



Basel Action Network (BAN) / European Environment Bureau (EEB) Comments on the WPRPW Proposal in light of Japan's 2022 Objection to Incorporation of Basel e-Waste Amendments: A call for a Legal Review and in the meantime Deletion of Inappropriate Examples

11 March 2024

The Basel Action Network (BAN) and the European Environment Bureau (EEB) wishes to alert the OECD Environment Policy Committee (EPOC) as to the need to conduct a legal review of all recent changes taking place with the OECD Council Decision (OECD/LEGAL/0266) on the Control of Transboundary Movements of Wastes Destined for Recovery Operations. Further, we urge the EPOC members to vote no on the proposed WPRPW text pending a legal review or alternatively first remove the "examples" highlighted in yellow in the proposal (see below).

BAN has strong concerns shared by environmental legal experts that the legal basis for the OECD Council Decision has been recently forgotten by the WPRPW and has, once again with the latest proposed amendment text, strayed from what is legally sound and acceptable under the agreement and its legal basis.

The legal basis for the OECD accord is found in Basel Convention's Article 11. Thus the first mistake of the WPRPW was to proceed without reference to that legal basis to ensure that their work and product is legally sound. Had this been done in no way would listings GC010 and GC020 be retained, when in fact the Basel Convention requires that these wastes be strictly controlled and not considered "Green" listed.

While the retention of these listings in the OECD decision is inappropriate, their existence does not promote their use. The second mistake and one that must be removed, was to use examples, that assert that some OECD member states may in fact use these listings to derogate from the Basel Convention, when that is not a legal interpretation for the OECD to make. It is far better for the OECD not to assume that Parties *may* refuse to accept the Basel Amendments, and not imply to OECD members that operating without accepting the new amendments is an option available to them. The preponderance of evidence asserts the contrary. It is enough to simply state the facts similar to what has been stated previously with in the text responsive earlier to the Basel Plastic Waste Amendments -- that is simply to state the following:

No consensus has been reached among OECD Member countries on the incorporation of Basel entries A1181 and Y49 into this Decision. As a result of this situation, each Member country retains its right to control the electrical and electronic waste covered by these entries in conformity with its domestic legislation and international law,"

The subsequent examples provided however (see yellow highlighted text) which cite listings GC010 and GC020 and the option of their use, are first a) not appropriate because a legal reading of Article 11 cannot allow such listings to be retained today, and second b) even if you might retain these listings, it is not at all appropriate to assert that individual countries may in fact legally make use of them. That is a decision for those countries alone. Below we explain in greater detail.

Background

Today's OECD Council Decision (OECD/LEGAL/0266) is not the same document as C(92)39/FINAL originally adopted in 1992. The amendments to the OECD decision over time and in particular the sweeping changes made in 2020 resulted in a very different decision in comparison to its first version. These changes are significant to the degree that it is certain that the OECD Council Decision can no longer be legally considered an Article 11 paragraph 2 agreement made *prior* to the Convention's entry into force. Rather the OECD Council Decision must now be considered as an Article 11 paragraph 1 agreement made *subsequent* to the entry into force of the Basel Convention. Certainly, the e-waste amendments themselves we are discussing most recently must be considered under 11 paragraph 1. Yet this crucial consideration appears to have been forgotten completely by the WPRPW.

Under that lens, a plain reading of the far more strict Article 11.1 means that the OECD and its member states cannot "*derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention,*" and it must stipulate provisions "*which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.*"

It is legally clear then that there can be no OECD listings which remove control procedures and obligations that apply within the Basel Convention. This is not a correct and legally valid use of Article 11.1. This conclusion is fully consistent with the Basel Convention's insistence that Parties are not allowed reservations from their obligations as stipulated in Article 26. Thus it is, that once the new Basel definitions for electronic waste enter into force in 2025, the less restrictive and environmentally sound listings GC010 and GC020 become inappropriate.

It should be clear that not accepting certain definitions of "hazardous and other wastes" of the Convention cited in the language of Article 11, will "*derogate from the ESM of hazardous and other wastes as required by the Convention,*" and will be "*less environmentally sound.*" This is true both because a) the new Y49 and A1181 listings are clearly more environmentally sound as the new listings places more waste under stricter trade control procedures in order to protect the environment, and because b) the full set of definitions of "hazardous and other" wastes define the scope of the Convention, are specifically part of what defines an Article 11 agreement and are de facto the fundament of ESM management and the definition of ESM used and required by the Convention.

Concern

1. The first concern as noted, is that the WPRPW appears not to have engaged in any kind of legal analysis to determine whether the listings GC010 and GC020 (as well as other listings which differ from the Basel Convention listings) are in fact a legally valid interpretation of the legal basis of the OECD Council Decision -- Basel's Article 11 and its first paragraph.

This legal analysis is sorely needed. It is our view that if it is undertaken it will become very clear that the OECD Decision should be accepted under the basis of Article 11.1 and that delisting wastes from Basel controls by labelling them "Green" listed is less environmentally sound and is a clear derogation from the Convention. We call upon the EPOC to hire more than one independent legal teams to conduct such an analysis and decide for themselves if the OECD Council Decision as currently constituted is not gravely out of step with what is legally acceptable under Basel.

2. However, in the absence of such a proper legal review, the mere retention of obsolete listings is not decisively harmful. What is harmful and thus unacceptable is the fact that the WPRPW proposed text goes far beyond the previously used factual assertion that "Member

countries retain the right to control the waste covered by the entry in conformity with its domestic legislation and international law." This was the language used by OECD following the Basel plastic waste amendments, when consensus of their adoption could not be achieved. But to then assert within subsequent examples that such conformity may in fact allow the use of GC010 and GC020 is inappropriate and most likely incorrect. Such legal usage is not in fact a given and it is not for the OECD to decide that, once it is clear that they lack a consensus opinion on these listings.

The subsequent sentences, now proposed as examples, in Appendix 1, footnotes 10, 11, and in Part 1 (g) assert that OECD member countries (that are most likely to also be Parties to the Basel Convention), may opt to ignore their Article 11 Basel obligations and continue to use GC010 or GC020 listings. This is not at all a certainty and in any case will need to be decided not by the OECD but its member states individually. We all know that Japan in this case is the country objecting to the new listings being automatically adopted within the OECD Council Decision and therefore most likely to make use of the WPRPW text to assume such an interpretation is in fact legally correct. The legality of this is highly doubtful even if Japan opts to refuse to accept the new Amendments at Basel level by virtue of Article 18.2(b). Even in such an instance, Japan cannot make use of OECD listings as such listings violate the obligations of Article 11.1.

Actions that ignore the new definitions of (Y49 and A1181) are not appropriate for Basel Parties to take unless multiple Parties refuse to accept the amendments -- a possibility that is highly unlikely and even if it does take place cannot be made legal by virtue of the OECD and their listings.

Remedy

To address point 1 above, the OECD must re-examine the Council Decision under the lens of its legal basis for Basel Parties -- Article 11. They must re-examine, in particular that the incorporation of new amendments must be viewed in the context of Article 11 paragraph 1. Changes to the entire Council Decision, including the deletion of GC010 and GC020 must be undertaken to achieve consistency with the legal basis.

Second, the text: *"each Member country retains its right to control the electrical and electronic waste covered by these entries in conformity with its domestic legislation and international law"* should be retained as it adequately covers the reality of all member countries of the OECD, including the United States and does not open the door to a possible violation of the Basel Convention to the vast majority of OECD member states.

However the subsequent examples must be removed as they assert and assume that GC010 and GC020 can be legally used to ignore the new Basel listings A1181 and Y49, when in fact this may not be the case. Furthermore, the determination of the legality must lie with the individual countries concerned and their obligations under domestic and international law as their own legal advisors may counsel. It is not for the OECD to decide for each member state.

We therefore call on the removal of the inappropriate illegal assertions as indicated in the yellow highlighted text.

Footnote 10 of the OECD Decision: *"No consensus has been reached among OECD Member countries on whether or not entry GC010 continues to apply in this Decision. As a result of this situation, each Member country retains its right to control the electrical and electronic waste covered by this entry in conformity with its domestic legislation and international law. For example, some member countries may apply entry GC010 where appropriate, while other member countries may consider that entry GC010 no longer applies."*

Footnote 11 of the OECD Decision: “No consensus has been reached among OECD Member countries on whether or not entry GC020 continues to apply in this Decision. As a result of this situation, each Member country retains its right to control the electrical and electronic waste covered by this entry in conformity with its domestic legislation and international law. For example, some member countries may apply entry GC020 where appropriate, while other member countries may consider that entry GC020 no longer applies.”

Appendix 4, Part 1 g) OECD Decision: “[Basel entry A1180 does not apply¹⁵.] No consensus has been reached among OECD Member countries on the incorporation of Basel entries A1181 and Y49 into this Decision. As a result of this situation, each Member country retains its right to control the electrical and electronic waste covered by these entries in conformity with its domestic legislation and international law. For example, some member countries may apply entries GC010, GC020, A1181 and/or Y49 where appropriate. Member countries should inform the OECD Secretariat about their controls for electrical and electronic waste covered by Basel entries A1181 and Y49 by 15 January 2025, as well as about any future changes of such controls, in a timely manner. The OECD Secretariat should publish the information received on the OECD website.”

Summary

In sum, the legal basis for the OECD Council Decision is the Basel Convention and its Article 11. We call for an independent legal review of the Council Decision to determine whether it fulfills the requirements of that Article. Further, the OECD must not advocate that some countries may by virtue of the OECD Council Decision or any other rationale, fail to live up to their international legal obligations under the Basel Convention. Japan nor any other Basel Party "may apply entries" that are not acceptable within the Basel Convention and the OECD should never assert that they can. In the meantime, while the legal review is pending, we strongly suggest removing the yellow highlighted text above in footnotes 10, 11 and Appendix 4, Part 1 (g), and retain the appropriate (in green highlight) language as was done previously, reading "No consensus has been reached among OECD Member countries on the incorporation of Basel entries A1181 and Y49 into this Decision. As a result of this situation, each Member country retains its right to control the electrical and electronic waste covered by these entries in conformity with its domestic legislation and international law."

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