



Reflections on some of the everyday challenges due to the complexity of waste crime legislation

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Summary

The legislation relevant to waste crime is very complex.

A case study from everyday life as a Danish prosecutor shows that the complexity of the legislation can have a fundamental impact on court rulings.

The case study concerns a criminal case regarding the cross-border transport of waste. The waste was transported from Sweden through Denmark to Germany. During the investigation of the case – and even during the trial itself – the competent authority changed its mind about which articles in the relevant regulation the indictment should refer to.

Only the international legislation relevant to the specific criminal case is commented on in the following.

The analysis of the case study shows that the legislation is based on reference upon reference upon reference. Although the main regulation in the criminal case is a European one – Regulation (EC) No 1013/2006 – this regulation does not state the relevant definitions or procedures within the regulation itself but through references to EU directives, the Basel Convention, etc.

The complexity of the legislation makes it difficult for authorities to navigate the legislation – even so difficult that it means criminal cases are sometimes lost in court.

Keywords: waste crime, complexity, legislation.

Transport of waste – the two procedures

Transport of waste across borders has to follow one of two procedures laid out in Regulation (EC) No 1013/2006⁽³³⁾.

The procedure of prior written notification and consent

The main rule is that the transport of waste across borders must follow the procedure of prior written notification and consent.

In simple terms, this means that prior to the transport/shipment, the notifier has to submit a written notification to and through the competent authority of the dispatch country; there has to be a contract between the notifier and the consignee; and there has to be established a financial guarantee or equivalent insurance.

The competent authority sends the notification to the competent authority of the destination country, with copies to any competent authority/authorities of the transit country. Only when all relevant parties have agreed to the transport it can take place⁽³⁴⁾.

This procedure takes resources and time.

Annex VII procedure

In recognition of the high demands of the procedure of prior written notification and consent, the regulation includes an exception to this procedure.

Waste listed in Annex III or IIIB can be transported without the procedure of prior written notification and consent, and simply accompanied by the document contained in Annex VII⁽³⁵⁾.

This is considered sufficient. Thus, the waste listed in Annex III is so-called green-listed waste⁽³⁶⁾.

The criminal case:

- The criminal case involved transporting aluminium skimmings from Sweden through Denmark to Germany.
- In Denmark, the competent authority is the Environmental Protection Agency.

In a criminal case, the Environmental Protection Agency makes a recommendation to the police regarding investigation work that is still needed, the right legislation, etc., and, of course, the categorisation of the waste.

⁽³³⁾ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

⁽³⁴⁾ Chapter 1 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

⁽³⁵⁾ Art. 18 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

⁽³⁶⁾ Annex III to Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

The specific inspection took place in the south of Denmark. On that day, both the police and the Environmental Protection Agency were present during the inspection.

The shipment was accompanied by an Annex VII document ⁽³⁷⁾. The Annex VII document stated that it was being transported from Sweden to Germany and that it was aluminium skimmings.

What caught the attention of both the police and the Environmental Protection Agency was the fact that the aluminium skimmings smelled strongly of ammonia. In fact, the entire area where the inspection took place had to be shut down so that the public could not use it, and the Emergency Management Agency was called to take samples, etc.

The conclusion was that the aluminium skimmings, due to contact with water, were giving off gases.

The Danish authorities found that the shipment was not compliant with the Annex VII procedure; therefore, the shipment was to be sent back to Sweden ⁽³⁸⁾.

Extraordinarily, it was decided that it could continue the rest of the way to its destination in Germany. As the inspection took place in the south of Denmark, the destination was much closer than the place of dispatch, and the Danish authorities did not want the shipment being driven across Denmark and giving off gases.

Based on the categorisation of the waste, the test results and the recommendation from the Environmental Protection Agency, the prosecutor's office filed charges against the dispatching company. The charges were that the waste was 'not listed', instead of being covered by Annex III (green-listed waste); thus, the shipment was not compliant with the Annex VII procedure, and should have been subject to the procedure of prior written notification and consent ⁽³⁹⁾.

During the trial, everybody agreed that:

- the correct company was facing charges;
- the transport of aluminium skimmings could have been compliant with the Annex VII procedure if the skimmings had stopped giving off gases.

During the trial, there were different opinions on whether the shipment was compliant with the Annex VII procedure or whether it should have been subject to the procedure of prior written notification and consent.

The Swedish authorities did not take any samples or did any tests regarding the shipment. They made a statement that aluminium skimmings' in general were covered by Annex III and, therefore, the transport was compliant with the "Annex VII procedure".

⁽³⁷⁾ Annex VII to Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

⁽³⁸⁾ Art. 22 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

⁽³⁹⁾ Chapter 1 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

Denmark (country of transit) tested the shipment, showing that there was a dangerous level of gases present. The tests showed that the aluminium skimmings produced these gases when put in contact with water. Once the chemical reaction was complete, it would not start up again should the aluminium skimmings get wet once more.

Germany (country of destination) tested the shipment, and this test showed that gases were not present. The German tests were conducted several days after the Danish tests. Thus, the chemical reaction had stopped and gases were no longer present.

In cases of disagreement about the waste categorisation, the environmental legislation is clear. If the competent authorities of the dispatch and destination countries cannot agree on whether the notified waste is listed in Annex III, IIIA, IIIB or IV, the waste shall be regarded as listed in Annex IV ⁽⁴⁰⁾.

The twist in this case was that the authorities of the dispatch and destination countries agreed that the waste was listed in Annex III.

Denmark was the only country of transit; however, it was documented that there was a dangerous level of gases present in the shipment when it was in Denmark.

The Environmental Protection Agency had, prior to the trial, concluded that the shipment was to be regarded as listed in Annex IV ('not listed'), and the references to the legislation in the indictment were made according to this conclusion.

Just before the end of the trial, the Environmental Protection Agency changed its mind. Thus, Denmark was neither the country of dispatch nor destination, the Environmental Protection Agency now speculated that Denmark could not state that the shipment was to be regarded as listed in Annex IV, when both the country of dispatch and destination agreed on the waste of the shipment was listed in Annex III.

The Environmental Protection Agency now stated that it was a shipment of waste listed in Annex III, as it displayed the hazardous characteristics listed in Annex III to Directive 91/689/EEC ⁽⁴¹⁾.

The bottom line was the same as before. The shipment should have been subject to the procedure of prior written notification and consent.

However, since the reference to the legislation was different, namely that the shipment was not being categorised as listed in Annex IV but instead in Annex III with the presence of dangerous levels of gases, and the indictment did not reflect this, the judge acquitted the defendant.

⁽⁴⁰⁾ Art. 28 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

⁽⁴¹⁾ Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ L 377, 31.12.1991, p. 20).

Legislation

The legislation on environmental crime is complex. It is an area of legislation where there is not one set of rules but national legislation combined with EU regulations that refer to EU directives, conventions, etc.

In addition to the complexity of the legislation, there are two opposing principles regarding environmental crime in criminal cases:

1. the legislation regarding environmental crime has the main purpose of putting the environment first;
2. in criminal cases, any reasonable doubt must benefit the accused.

In the following, only the international legislation relevant to the criminal case mentioned above will be analysed and commented upon, and some challenges will be highlighted. In the criminal case, it was not an issue whether the waste was contaminated or mixed. Therefore, this issue will not be a topic for exploration or discussion.

The main legislation relevant to the criminal case was Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste⁽⁴²⁾. This regulation incorporates the Basel Convention and the Organisation for Economic Co-operation and Development (OECD) decision into Community legislation.

Therefore, in this regulation, there are references to directives, conventions, the OECD decision, etc.

Even terms used in the regulation are not defined within the regulation but by reference to other legislation.

For example, Article 2 states the following:

For the purposes of this Regulation:

1. 'waste' is as defined in Article 1(1)(a) of Directive 2006/12/EC;
2. 'hazardous waste' is as defined in Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste.

Article 3 describes the method used for waste transport across borders. The method depends on which annex the waste is listed in.

In the case referred to, it was relevant whether the aluminium skimmings should have been sent accompanied by an Annex VII document – under the Annex VII procedure – or if the shipment should have been subject to the procedure of prior written notification and consent.

In order to determine the right procedure, the waste had to be categorised.

⁽⁴²⁾ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1), Preambles 3–5.

The shipment was transported following the Annex VII procedure; therefore, it was relevant to determine whether Annex III to Regulation (EC) No 1013/2006 covered aluminium skimmings.

Annex III to the regulation provides the reader with the same challenge as previously mentioned. It does not list the wastes subject to the general information requirements laid down in Article 18 (green-listed waste) as the title states – it refers to the Basel Convention.

Part I of Annex III states:

The following wastes will be subject to the general information requirements laid down in Article 18:

Wastes listed in Annex IX to the Basel Convention.

In order to determine whether the shipment is covered under Annex III to Regulation (EC) No 1013/2006, the reader has to refer not to Annex III to the regulation but to Annex IX to the Basel Convention.

Aluminium skimmings are mentioned in Annex IX to the Basel Convention as 'B1100: Aluminium skimmings (or skims) excluding salt slag'.

So far, it can be concluded that aluminium skimmings are covered by Annex IX to the Basel Convention and, therefore, by Annex III to Regulation (EC) No 1013/2006. They can therefore be transported, accompanied by an Annex VII document.

The question in the criminal case was whether that conclusion was enough to conclude that the specific shipment was compliant with the Annex VII procedure or not.

As mentioned, the answer to that question can be found in Article 3 of Regulation (EC) No 1013/2006.

The main rule – the procedure of prior written notification and consent – is listed in Article 3, paragraph 1.

The exception is found in Article 3, paragraph 2, which states:

Shipments of the following wastes destined for recovery shall be subject to the general information requirements laid down in Article 18 if the amount of waste shipped exceeds 20 kg:

(a) waste listed in Annex III or IIIB ...

Article 18, paragraph 1, states:

Waste as referred to in Article 3(2) and (4) that is intended to be shipped shall be subject to the following procedural requirements ...

The references are circular. Therefore, it can be difficult to decide which is the correct order to mention the articles when formulating an indictment. The meaning is pretty clear, though, and the issue of the correct order in which to mention the articles is more of an academic discussion that will be taken no further here.

The main rule is stated in Article 3, paragraph 1. The exception is stated in Article 3, paragraph 2.

An exception to the exception is made in Article 3, paragraph 3, which states:

For wastes listed in Annex III, in exceptional cases, the relevant provisions shall apply as if they had been listed in Annex IV if they display any of the hazardous characteristics listed in Annex III to Directive 91/689/EEC. These cases shall be treated in accordance with Article 58.

Again, it is not possible to find what these exceptional cases are by reading Regulation (EC) No 1013/2006. A new reference is made, as the paragraph refers to Directive 91/689/ECC. Directive 91/689/ECC is no longer in force.

The new directive, Directive 2008/98/EC of the European Parliament and the Council of 19 November 2008 on waste and repealing certain directives, repeals Directive 91/689/ECC but states in Article 41 that 'References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex V.'

H12 substances in Annex III to the directive are essentially the same as before, as in Regulation (EC) No 1013/2006 H12 describes 'Substances and preparations which release toxic or very toxic gases in contact with water, air or an acid', while Directive 2008/98/EC says: 'Waste which releases toxic or very toxic gases in contact with water, air or an acid'.

The conclusion, as far as the regulation goes, is that the shipment, under the special circumstances that were present in Denmark, should have been transported according to the procedure of prior written notification and consent because the waste was categorised as listed in Annex III, as it displayed the hazardous characteristics listed in Annex III to Directive 91/689/EEC and was therefore covered by the exception in Regulation (EC) No 1013/2006, Article 3, paragraph 3.

Discussion

In order to find the correct legal references in just one simple criminal case regarding one cross-border shipment of waste, it was necessary to find the appropriate legal provisions in the following:

- Regulation (EC) No 1013/2006;
- Directive 2006/12/EC;
- Directive 91/689/ECC, which is no longer in force, so also Directive 2008/98/EC;
- the Basel Convention, as it has been amended over the years.

As a special prosecutor, I am used to work with European regulations, directives, etc. I was startled to find how difficult it was to find Annex IX to the Basel Convention.

Finding the latest consolidated version of the legislation is an extra challenge that has to be overcome in everyday work life.

The very first preamble of Regulation (EC) No 1013/2006 states that 'The main and predominant objective and component of this regulation is the protection of the environment, its effects on international trade being only incidental.'

Nevertheless, the complexity of the legislation resulted, in this specific criminal case, in the principle that any reasonable doubt must benefit the accused winning against the principle of putting the environment first.

Even though it was documented that the shipment in Denmark gave off a dangerous level of gases and that the result of this was that the shipment should have been subject to the procedure of prior written notification and consent, the Environmental Protection Agency in Denmark – and thereby the prosecutor's office – had such difficulty finding the appropriate references in the legislation that the judge saw no other option but to acquit the defendant of the charges.

It must be acknowledged that, by making the legislation the way it is, by building it up with one reference after another, by making it impossible to know what to do by reading only the regulation itself, it is a very difficult tool to use – not only for the competent authority or public prosecutor – but certainly also for the transporting business and the notifier.

There are still many illegal shipments of waste within the EU. The European Commission is aware of this, and the problems controlling shipments are one of the reasons for proposing a revision of the regulation⁽⁴³⁾.

However, after reading the proposal, I realised that transparency is not the goal of the revision. It seems that it is not even a minor goal or a side effect of the revision. Reading through the main findings of the *ex post* evaluation of the current regulation, illegal shipments and control thereof is the last point mentioned⁽⁴⁴⁾.

Four political options are mentioned in the proposal⁽⁴⁵⁾. None of them seems to acknowledge that the complexity of the legislation in using references instead of stating rules within the regulation is part of the problem.

It goes against the sense of justice that companies can get away with violations only because the rules are so complex that they cannot always lead to the right indictment and therefor conviction.

⁽⁴³⁾ 2021/0367 (COD) Proposal for a Regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056, Section 1.

⁽⁴⁴⁾ 2021/0367 (COD) Proposal for a Regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056, Section 3.

⁽⁴⁵⁾ 2021/0367 (COD) Proposal for a Regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056, Section 3.

Making the legislation more transparent is crucial to making sure that the main principles of the legislation can be employed in the courtroom and that the environment can be put first.

References

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ L 377, 31.12.1991, p. 20).

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1).

2021/0367 (COD) Proposal for a Regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056.