/03, Commission v. European Parliament and Council.

¹⁷ Judgment of 8 September 2009 in case C-411/06, Commission v. European Parliament and Council.

¹⁸ Corrigendum of Art. 2 No. 15(b) and of Annex V Part 2 code 10, OJ L 318, 28 November 2008, p. 15.

¹⁹ Commission Regulation (EC) No 1379/2007 of 26 November 2007 amending Annexes IA, IB, VII and VIII of Regulation (EC) No 1013/2006 of the

In addition, the new grounds for objection relating to “lower treatment standards” constitute a potential obstacle to the trade with waste for recovery in the Internal Market.

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 Regulation No 1013/2006 discloses the identity of the waste generator to the final recovery facility, which may lead to the broker being sidelined in future by dispatcher and consignee. Metal trade representatives are thus strongly in favour of amending the Regulation and/or establishing confidentiality clauses in EU law that do not exist at the moment.

Last but not least, a controversy between Germany and some new Member States has been ongoing over the last years, fuelled by a gap in the provision for take-back when a shipment is illegal (Art. 24). The case where persons both in the country of dispatch and the country of destination are responsible for the illegal waste shipment – a rather frequent case – is not explicitly addressed in the Regulation, so that the question who should bear the costs of take-back is not yet finally resolved.

10 Measures to improve implementation

The Commission has repeatedly emphasised the need for better implementation of waste law, with a priority given to the rules on landfills and on waste shipments.²⁶ An Action Plan to that effect was drafted and presented to high-ranking officials of the Member States in April 2009, but has not yet been published.

An important tool in this context is better cooperation between Member States. The key institution for this is the above-mentioned IMPEL network which has recently become a registered non-profit association under Belgian law. Its drawback is that not all Member States are participating and in particular some of the very States with serious enforcement deficits like Italy and Greece. In view of the new legal obligation to cooperate in enforcement matters, it will fall upon the Commission to take the necessary action and, if other means fail, initiate infringement proceedings against unwilling Member States.

Below this level, guidance can play a role, by the Commission (who may adopt relevant measures under Art. 59 of the Regulation) as well as by individual Member States and by the waste shipment correspondents in the form of Correspondents’ Guidelines. In

²⁶ See e.g. Report from the Commission of 20.11.2009 on implementation of the Community waste legislation for the period 2004-2006, COM(2009) 633 final, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0633:FIN:EN:PDF>, p. 10.

addition, the Commission started in 2007 a series of awareness-raising events for waste shipment inspectors and staff of other relevant authorities (like police and customs) in various Member States.²⁷

For the future, the Commission is considering stronger instruments, such as legally binding criteria for waste shipment inspections²⁸ and the establishment of a separate EU agency for waste law implementation.²⁹ It remains to be seen if the Member States are ready to accept an enhanced role for European institutions in this context that would improve the effectiveness of waste shipment law but also touches on the sensitive issue of national sovereignty and the distribution of powers in the EU.

11 Conclusion

The Waste Shipment Regulation of 2006 has only marginally reduced the complexity of EU rules for the international waste trade. Open issues remain, and new challenges are presented especially by the mounting flood of e-waste and used electronic equipment that ends up as waste in developing countries. The EU Commission’s increasing focus on better implementation points in the right direction but needs to be underpinned by more commitment from Member States, as well as more support from business circles and the general public. The effectiveness of environmental and health protection will largely depend on the willingness of the EU and its Member States to assign sufficient resources for enforcement and to cooperate closely with each other and with third countries in the struggle against illegal waste shipments.

²⁷ See workshop reports and current programme on the contractor’s website, <http://www.bipro.de/waste-events/ship/shipment.htm>.

²⁸ Communication from the Commission of 14 November 2007 on the review of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States, COM(2007) 707 final, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0707:FIN:EN:PDF>, p. 9.

²⁹ See the *Recent Developments: Report on the establishment of an EU Waste Implementation Agency* in this issue, p. 36.

Recent Developments

Report on the establishment of an EU Waste Implementation Agency

One of the most serious environmental challenges facing the EU today is the monitoring of waste management to ensure that it is safe and environmentally sound. An estimated 2.6 billion tonnes of waste are generated each year in the EU, over 6 tonnes per citizen, and about 90 million tonnes of this waste is classified as hazardous.¹

Around 60 waste-related EU legal acts² have been adopted in recent decades. The European Commission is taking a series of steps to strengthen the implementation of EU waste legislation and is exploring new initiatives for the years ahead. The aim is to ensure that implementation meets the standards set by EU legislation to protect citizens and the environment. In November 2009, the Commission adopted two reports, which reveal that EU waste law is being poorly implemented and enforced in many Member States.³ Current gaps in implementation and legislation have led to wide-scale illegal dumping and large numbers of landfills and other facilities and sites that do not meet EU standards. In some Member States, waste infrastructure is inadequate or missing.⁴ A lack of inspections and on-the-spot checks was identified as a contributory factor to the illegal shipment of waste. Research by the Commission and recent inspection campaigns organised by IMPEL⁵ revealed that around 19% of the shipments in question were illegal.⁶ These are mostly exports which contravene the export ban on hazardous waste or do not fulfil the information requirements for exports of "green", non-hazardous waste.

Several studies were commissioned, one of which addressed the feasibility of a European Waste Implementation Agency.⁷ The study was published in Feb-

ruary 2010 and outlines the benefits and costs of creating a dedicated agency to support the implementation of EC waste legislation. This agency should monitor the implementation and enforcement of EU waste legislation as well as support the Commission in the updating of legislation and in other work.

The study shows that in many parts of the EU, implementation and enforcement of EU waste legislation fall significantly short of legal obligations. The key problems are:

- Lack of sufficient capacity for the inspections, controls and other enforcement actions in the Member States.
- Organisational problems, such as poor coordination among various national bodies with responsibilities for inspections and controls.
- Implementation of EU waste legislation is considered a low priority in many Member States. This leads to a shortcoming of resources for enforcement.
- Lack of technical capacity for the preparation of waste management plans and programmes.
- Member States have different interpretations of the EU waste requirements.

The study further criticises that many national producer responsibility schemes, waste management plans and other strategies and programmes work poorly in practice. These problems have led to a high level of citizen complaints to the European Commission and many infringement cases against various Member States: the waste sector, together with nature protection, has accounted for the largest share of environmental infringement cases brought before the ECJ in recent years.

The overall situation leads to the conclusion that the overarching goal of EU waste legislation⁸ is not achieved. Due to the differences in implementation and enforcement across the EU and the differences in interpretation of EU waste legislation, the actors in the area of waste and in industry generally do not have a level playing field across the EU. In the survey for this study, nearly all Member State officials and all stakeholder representatives who responded saw the need for new actions at EU level to improve the implementation and enforcement of EU waste legislation. Moreover, the Commission lacks investigatory powers as regards EU waste legislation, and when verifying complaints from citizens about possible infringements, it is confined to relying on often contradictory information provided by national authorities, complainants and other parties. This creates difficulties for the

¹ Zamparutti, T.; Isarin, N.; Wemaere, M.; Wielenga, F. (et al): Study on the feasibility of the establishment of a Waste Implementation Agency. Revised Final Report, 7 December 2009, p. 1. This report has been prepared by Milieu Ltd, AmbienDura and FFact for the European Commission. Download at: http://ec.europa.eu/environment/waste/pdf/report_waste_dec09.pdf. See also Dedicated EU body needed to ensure enforcement of European waste law, says Commission study, IP/10/113, 1 February 2010. Available online: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/113>.

² Which includes regulations, directives and decisions of EEC and EC.

³ Waste management: Commission calls for better implementation of EU waste law by Member States, IP/09/1795, 20 November 2009. Available online at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1795&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴ See *supra* note 3.

⁵ IMPEL: EU network for the implementation and enforcement of environmental law.

⁶ See European Commission, Services to support the IMPEL network in connection with joint enforcement actions on waste shipment inspections and to coordinate such actions, Final Report No. ENV.G.4/FRA/2007/0066 of 15 July 2009, p. 60. Download at: http://ec.europa.eu/environment/waste/pdf/impel_report_09.pdf.

⁷ Zamparutti, T.; Isarin, N.; Wemaere, M.; Wielenga, F. (et al), 2009, *supra* note 1.

⁸ See Art. 1 of the Waste Framework Directive (2008/98/EC).

Commission in ensuring that EU waste legislation is correctly applied by Member States.

The study has identified a series of possible tasks to be undertaken, based on an analysis of the work of existing European agencies as well as inputs provided by Member State officials and stakeholders through a questionnaire, interviews and two informal workshops. These potential tasks are then assessed prospectively with regard to improving implementation and enforcement of the EU waste management system throughout the EU. These tasks are:

- **Enforcement:** Reviews of Member States' enforcement systems, coordinated controls and various inspections activities.
- **Training of Member State officials as well as related work:** Both direct training and train-the-trainer programmes would be supported by exchanges and other work to coordinate Member State training programmes.
- **Guidance:** Drafting and updating guidance documents, both for enforcement activities and more generally for the implementation of EU waste legislation.
- **Support for the updating of EU waste legislation:** The agency's expertise on waste issues would support the Commission on technical and scientific issues for updating of EU legislation, including support on impact assessments and other technical steps.
- **Other key tasks:** Support to the Commission in the monitoring and assessment of waste management plans and waste prevention programmes and provision of a helpdesk for Member States.

In an examination of institutional options, the study concludes that creating a new European structure, i.e. an EU Agency for waste implementation, provides the most effective way forward for carrying out the recommended tasks.

The study also addresses co-operation measures through a European network of Member States which would support the agency in a number of activities and which is deemed to be a key partner. Information exchange among Member States would also be extended to address common challenges. In addition, the EEA, its Topic Centre and Eurostat would carry out wider work on waste issues and cooperate with the new agency. The proposed mission statement of the agency reads as follows:

“The European Waste Implementation Agency is dedicated to promoting uniform, effective implementation and enforcement of EU waste legislation across the European Union in order to protect human health and the environment. The Agency's activities support the

*EU Member States and European Commission in their respective roles.”*⁹

In carrying out a broad range of tasks, the agency would become a centre of knowledge and information on waste issues. Moreover, it would realise important synergies among the tasks it carries out, and the knowledge it gathers would be institutionalised.

The study states that the European body for carrying out inspections and controls should be hosted by the European Commission in order to be as effective as possible.

The study estimates the total annual cost for carrying out these recommendations at just over 16 million Euros. The proposed agency would require just under 50 professional staff members and 11 management and support staff. Additional staff would also be needed by the proposed body for carrying out direct inspections and controls of facilities and sites, possibly hosted by the Commission/DG Environment: 20 new staff, including 15 operational staff for the body. Additional staff would be added at the Secretariat of the European network (2), Member State governments (5), and EEA/Eurostat (1.75 combined). In addition to these annual costs, the agency would require an additional 1.6 million Euros in estimated start-up costs in its first two years.

However, there are conflicting views on the necessity of an EU waste implementation agency. The study states that “nearly all” Member State officials who responded saw the need for new actions at EU level.¹⁰ A dissenting opinion by the British government stated that the Commission questionnaire seemed to start from the premise that a European waste agency is necessary while it has not yet been adequately demonstrated that EU action is needed at all. The British government based this assumption on a workshop held on 2 April 2009. The European Commission confirmed that it did not have a proposal to establish a waste implementation agency. The commissioned study was to address the feasibility of establishing such an agency. In the Communication of 11 March 2008, the Commission concluded that it will “propose no new regulatory agencies until the work of the evaluation is complete (end of 2009)”.¹¹

Moreover, if the necessity of an EU action is proven, the Commission should firstly consider whether existing EU agencies could fulfil that need. There is a risk that a new EU agency's work would conflict with what national enforcement authorities are trying to achieve.

⁹ See Zamparutti, T.; Isarin, N.; Wemaere, M.; Wielenga, F. (et al), 2009, *supra* note 1, p. 20.

¹⁰ See Zamparutti, T.; Isarin, N.; Wemaere, M.; Wielenga, F. (et al), 2009, *supra* note 1, p. 1.

¹¹ See COM(2008) 135 final “European agencies – The way forward”, p 10.

Latest News:

Commission warns the UK about the unfair cost of challenging decisions

The European Commission is warning the UK about prohibitively expensive challenges to the legality of decisions on the environment.¹ The Commission sent an initial warning to the UK government in October 2007, and the UK replied that the procedures were under review. Whilst the reviews undertaken since 2007 have been illuminating, they have not resulted in any changes being made to improve the situation as it stood in 2007. The Commission therefore considers that the UK is failing to comply with the legislation. A failure to comply with this final warning could see the UK being brought before the European Court of Justice on the basis of Art. 258 of the Treaty on the Functioning of the European Union.

European law explicitly states that challenges of decisions must not be prohibitively expensive. The Commission is concerned that in the United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing challenges is preventing non-governmental organisations and individuals from bringing cases against public bodies.

The warning letter also raises concerns about the requirement in the United Kingdom for applicants for interim injunctions to give expensive and often unaffordable “cross undertakings in damages” (deposits that may be used to compensate defendants) before such orders are granted by the courts. This is a serious impediment to the use of such injunctions.

Several pieces of environmental legislation, including the Environmental Impact Assessment (EIA) Directive and the Integrated Pollution Prevention and Control (IPPC) Directive², aim to boost public awareness of environmental matters in Member States and ensure increased transparency. The measures – which are also necessary under the Aarhus Convention on Access to Justice, which has also been signed by the UK – have been transposed to UK legislation, but the current financial obstacles have led the Commission to conclude that the laws covering this area of the Directive have not been fully transposed and are not being properly applied in practice.

¹ This contribution is an excerpt of the press release in RAPID (IP/10/312 of March 18, 2010) available online: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/312&type=HTML>

² In December 2007, the Commission adopted a proposal for an Industrial Emissions Directive (IED). The proposal recasts seven existing directives related to industrial emissions into a single legislative instrument. This recast includes in particular the IPPC Directive. See also ELNI-VMR-VVOR congress “Talking about the environmental effects of industrial installations: the European Directive on Industrial Emissions” in this issue of *elni Review* on page 39.

ELNI-VMR-VVOR-congress

Talking about the environmental effects of industrial installations:
the European Directive on Industrial Emissions

Ghent, Ghent University,
17 September 2010

elni

Environmental Law
Network International



VMR
vereniging voor milieurecht



Talking about the environmental effects of industrial installations:
the European Directive on Industrial Emissions



In December 2007, the Commission adopted a proposal for an Industrial Emissions Directive (IED). The proposal recasts seven existing Directives related to industrial emissions into a single legislative instrument. This recast includes in particular the IPPC Directive, which has been in place for over 10 years. One of the keys of the proposal is to strengthen the dynamic Best Available Techniques (BAT) standards.

A lot of questions arise. Among others: which lessons can be learned from IPPC? Will the IED offer the highest level of protection for the environment and human health? Will the existing legislation be simplified? Will unnecessary administrative costs be cut?

On the occasion of the 20th birthday of ELNI, the Dutch and Flemish Environmental Law Associations (VMR and VVOR) decided to co-organise a congress on IPPC, IED and all possible and impossible questions in this respect. At the end of the day, an unforgettable ELNI-birthday party will take place!

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VMR
vereniging voor milieurecht

Ghent, Ghent University, 17 September 2010
10h00 - 21h00

Programme

10h00 **Martin Führ**, University of Darmstadt,
Welcome and opening speech

I. READING *What about the current status of the regulatory framework?*

10h15 **Filip François**, *European Commission*:
Actual status of the Industrial Emissions Directive (IED)
10h45 **Christian Schalbla**, *European Environmental Bureau*:
New aspects arising from the IED
11h00 **Marga Robesin**, *Stichting Natuur en Milieu*:
Relation between the IED and the NEC-Directive
11h15 Discussion – Moderator:
Marc Pallemmaerts, *University of Amsterdam*
12h00 Lunch

II. DOING *What about the implementation in the Member States?*

13h00 **Jan van den Broek**, *VNO-NCW and MKB – the Netherlands*: Practical experiences with IPPC
13h15 **Yolanda Waas**, *DCMR Environmental Protection Agency*: Interpretation, application and review of IPPC
13h30 **Lesley James**, *Friends of the Earth*:
Definition of 'Best Available Techniques'
13h45 **Delphine Misonno**, *Facultés universitaires Saint-Louis*:
The European Safety Net
14h00 **Chris Backes**, *University of Maastricht*: Emission limit values versus environmental quality standards
14h15 **Jerzy Jendroska**, *Centrum Prawa Ekologicznego*:
Link to the Aarhus Convention
14h30 **Ana Barreira**, *Instituto Intemacional de Derecho y Medio Ambiente*: Compliance and enforcement
14h45 Discussion – Moderator:
Luc Lavrysen, *Ghent University*
15h30 Coffee break

III. DREAMING *What about future developments?*

16h00 **Marjan Peeters**, *University of Maastricht*:
Alternatives to the environmental permit
16h15 **Isabelle Larmuseau**, *Ghent University*:
Introduction of the sustainability criterion
16h30 **Martin Führ**, *University of Darmstadt*: IED and substance related information gathered under REACH
16h45 **Filip François**, *European Commission*:
General reflections
17h00 Discussion – Moderator:
Gerhard Roller, *University of Bingen*

IV. ELNI-BIRTHDAY-PARTY

18h30 **Gerhard Roller**, *University of Bingen*:
Birthday speech 'How it all began...'

Ghent, LDR Law Firm, 18 September 2010
10h00 - 13h00

10h00 Follow-up meeting: perspectives for the future of ELNI-VMR-VVOR
12h00 Lunch

Ghent, Ghent University, 17 September 2010
10h00 - 21h00

Locations:

Conference	Lunch & ELNI-Party
Filmplateau	Facultaire Raadzaal
Paddenhoek 3	Voldersstraat 3
9000 Gent	9000 Gent

Ghent, LDR Law Firm, 18 September 2010
10h00 - 13h00

Location:

LDR
Kasteellaan 141
9000 Gent

Practical information

Conference fees:

The participation fee includes all conference materials as well as break refreshments, lunch and walking dinner.

Member fee (VVOR/VMR/ELNI): 60
Standard fee (non-members): 125

ELNI - *Environmental Law Network International*
Website www.elni.org

vzw V.V.O.R. - *Vlaamse Vereniging voor Omgevingsrecht*
Kortrijksesteenweg 1007 - 9000 Gent
E-mail info@omgevingsrecht.be
Website www.omgevingsrecht.be

VMR - *Vereniging voor Milieurecht*
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Registration: <http://www.omgevingsrecht.be>

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Imprint

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The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the *elni Review*.

Focus of the forthcoming issue

Environmental law in developing and emerging countries.

Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): €52; private users, students, libraries: €30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

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Environmental Law and Policy at the Turn to the 21st Century

Umweltrecht und -politik an der Wende zum 21. Jahrhundert



Gedenkschrift / Liber amicorum Betty Gebers

*Thomas Ormond/Martin Führ/
Regine Barth (eds.)*

The present environmental law in Europe has been essentially produced in the last 20 years, and current environmental policy is still based on the courses set in this time. One of the actors in this process was the environmental lawyer Betty Gebers, until her premature death in September 2004. Her life achievements but also the current status in the many fields where she was active are examined in this book. The combination of retrospective and present-day analysis forms also the basis of an outlook how environmental law and policy in Europe could further develop in the next decades of this century.

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in

the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements – The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment – European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
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Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.