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| From: | Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director |
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| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |
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| Subject: | COMMISSION STAFF WORKING DOCUMENT Subsidiarity assessment Grid accompanying the document 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 |

Delegations will find attached document SWD(2021) 330 final.

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Brussels, 17.11.2021
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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity assessment Grid

Accompanying the document

**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**

{COM(2021) 709 final} - {SEC(2021) 402 final} - {SWD(2021) 331 final} -
{SWD(2021) 332 final}

Subsidiarity Grid

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| 1. Can the Union act? What is the legal basis and competence of the Unions' intended action? |
| 1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative? |
| <p>The legal basis of the WSR is Article 192 of the Treaty on the Functioning of the European Union that effectively sets the manner in which Article 191 of the Treaty should be implemented. Article 191 addresses EU policy on the environment that must contribute to pursuit of the following objectives:</p> <ul style="list-style-type: none">- preserving, protecting and improving the quality of the environment,- protecting human health,- prudent and rational utilisation of natural resources,- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. |
| 1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature? |
| <p>In accordance with the Article 5 of the TFEU, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The EU must act in accordance with the principle of subsidiarity when developing proposals for revising the EU legal framework on waste shipment.</p> |
| <p><i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU¹. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU² sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU³ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i></p> |
| 2. Subsidiarity Principle: Why should the EU act? |
| 2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁴: |
| <ul style="list-style-type: none">- Has there been a wide consultation before proposing the act?- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level? |
| <p>Consultations were held with the objective:</p> <ul style="list-style-type: none">● To gather views on the scope of the impact assessment process, in particular to ensure that the correct objectives were being targeted.● To gather views with regard to the options and measures under consideration to address the objectives identified. |

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

- To gather further evidence to substantiate the analysis of the options and measures.

Stakeholders

Relevant stakeholders to be addressed as part of the impact assessment were identified as:

- Member States and their authorities responsible for waste shipments and waste management. This included members of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL);
- The Waste Correspondents⁵;
- Industrial/economic actors, including small and medium sized enterprises, within sectors involved in waste shipments and/or the implementation of the Regulation;
- Civil society, including environmental Non-Governmental Organisations and citizens' initiatives;
- International organisations relevant to the matter of waste shipment, e.g. those involved in the implementation of multi-lateral environmental agreements;
- Academia, research and innovation organisations and institutes; and
- Citizens.

Methods for engagement of stakeholders

The methods to be applied according to the consultation strategy were identified as:

1. Public consultation through an online questionnaire, including expert consultation as part of the same exercise, using the Commission consultation's website;
2. Targeted consultations including:
 - A stakeholders' workshop; and
 - Interviews.
3. Feedback received on the evaluation roadmap.

All of these methods were applied.

- The explanatory memorandum and the impact assessment (chapter 3) for the review of the WSR contain a section on the principle of subsidiarity. Please see the reply to question 2.2 below

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

An EU approach to waste shipments is necessary to ensure a level playing field for the protection of the environment and for ensuring a good functioning of the EU internal market. The EU has put in place a comprehensive and ambitious waste legislation. It is necessary to have common rules in place at the EU level governing the export of waste, to ensure that this legislation is not circumvented by the shipment of waste to third countries, where waste management standards and performance greatly differ from the EU ones. EU rules are also justified for intra-EU shipments of waste, in view of the fact that the EU waste industry is highly integrated and in order to ensure equal treatment and legal clarity to all economic actors in this sector.

The added-value of an EU approach to waste shipment also resides in the fact that it ensures consistency in the implementation by each Member States of the general provisions laid down in the

⁵ Art. 54 and 57 of the WSR

Basel Convention and the OECD Decision. The detailed provisions contained in the waste shipment regulation avoid that Member States develop different interpretations of these provisions, which would notably hamper the shipments of waste within the EU. As indicated in section 3, stakeholders often complain that the EU rules on the shipments of waste are actually not sufficiently detailed in some aspects, which result in diverging national approaches and impede the good functioning of the EU single market. In addition, the EU approach to waste shipment is stricter than the Basel Convention when it comes to export of waste, as it notably sets out prohibitions to export waste for disposal outside EFTA countries, as well as to export some non-hazardous waste⁶ outside the OECD. The EU approach has therefore also a clear environmental added-value compared to a situation where Member States would solely rely on the Basel Convention. One indication for this is that the EU is one of the only Parties to the Basel Convention to apply such strict rules (as an example, the United Kingdom will not apply a prohibition of the export of plastic waste which became listed in Annex II of the Basel Convention in 2021, while they would have had to do it if they had remained in the EU).

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

It is important that common rules on the control of transboundary movements of waste are set out at the EU level, to avoid a situation where illegal operators would choose to ship their waste through EU countries with less strict domestic rules than others, to export this waste outside the EU (port-hopping scenario). EU rules are also justified for intra-EU shipments of waste, in view of the fact that the EU waste industry is highly integrated and in order to ensure equal treatment and legal clarity to all economic actors in this sector.

The added-value of an EU approach to waste shipment is also that it ensures consistency in the implementation of the Basel Convention and the OECD Decision by each Member State. The detailed provisions contained in the WSR avoid that Member States develop different interpretations of these provisions, which would hamper the shipments of waste within the EU.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

The WSR sets out control mechanisms for the export and import of waste from the EU to third countries (“extra-EU shipments”), as well as for shipments between EU Member States (“intra-EU shipments”). The types of controls under the WSR depend on the characteristics of the waste (for example hazardous, non-hazardous), its destination and its treatment as part of recovery (for example recycling) or disposal (for example landfilling) operations. The WSR also lays down export prohibitions for certain categories of waste and certain destinations: the most important example is the prohibition to export hazardous waste from the EU to non-OECD countries.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁷ or significantly damage the interests of other Member States?

Absence of EU action would mean Member States fall back on their individual implementation of the Basel Convention⁸ plus the OECD decision⁹ along with bilateral or multilateral arrangements between Member States. During the consultation for the evaluation of the WSR the Competent Authorities in

⁶ The « other waste » listed in Annex II of the Basel Convention

⁷ https://europa.eu/european-union/about-eu/eu-in-brief_en

⁸ www.basel.int

⁹ Council Decision C(92)39/FINAL on the control of transboundary movements of wastes destined for recovery operations (this Decision was amended and the last version is Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations (OECD/LEGAL/0266)

Member States felt that this would increase the risk of discrepancies between Member States. This would also increase the risk of unscrupulous waste transporters finding the path of least resistance, by transporting waste through the least well-regulated Member States.

The Basel Convention and OECD Decision have much less detailed provisions than the WSR. Most stakeholders across all categories agreed that the problems caused by stopping EU action include the following:

- An increase in the number of illegal shipments (including those out of the EU, partly because it is harder to control cross-border illegal activities with a lack of a common approach);
- Reduction in trade of waste for recycling, with a negative impact on the secondary commodities market due to national variations in regulations, and thus a negative effect on the transition towards a circular economy;
- Even more inconsistency between Member States and use of national approaches which are less detailed and could lead to more delays due to the lack of consistency;
- An increased risk of environmental harm;
- EU would be in breach with international law (Basel Convention) as it would not implement the provisions of the Convention to which it is a Party;
- Loss of waste traceability.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

The WSR establishes two types of control procedure for the shipment of waste across borders:

- An operator wishing to ship **hazardous waste**, household waste and residues arising from the incineration of household waste or waste for disposal (e.g. landfilling) to another country, has to follow the procedure of prior written notification and consent (“**notification procedure**”). Under that procedure, the competent authorities of all countries concerned by the shipment (countries of dispatch¹⁰, destination and transit) have to give their consent to the shipment, in a given period of time, before this shipment can take place. To this end, the WSR establishes a comprehensive notification system. In addition, all shipments of waste for which a notification is required are subject to the requirement of a financial guarantee;
- An operator wishing to ship **non-hazardous waste** (“**green listed waste**”) to another country has to fulfil the **general information requirements** of Article 18 and make sure the shipped wastes are accompanied by a duly filled in document as provided in Annex VII of the WSR.

Member States have the competence to implement these provisions by setting up the administration for notifiers to submit their prior notification requests, to issue consents and follow-up on them, including enforcement of shipments on the ground.

(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

There are different interpretations in EU Member States of various aspects of the WSR, a few issues being interpreting what constitutes a waste or not, on what is considered a hazardous or non-hazardous waste and on the thresholds for impurities that determines whether a waste is considered a mixed waste. This leads to inconsistent approaches of national authorities in terms of whether the notification procedure is necessary and hampers legal clarity for economic operators active on the EU market. In turn these lead to delays in shipments of waste, with additional costs to waste

¹⁰ ‘country of dispatch’ means any country from which a shipment of waste is planned to be initiated or is initiated.

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| shipment companies, mainly due to waste storage costs before transport. |
| (e) Is the problem widespread across the EU or limited to a few Member States? |
| Problems of non-harmonised implementation of the provisions and procedures of the Regulation, have been identified. Furthermore, enforcement has proven to be inconsistent across the EU. Because of the transboundary character of waste shipments this implies a problem that overarches individual Member States. |
| (f) Are Member States overstretched in achieving the objectives of the planned measure? |
| No |
| (g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU? |
| See reply to e) |
| 2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)? |
| Further to 2.3, the added-value of an EU approach to waste shipment is also that it ensures consistency in the implementation of the Basel Convention and the OECD Decision by each Member States. The detailed provisions contained in the WSR avoid that Member States develop different interpretations of these provisions, which would hamper the shipments of waste within the EU. |
| (a) Are there clear benefits from EU level action? |
| The WSR ensures that the EU comprehensive waste legislation is not circumvented by shipping waste to third countries, where waste management standards and performance greatly differ from the EU ones. It is important that common rules on the control of transboundary movements of waste are set out at the EU level, to avoid a situation where illegal operators would chose to ship their waste through EU countries with less strict domestic rules than others, to export this waste outside the EU (port-hopping scenario). EU rules are also justified for intra-EU shipments of waste, in view of the fact that the EU waste industry is highly integrated and in order to ensure equal treatment and legal clarity to all economic actors in this sector. |
| (b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved? |
| The EU waste industry is highly integrated and in order to ensure equal treatment and legal clarity to all economic actors in this sector, EU rules are also justified for intra-EU shipments of waste. |
| (c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach? |
| <ul style="list-style-type: none"> - Cross-border illegal activities (including those out of the EU), can be controlled more efficiently and effective with a common approach; - Trade in waste for recycling is facilitated, with a positive impact on the secondary commodities market due to an EU wide legal framework and thus a positive effect on the transition towards a circular economy; <p>The use of national approaches which are less detailed and could lead to more delays due to the lack of consistency, is avoided;</p> |

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| <ul style="list-style-type: none"> - An increased potential of environmental protection; - EU implements its international obligations (Basel Convention) in a consistent and uniform manner; - Increased traceability of waste. |
| (d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)? |
| Yes |
| (e) Will there be improved legal clarity for those having to implement the legislation? |
| This is one of the specific objectives of the current review of the WSR (to simplify and clarify current provisions and procedures) |
| 3. Proportionality: How the EU should act |
| 3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission’s proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality? |
| The added-value of an EU approach to waste shipment is also that it ensures consistency in the implementation of the Basel Convention and the OECD Decision by each Member States. The detailed provisions contained in the WSR avoid that Member States develop different interpretations of these provisions, which would hamper the shipments of waste within the EU and impede the good functioning of the EU single market. In addition, the EU approach to waste shipment is stricter than the Basel Convention when it comes to export of waste, as it prohibits the export of waste for disposal outside EFTA countries and the export of some non-hazardous waste ¹¹ outside the OECD. The EU approach has a clear environmental added-value compared to each Member State individually relying on the Basel Convention. Indeed, the EU is one of the only Parties to the Basel Convention to apply such strict rules (as an example, the United Kingdom does not apply a prohibition of the export outside the OECD of plastic waste which became listed in Annex II of the Basel Convention in 2021, while they would have had to do it if they had remained in the EU). |
| 3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives? |
| Waste shipments are by nature international and require the implementation and enforcement of regulations in the same way by all Member States to ensure a level playing field and limit unlawful shipments of waste which hamper EU and international trade and create a danger for human health and the environment. |
| (a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better? |

¹¹ The « other waste » listed in Annex II of the Basel Convention

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| <p>Waste shipments are by nature international and require the implementation and enforcement of regulations in the same way by all Member States to ensure a level playing field and limit unlawful shipments of waste which hamper EU and international trade and create a danger for human health and the environment.</p> |
| <p>(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?</p> |
| <p>When first implementing the international obligations as regards waste shipments (Basel Convention) a Regulation rather than a Directive was deemed necessary in order to ensure simultaneous and harmonised application in all the Member States.</p> |
| <p>(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)</p> |
| <p>Member States' competent authorities are in charge of implementing the prior notification and consent procedures, whereby they can decide to consent or object to a planned shipment, leaving, passing by or destined to their territory.</p> |
| <p>(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?</p> |
| <p>The blend of the targeted and structural changes chosen would result in a balanced approach in terms of effectiveness (achievement of the objectives) and efficiency (cost-effectiveness). It aims to ensure that this Regulation can facilitate intra EU shipments in line with the circular economy objectives, support the EU's objective to stop exporting its waste challenges to third countries and contribute to better address illegal shipments of waste, without risking excessive costs or disruption. It responds both to (i) the need for new, effective measures to achieve the three objectives, and (ii) the importance attached to them being implementable while not creating excessive burden or undesirable impacts.</p> |
| <p>(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?</p> |
| <p>Member States' competent authorities are in charge of implementing the prior notification and consent procedures, whereby they can decide to consent or object to a planned shipment, leaving, passing by or destined to their territory.</p> |