



turn back the toxic tide

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Comments for the Public Consultation on the Revision of the European Union Waste Shipment Regulation

Basel Action Network (BAN)

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I. INTRODUCTION

The Basel Action Network (BAN) applauds the new emphasis found in the Circular Economy Action Plan (CEAP)¹ -- one of the main blocks of the European Green Deal, calling inter alia for this *"thorough review of EU rules on waste shipments. The review will also aim at restricting exports of waste that have harmful environmental and health impacts in third countries..."*

BAN's Director Jim Puckett has been personally active on the Waste Shipment Regulation (WSR) since 1989. During that time, we have first seen its improvement and then unfortunately, in recent years, its weakening through the addition of unwarranted exemptions and weakening efforts to the principled basis for the Regulation.

Those fundamental principles behind the WSR in our view are the same principles that gave rise to the Basel Convention and the Ban Amendment and those are:

- **The need to preventing waste trade which moves to weaker economies to externalize costs and avoid ESM including waste prevention.**
- **The need to provide transparency and strict accountability for all waste trade that moves appropriately to internalize costs and conduct ESM including waste prevention.**

With the new emphasis on an ethical and responsible Circular Economy, as outlined in the aforementioned European Green Deal's CEAP, we wish, with these comments to focus your attention on our 4 themes in order to return to the above principles. These themes are as follows:

¹ https://ec.europa.eu/environment/circular-economy/index_en.htm

- 1. Remove and Prevent Further Exemptions to Trade Controls for Ships And Electronic Waste** -- A massive exemption removing ships from the Waste Shipment Regulation and an exemption on certain types of Electronic Waste within the EU legislation and lobby at Basel need to be reversed.
- 2. Strictly Control Exports of All Plastic Wastes** -- Extend the Basel controls on some plastic waste to all plastic waste. This means all plastic waste must be subject to prior informed consent in the OECD area and will be banned from being exported outside of the OECD area. This will make for easier enforcement and greater transparency to enable the design of a true and responsible circular economy.
- 3. Ensure Greater Transparency and Efficient Implementation for Appropriate Waste Trade** -- All movements of wastes from, through and within the European Union must be made fully transparent to the public, in as close to real-time as feasible, through online reporting.
- 4. Increase Enforcement Including Penalties for Violators** -- It should become the norm and not the exception that criminal prosecutions are advanced and jail time incurred for violators. More intelligence-led enforcement is needed including unannounced inspections of shipping containers and use of tracking technology (e.g. GPS) be used.

II. CONCERNS OVER THE PROPOSED "POLICY OBJECTIVES" AS POSED BY THE COMMISSION FOR PUBLIC CONSULTATION

The above themes are different than the three pre-ordained Policy Objectives outlined for the EU public consultation and thus different from the measures pre-supposed as important in your survey. Those pre-ordained Policy Objectives are as follows:

- A. To facilitate preparing for re-use and recycling of waste in the EU and ensure a smooth functioning of the EU internal market for waste destined for preparation for re-use or recycling, thereby supporting the transition to Circular Economy models and adding value to waste in the EU. One important element therein is to simplify and reduce unnecessary administrative burdens linked to the implementation of the WSR;*
- B. To restrict exports of waste outside the EU that have potentially harmful environmental and health impacts in third countries or can be treated domestically within the EU. This should help ensure the environmentally sound management of waste in the EU and in third countries, by focusing on countries of destination, problematic waste streams, and types of waste operations that are a source of concern;*
- C. To strengthen enforcement of the WSR and control of waste shipments in order to better address illegal shipments of waste within the EU as well as illegal exports to third countries.*

It is not entirely clear how the above three points became *the* policy objectives for the Public Consultation on the revision of the Waste Shipment Regulation, but BAN does not concur that these are the most important objectives going forward. We find that these can even be counter-productive in some ways. As we do not fully embrace these objectives, answering the

online questionnaire that assumes at the outset that these are worthy objectives while suggesting measures for achieving them, was not possible for us. Further the online platform locked us out of full participation and would not provide a reset email as it was meant to. For these reasons, we have chosen to submit this document as our consultation contribution. Below we explain our concerns regarding the three pre-supposed Policy Objectives and then proceed with our four themes for reform of the Regulation for your careful consideration.

Concerning Policy Objective A. (Facilitate Re-use and Recycling). The circular economy is about far more than simply recycling and re-use of our existing wastes. If the EU Commission, Parliament and Member States only see it that way, they miss the only effectual way of proceeding with circularity. Circularity begins with design for circularity. Under that lens, we learn that so much of what is produced should never have been produced in the first place and may in fact be harmful to recycle or re-use. Such products were not designed to be circular and may be far better not to facilitate circularity including possible transboundary movement for toxic recycling or re-use until it is. And this is not, unfortunately a rare situation. The case can be made that almost all plastics are not designed to be circular. They contain toxic additives, they cannot be recovered in one-to-one value, but in fact can only be down-cycled to products with lesser value without adding virgin materials. Electronic waste as well, is most often designed so that it's very difficult to remove toxic components. And in fact, they contain materials that are toxic timebombs because waiting to be disposed in a manner (eg. open burning) which will harm the planet, its flora, fauna and humanity. So, if one truly cares about a true Circular Economy then one will not emphasize "*ensuring a smooth functioning of the EU internal market for waste destined for preparation for re-use or recycling... and adding value to waste in the EU.* If one were truly thinking about what precisely is being moved, how toxic it might be, and how safe the recycling or incineration of it is, or its eventual fate in the developing world where it is likely to end up, one would not work to *One important element therein is to "simplify and reduce unnecessary administrative burdens linked to the implementation of the WSR;"*

We do not support this objective.

Concerning Policy Objective B. (Restricting EU Waste Exports) Waste can move for good or for bad reasons. When it moves in order to externalize costs through exploitation of weaker economies or the global commons it should be prevented. When it moves to internalize costs to ensure greater care and safety than would be expected without such movement it should be streamlined but remain transparent and accountable. While it remains the case that almost all exports to developing countries from the EU are in the former category and we applaud the EU's leadership in implementing the Basel Ban Amendment, (the derogation for EU flagged ships and e-waste for repairs notwithstanding) it must be recognized at the same time that the EU member states are not immune from such exploitive movement taking place within the EU, taking advantage of relatively weaker economies and communities. Likewise, there will be times when it is necessary to move wastes, even for final disposal within the EU or to other OECD countries in order to internalize costs and prevent harm in the country of origin. So, the EU v. non-EU should not be the most important divide. And not all wastes are the same of course. If wastes are not at all harmful and their movement does not cause undo life-cycle impacts (e.g. transport/energy/carbon footprint costs) then their trade may in fact lead to cost internalization. So, the notion of treating waste movements without significant negative impacts the same as wastes whose movements or management will cause negative impacts makes little sense.

We support this objective in part.

Concerning Policy Objective C. (Strengthening Enforcement) This objective is a worthy one which we fully support. We would wish to ensure that this objective includes providing for penalties which are severe enough to serve as a strong deterrent. All of the enforcement in the world will not change anything if the cost of being prosecuted becomes just another cost of doing business.

We fully support this objective.

III. BAN'S POLICY OBJECTIVES FOR REFORM OF THE WASTE SHIPMENT REGULATION

1. Remove and Prevent Further Waste Trade Control Exemptions

At the outset, it is vital to remind the Commission, the Parliament and Member States that the European Union has already substantially weakened much of the emphasis called for in the European Green Deal and Circular Economy Action Plan with respect to limiting exports from the EU. Some of these actions also represent serious derogations from the original intent and purpose of the Basel Convention and Basel Ban Amendment which are international legal instruments that the EU has ratified and is obliged to uphold. This has happened too often at EU level whenever a powerful industry finds its wastes being controlled and chooses to flex its political muscle rather than follow the law. The EU goes along with this and fails to uphold the law and policy principles. It is hoped now with a new emphasis on maintaining strict controls and enforcement that the EU will seize the opportunity of the WSR revision to close the opened loopholes and resist further temptations to create new ones. In this regard, we direct your attention first and foremost to the following:

A. The EU's Illegal Unilateral Removal of Toxic Ships from Trade Controls must be Reversed

The shipping industry was the first powerful industry to push the EU into abandoning not only principle but legal obligations with respect to exporting hazardous wastes to developing countries when they chose to ignore their Basel Convention obligations in favor of a weaker more industry friendly, and human rights unfriendly -- Hong Kong Convention. While the Hong Kong Convention added some necessary elements of that were missing in the Basel Convention, there was in fact no reason why the EU could not accede to both Conventions and implement both. There was also no good reason not to work to improve the Basel Convention's weakness and implementation and enforcement due to the special challenges presented by regulating ships as wastes instead of promoting that for EU flagged ships the Basel Convention does not apply. In fact, the Basel Convention has asserted that it *does in fact apply to ships*² and the EU pretending otherwise does not make this position legally viable.

There is nothing duplicative or contradictory if the two approaches are added together. The

² Decision VIII/26 of October 2004 at the 8th Conference of the Parties to the Basel Convention affirmed, that "a ship may become waste as defined in Article 2 of the Basel Convention and ... at the same time it may be defined as a ship under other international rules." The Basel Convention therefore applies to end-of-life ships (waste) when they are considered as hazardous.

shortcomings of each Convention is in part remedied by allowing both to function in tandem. However, due to the pressure brought to bear by powerful shipping interests, the EU chose to chart a different course to undermine and derogate from its treaty obligations of the one binding treaty (Basel) in favor of another (Hong Kong) which is not yet in force. The industry wished to continue its practice of "exports of waste that have harmful environmental and health impacts in third countries..."³ They were very afraid that the Basel Convention, and in particular the Basel Ban Amendment, would not allow them to exploit developing countries and externalize costs to them. Sadly, the EU acceded to that aim. But we now have the opportunity to correct this.

The removal of ships from the Waste Shipment Regulation upon passage of the Hong Kong Convention implementing legislation (Ship Recycling Regulation) was a unilateral, illegal departure from the EU's Basel obligations. At the time of adoption of the Ship Recycling Regulation it was questioned not only by EU legal experts (CIEL and Dr. Ludwig Krämer) but by the European Council Legal services as well.⁴

These legal experts highlighted that the removal of the ships from the Waste Shipment Regulation by attempting to assert that the Ship Recycling Regulation was an illegal and illegitimate use of Basel's Article 11. Those assertions made back in 2012 have become even more certain now that the Basel Ban Amendment, already ratified by all EU member states and the EU Commission, has entered into force (as of December 5, 2019).

It is not legally possible now to assert that the Hong Kong Convention approach, which does not allow countries to consent or deny waste shipments arriving on their shores, can be seen as possessing "Provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries",⁵ than a regime which disallows such trade, on the basis that such trade "in particular to developing countries has a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;"⁶

These are the requirements of a valid Article 11 Agreement and they cannot be met by the EU. Indeed, much earlier it was decided by the European Commission and the Council of Environment Ministers that Article 11 cannot be used to circumvent the Basel Ban.⁷

Remedy: The exemption for ships of any size and type and flag when they are waste (Article 1.3.i) must be removed from the Waste Shipment Regulation. Also, the Ship Recycling Regulation must immediately conform to the Ban Amendment by limiting the Green list of acceptable ship recycling facilities to OECD based facilities.

B. Electronics Industry's Export Loopholes for Electronic Wastes Must be Removed

³ Text quoted from the Circular Economy Action Plan of the EU. https://ec.europa.eu/environment/circular-economy/index_en.htm

⁴ Several legal critiques asserted the obvious, opposite conclusion that in fact the Hong Kong Convention could not be considered as providing an "equivalent level" of control to that of the Basel Convention. See [Analysis by Dr. Ludwig Krämer](#), Analysis by the [Center for International Environmental Law](#). Further, the Council of the European Union, Legal Services, 28 November 2012, 16995/12 weighed in with their analysis: Proposal for a Regulation of the European Parliament and of the Council on ship recycling - relationship between Regulation 1013/2006 on waste shipments, the Basel Convention, and the Hong Kong Convention, can be found [here](#).

⁵ From Basel Convention's Article 11.

⁶ Preamble rationale for the Ban Amendment now part of the Convention as new Article 4A.

⁷ Submission by letter addressed to Dr. Rummel-Bulska, Executive Secretary of the Basel Convention by Director, and signed by Ludwig Krämer on behalf of the European Commission. The transcript of this letter is found [here](#).

The next instance of the EU reacting to a powerful industry lobby to weaken the original intent and purpose of the Waste Shipment Regulation is found in various efforts that have served to liberalize trade in hazardous electronic wastes on behalf of the electronics manufacturers. e-Waste is the most prevalent form of unsustainable hazardous waste trade found to take place today, and causes by far the most environmental harm of all traded hazardous wastes. There are several ways the EU has served to facilitate unsustainable trade in e-Waste outside of the EU to developing countries. The Waste Shipment Regulation recast provides an excellent opportunity to rectify each of these.

i. Remove Assertion that Circuit Boards are non-Hazardous

First, we note that the EU very early on exempted circuit boards containing leaded solders from the hazardous waste category within the EU. Yet, it has been fundamentally clear for many years of assessing the hazardous characteristics of electronic waste, that circuit boards should be considered hazardous. The EU has asserted that in their estimation the medium to high lead content found in ROHS compliant and non-ROHS compliant circuit boards do not trigger any of the Basel Annex III characteristics -- including H6.1 Poisonous, H11 Toxic, or H12 Ecotoxic. This assertion is made even though the Basel Convention includes circuit boards in its Annex VIII list of hazardous waste streams. And for this reason, the provisionally adopted Basel Convention Guidance document on the transboundary movement of e-waste lists in Paragraph 47 includes this entry in its hazardous e-waste list:

Printed circuit boards, which fall under Annex VIII entries A1180 ("waste electrical and electronic assemblies...") and A1020 ("antimony; antimony compounds" and "beryllium; beryllium compounds") and contain brominated compounds and antimony oxides as flame retardants, lead in solder and beryllium in copper alloy connectors. They also fall under Annex I categories Y31 ("Lead; lead compounds"), Y20 ("Beryllium, beryllium compounds"), Y27 ("Antimony, antimony compounds") and Y45 ("organohalogen compounds other than substances referred to" elsewhere in Annex I) and are likely to possess Annex III hazardous characteristics H6.1, H11, H12, and H13;

Indeed, the EU view that circuit boards are not to be considered hazardous is belied by the fact that the OECD went out of their way to establish a special "green list" exemption for Basel Annex VIII listing A1180 which designated these as hazardous if they contained lead, cadmium or mercury for example. This would not have been necessary to facilitate OECD trade in circuit boards outside of control procedures if the Basel Convention had not established A1180 as a hazardous waste listing which includes circuit boards. The EU went even further than the OECD though, and unilaterally decided that circuit boards did not exhibit hazardous characteristics and therefore their export could be allowed even to non-OECD countries without controls.

The unique view is echoed further in the EU waste catalog, where the footnote below fails to mention lead soldered circuit boards.

From Waste Catalog:

16 02 13 discarded equipment containing hazardous components (1) other than those mentioned in 16 02 09 to 16 02 12*

(1) Hazardous components from electrical and electronic equipment may include accumulators and batteries mentioned in 16 06 and marked as hazardous; mercury switches, glass from cathode ray tubes and other activated glass, etc.

Remedy: Clearly, the EU must revise not only their unscientific view that the metal lead is not poisonous, not toxic, nor ecotoxic when it resides in circuit boards. Everyone knows that it is and even small amounts of lead in "unleaded" ROHS compliant solders trigger these characteristics (failing TCLP leachate tests). This should also stand corrected in the Waste Catalog footnote.

ii. Remove WEEE Directive Exemptions that Violate the Waste Shipment Regulation

Secondly, in the WEEE directive, we have seen more dangerous exemptions to proper management of e-wastes take another form. Annex VI of the WEEE directive seeks to provide guidance in how to implement the WEEE directive in view of the Waste Shipment Regulation. Indeed, the opening paragraph of this Annex was consistent with the intent and purpose of the Waste Shipment Regulation. For example point 1 (a) and (b) states:

1. In order to distinguish between EEE and WEEE, where the holder of the object claims that he intends to ship or is shipping used EEE and not WEEE, Member States shall require the holder to have available the following to substantiate this claim:

(a) a copy of the invoice and contract relating to the sale and/or transfer of ownership of the EEE which states that the equipment is destined for direct re-use and that it is fully functional;

(b) evidence of evaluation or testing in the form of a copy of the records (certificate of testing, proof of functionality) on every item within the consignment and a protocol containing all record information according to point 3;

Point 3 is a protocol for functionality testing.

But, unfortunately, in the last hours of the negotiations on this Annex three large exemptions (a-c below) were placed into the text following industry pressure as follows in Point 2:

2. By way of derogation, point 1 (a) and (b) and point 3 do not apply where it is documented by conclusive proof that the shipment is taking place in the framework of a business-to-business transfer agreement and that:

(a) the EEE is sent back to the producer or a third party acting on his behalf as defective for repair under warranty with the intention of re-use; or

This derogation is explained further in the FAQ published by the Commission in 2014 as follows:

In the context of Annex VI (point 2(a)), a 'warranty' can be considered to be either an obligation under national legislation of producers towards consumers for the lack of conformity of equipment on the sale of consumer goods, or any written agreement by a seller or producer to repair or replace equipment if it does not meet the specifications set out in the guarantee statement or in the relevant advertising. Warranties include, for instance, the legal and consumer guarantees under Directive 1999/44/EC as well as

warranties provided by manufacturers and sellers in relation to business to business transactions involving EEE. The term also covers additional contractual undertakings, e.g. extended warranties, or obligations undertaken in the context of sales, service, maintenance and repair agreements

(emphasis added by BAN)

BAN Comment: This definition is far too broad and allows any kind of contractual arrangement between equipment owners and repair services. Such a definition is subject to wide-scale abuse. For example, an equipment lessor can take back its equipment from the lessee and warrant that after such use it will be repaired by X company in Y country -- an open avenue for dumping non-functional or untested electronic waste equipment with an accomplice abroad.

Now to examine the second exemption.

(b) the used EEE for professional use is sent to the producer or a third party acting on his behalf or a third-party facility in countries to which Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on control of transboundary movements of wastes destined for recovery operations applies, for refurbishment or repair under a valid contract with the intention of re-use; or

This derogation is explained further in the FAQ published by the Commission in 2014 as follows:

Point 2(b) of Annex VI applies to used EEE for professional use sent for refurbishment or repair under a valid contract with the intention of re-use, sent to

- the producer; or*
- a third party acting on behalf of the producer; or*
- a third-party facility in countries to which Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on control of transboundary movements of wastes destined for recovery operations applies.*

BAN Comment: The Basel Convention does not allow for this derogation. Many wastes sent for repair result almost immediately in large quantities of hazardous parts and residues. For example, repurposing old LCD screens by removing mercury lamps and replacing them with LED lighting is commonly done today. But the mercury waste is often just dumped and results in just as much of an export of hazardous waste as if it had been sent in a barrel -- which of course would be subject to the controls of the Basel Convention. Even worse such a "repairables" loophole can be taken advantage of by somebody not even intending to re-use the equipment -- once it falls outside of the Basel or EU control regime of prior informed consent, it is likely nobody will even know this material is coming and be able to determine if the facilities are appropriate and environmentally sound.

Producers are not always large brands which are more likely to be responsible equipment manufacturers. There are many very small producers in a supply chain, and of course, there are far more operators that can claim they are operating on the behalf of producers without any accountability afforded under the Waste Shipment Regulation. Finally, the fact that any, third party facility can receive this non-functional material apart from control procedures as long as

it is for alleged reuse in an OECD country is an abrogation of both the Basel Convention and the OECD Council decision C(92)39/Final.

Finally, we examine the third exemption.

(c) the defective used EEE for professional use, such as medical devices or their parts, is sent to the producer or a third party acting on his behalf for root cause analysis under a valid contract, in cases where such an analysis can only be conducted by the producer or third parties acting on his behalf.

BAN comment: While BAN sympathizes with the intent of this language, to restore medical equipment to service as quickly as possible, the language here needs to be tightened up to ensure that this indeed is what is occurring because anybody can claim they are in the root cause analysis business, valid contracts are easy to draft, and anybody can claim they are a third party acting on the behalf of producers.

Proposed Remedy: The exemptions (a - c) found in Annex VI are carelessly constructed and create reservations from the Basel Convention which the Convention does not allow. They need to be tightened up. While there can be foreseen some warranty exemptions, as well as exemptions for medical equipment, under clear criteria, these can only take place under the greatest degree of transparency to be assured these exemptions do not become loopholes for unscrupulous operators.

iii. Cease EU Lobby to Liberalize Trade in Repairable e-Waste at Basel Convention

Thirdly, the EU incoherence vis a vis, the Basel Convention, the EU Waste Shipment Regulation and the Ban Amendment for electronic waste has been evidenced by the aggressive EU and industry lobby using the Basel e-Waste Guideline on the Transboundary Movement of e-Waste as a means to uniquely interpret the Convention as not applying to repairable non-functional electronic equipment.⁸ The position of the EU delegation for the last 5 years at Basel has been identical to the unique position of Digital Europe (electronics manufacturers trade association) to press for a new and massive exemption in ordinary Basel control procedures for non-functional, hazardous electronic equipment. This EU lobby has even pressed for an exemption found in paragraph 32(b) which is not in coherence with the WEEE directive's Annex VI discussed above and promotes controls far less strict than the EU control procedure.

This choice for deregulation on behalf of the electronics industry contradicts the Basel Convention and works at the detriment of safeguards to protect developing countries from unscrupulous waste traders of e-Waste, in order to maintain business as usual as certain large OEMs operate some few repair centers in non-OECD countries like Malaysia. The attempted loophole created in the Technical Guideline by the EU lobby, is large as it not only seeks to be exempt from the Basel Ban but wishes to not apply the default prior-informed-consent procedure as well or any of the other safeguards of the Convention. It allows any trader to claim that their waste is "repairable" and therefore not a waste. And, of course only wastes

⁸ Technical guidelines on transboundary movements of electrical and electronic waste and used electrical and electronic equipment, in particular regarding the distinction between waste and non-waste under the Basel Convention. UNEP/CHW.14/7/Add.6/Rev.1.

can be under the scope of the Convention. This treaty interpretation via a Guideline and not via amendment legally unacceptable and is in direct contradiction to the intent of the Basel Convention, as well as the intent of the new Action Plan for a Circular Economy, to "*aim at restricting exports of waste that have harmful environmental and health impacts in third countries...*"

It is, of course, a nonsense to claim that the best way to increase reuse is to allow exports of hazardous broken equipment to non-OECD countries. The primary obstacles to re-use and product longevity lies in product design not in finding cheap labor locations to conduct the repairs. Thus, any claims that warping Basel Controls serve the circular economy really serve cost externalization to weaker economies -- an utterly linear impulse.

Proposed Remedy: Claiming a blanket designation of "repairables" as a non-waste and thus outside of the scope of the Basel Convention cannot be done by any method short of amending the Convention and is a terrible idea in any case. It will invite obvious abuse and is in fact contrary to current EU law as well as the intent and purpose of the Ban Amendment. BAN has published an Alternative Responsible Basel Guideline which strikes a compromise to enable limited movements for repair under strict criteria and with full transparency and residual material being sent onward to OECD processors consistent with the aim of the Ban Amendment.

2. Strictly Control Exports of Plastic

A. Proposed Delegated Act Unacceptable -- NO Double Standard for Europe!

First, as BAN and numerous NGOs have commented in earlier occasions,⁹ the delegated act proposing to ignore the new Basel Plastics Amendments within the EU is unacceptable, unwarranted and illegal. All of the EU and its Member States are Parties to the Basel Convention, which allows for no reservations or exceptions, meaning the EU is obligated to, at a minimum, transpose the recent amendments to ensure prior informed consent within the EU. To do otherwise is to create a reservation for itself, which the Basel Convention does not allow. We cannot accept the approach of pretending the EU can legally create a reservation for itself via Article 11 of the Basel Convention. Article 11 can only be used if there is an equivalent level of control (using the EU's own language proposed in the context of the Hong Kong Convention several years earlier). It is a contradiction to argue that not requiring prior informed consent is an equivalent level of control to requiring it and should therefore be flatly rejected.

While we can fully support streamlining the notification and consent regimes as long as transparency and efficacy are not sacrificed, in our view, the proposal by the Council and Commission found in the Delegated Act to create an EU exceptionalism from the rest of the world is an unacceptable derogation from the Basel Convention's obligations to, a) minimize transboundary movements of hazardous and other wastes and b) to require notification and consent for those wastes on Basel Annexes VIII and II that must be moved.

⁹ NGO Response to informal call for comments on the Draft Commission Delegated Regulation to implement recent changes to the Basel Convention, 25 May 2020 from BAN, GAIA, EIA, EEB, ZWE (submitted in EU portal, available upon request). And Press Release: <https://www.ban.org/news/2020/7/6/eu-promotes-greater-global-responsibility-on-plastic-waste-but-not-for-internal-market>

The EU fought hard for the adoption of the recent amendments to the Basel Convention to bring more transparency, accountability and assurances of ESM to the plastic waste trade. It is the height of hypocrisy to now take a "do as I say, not as I do" posture. Even if this were a legal possibility, the problems that plague intra-EU trade of plastic waste are well documented¹⁰ and do not warrant any kind of special treatment. Some of the known routes for illicit plastic waste in the EU recently in the news include: Italy to Slovenia,¹¹ Italy to Croatia,¹² Italy to Bulgaria,¹³ Sweden to Latvia,¹⁴ Germany to Poland,¹⁵ and Germany to Romania,¹⁶ among many others.

If the EU proceeds with an illegal reservation via an illegal use of Article 11, the WSR revision is the chance to correct this and to go further (see B. below).

B. All Plastic Waste Trade Should be Managed as Basel Annex II

We, along with the ReThink Plastics Alliance of Europe and the Global Alliance for Incinerator Alternatives (GAIA) are calling for all plastic waste to be placed into the list of wastes requiring controls as if they were a Basel Annex II waste in the existing WSR (pre-delegated act). That is, prior informed consent will be the control procedure within the OECD/EU while a full prohibition for all plastic waste exports (not just that on Basel Annex VIII and II) outside of the OECD area.

Although the recent amendments to the Basel Convention bring much needed transparency and accountability to the plastic waste trade, as drafted, certain categories of plastic waste remain outside of the control procedures. Oftentimes, due to the ambiguous language, for example the contamination levels that qualify or not, it will be difficult for both traders and enforcers to know what is covered and not. Such ambiguity and complexity create a game of "find the loophole" and makes enforcement vastly more difficult and therefore expensive. There is a very high risk that treating some plastic waste as green-listed and other plastic waste as amber-listed within the EU will likewise exacerbate intra-EU illegal trade.

This becomes evident by looking at the current issues with green-listed waste. For example, under the WSR, plastic waste is currently green listed, meaning it is only subject to general

¹⁰ IMPEL (2020). WasteForce Waste Crime Alert #6: March- May 2020. Available at: https://www.wasteorceproject.eu/wp-content/uploads/2020/06/WCA_6.pdf.

¹¹ Europol (18 September 2019). From Trash to Treasure: The Growing Illegal Waste Trafficking Market. Available at: <https://www.europol.europa.eu/newsroom/news/trash-worth-millions-of-euros>. IMPEL (2018). Impel - TFS Enforcement Actions: Project Report 2016 – 2017: Enforcement of the European Waste Shipment Regulation (Report Number: 2018/04). Available at: <https://www.impel.eu/wp-content/uploads/2019/01/FR-2018-04-Enforcement-Actions-project-2016-2017.pdf>. IMPEL (2020). WasteForce (31 January 2020). WasteForce Crime Alert Overview: January 2018- January 2020. Available at: https://www.wasteorceproject.eu/wp-content/uploads/2020/06/WCA_overview.pdf.

¹² WasteForce (31 May 2019). WasteForce Crime Alert #2: March - May 2019. Available at: <https://wasteorceproject.eu/wp-content/uploads/2019/06/WasteForce-Waste-Crime-Alert-2.pdf>.

¹³ Sofia News Agency (29 May 2020). Development: More Arrested for Illegal Import of Waste from Italy. Available at: <https://www.novinite.com/articles/204679/Development%3A+More+Arrested+for+Illegal+Import+of+Waste+from+Italy>

¹⁴ LSM.LV (2 January 2018). Swedish Minister Apologizes for Waste that Ended up in Jurmala. Available at: <https://eng.lsm.lv/article/society/society/swedish-minister-apologizes-for-waste-that-ended-up-in-jurmala.a262864/>.

LSM.LV (22 November 2018). Customs Stop Three Illegal Waste Shipments from Sweden, Norway. Available at: <https://eng.lsm.lv/article/society/society/customs-stop-three-illegal-waste-shipments-from-sweden-norway.a300515/>

¹⁵ Arte (2019). Décharges Illégales Hors de Contrôle. Available at: <https://www.arte.tv/fr/videos/092551-000-A/decharges-illegales-hors-de-controle-vox-pop/>

¹⁶ OCCRP (7 March 2019). Cement's Dirty Business. Available at: <https://www.occrp.org/en/documentaries/cements-dirty-business/>.

information requirements.¹⁷ Member State competent authorities have reported “challenges related to the enforcement of the general information requirements throughout the EU,” and experience shows that “the export of ‘green listed waste’ is often not controlled by national authorities as closely as the export of ‘notified wastes.’”¹⁸

Indeed, it is “not always clear whether (and how) operators and authorities ensure that exported waste is treated in an environmentally sound manner.”¹⁹ At this moment in history when it is clear that all plastic waste management is rife with opportunities for abuse it is important to project clear rules and ultimate transparency in order to design a truly circular economy without leakage.

There remain serious concerns about these supposedly benign plastic wastes, namely: (a) in practice, many contain harmful additives in significant concentrations to be quite hazardous; and (b) often times, the recycling or disposal of these “green wastes” create harmful emissions, including volatile organic compounds, products of incomplete destruction, such as dioxins, hazardous wash waters and fugitive emissions, as part of or because of the treatment process itself. There is little reason for there to be less scrutiny and accountability placed on these plastic wastes in terms of both ensuring ESM and respecting national rights to deny importation.

Proposal: For these reasons, not only must the EU fully transpose the Basel amendments for their application between Member States, it should go one step further and require prior informed consent for *all plastic waste* within the OECD area while banning such exports outside the OECD area.

3. Full Public Transparency on Waste Trade

There is no greater driver from waste responsibility than shining a spotlight on it, where it goes and how it is being managed. The public has the right to know how much waste is generated and where their waste and business waste goes within and from their communities. Currently this knowledge is opaque with little reporting or verification placed made available to the public. There can be no overriding business confidentiality considerations which trump the public's right to know of wastes. This public disclosure needs to take place digitally and online and be transmitted as close to real time as is technically practicable. Wastes must be recorded on the basis of description and weight and thus mass balance analyses can be assessed by academics, policy makers, businesses and the public and their government alike. Likewise, actual destinations and transit countries must be fully recorded. The Waste Shipment Regulation must make such reporting a requirement by calling for all waste vendors/haulers be required under contract to be make all shipments known and reported in real time as well as be willing to be spot checked and subject to GPS tracking to verify conformance. This data will

¹⁷ European Commission (31 January 2020). Commission Staff Working Document: Evaluation of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste, WSR, Article 18 and Annex VII. Available at: https://ec.europa.eu/environment/waste/shipments/pdf/SWD_2020_26_F1_SWD_EVALUATION_EN_V4_P1_1064541.pdf.

¹⁸ European Commission (31 January 2020). Commission Staff Working Document: Evaluation of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste, p. 39. Available at: https://ec.europa.eu/environment/waste/shipments/pdf/SWD_2020_26_F1_SWD_EVALUATION_EN_V4_P1_1064541.pdf.

¹⁹ European Commission (31 January 2020). Commission Staff Working Document: Evaluation of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste, p. 39. Available at: https://ec.europa.eu/environment/waste/shipments/pdf/SWD_2020_26_F1_SWD_EVALUATION_EN_V4_P1_1064541.pdf.

be collected by all member states in a common system/database on a national basis that will feed that data into a central EU data center. Both the EU and National data will be fully accessible by the public.

Proposal: The new Waste Shipment Regulation must include a legal requirement of all Member States to ensure that all municipalities, traders and jurisdictions ensure reporting to a national waste trade online database that is fully accessible to the public. Contracts with Private Sector actors must ensure full transparency and the right to inspect and verify with tracking technology.

4. Increase Enforcement and Penalties on Violations

From our experience enforcement of the Waste Shipment Regulation is great in some Member States and almost non-existent in others. It is imperative that this change and that all Member States provide staffing and funding for enforcement commensurate with their population. These enforcers need to work together and all be part of the excellent IMPEL organization and active with Europol. This must be stipulated in the WSR.

The enforcement needs to be intelligence led and begin to utilize new methods now available including GPS tracking. It needs to have programs for spot container inspections at the exporter site as well as in port. All waste management contracts must contain clauses that allow the State and local governments to spot check operations. Trainings and workshops in these methods and techniques across all Member States need to be funded.

Further, and perhaps most importantly, tougher penalties must be applied to successful prosecutions. The Basel Convention requires that illegal traffic is considered a criminal act. Yet we have witnessed very few criminal cases of illegal waste exports and when there are prosecutions, far too little jail time is prescribed as punishment. Such lax punitive measures, leads to further perpetrators and further violation of law which is vital to a well-regulated, and ethical circular economy. The entire enforcement and penalty regime with respect to illegal trafficking in wastes must be reviewed and overhauled with a view to creating strong disincentives to waste crime.

Proposal: On the enforcement side, far more funds need to be applied and more evenly distributed across all Member States, while punitive measures need to be strict enough to serve as a serious deterrent.

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