



## Laying down the law

### Trading on waste

With the export of waste a growth industry and regulators increasingly focusing their efforts on illegal transfers, **Ross Fairley** offers a reminder of the legislation and case law



There is a growing trade in waste across Europe. The amount of refuse-derived fuel exported from the UK for energy recovery rose threefold in 2012 compared to the previous year and there continue to be major exports of recyclate and recovered materials. Over the years, international conventions, EU rules and the UK Transfrontier Shipment of Waste Regulations 2007 (TFSW) have sought to create a procedural framework for the safe movement of waste, as well as prohibit the export of waste to, and import from, certain countries.

The growing trend among participants in the UK waste market to take advantage of attractive gate fees being offered at European waste-to-energy recovery facilities means that the area of transfrontier shipment has received a great deal of attention from regulators. The Environment Agency, for example, is devoting considerable time and effort to detecting, investigating and prosecuting those that breach the rules.

Detailed notification procedures were set out under the Basel convention on controlling transboundary movements of hazardous waste and its disposal. EU Regulation 1013/2006 implements the convention across the bloc. The rules applying in member states on shipments of waste within Europe must be understood and adhered to by those in the trade.

Defra has recently consulted on the draft Transfrontier Shipment of Waste (Amendment) Regulations 2013, which are going to update the UK procedures. The proposed changes include:

- allowing HM Revenue and Customs to disclose export data to competent authorities in the UK, giving the

regulators better intelligence on illegal waste export; and

- allowing the UK Border Force to stop and detain suspect containers.

The recent rigorous enforcement of existing rules has also resulted in the emergence of a significant amount of case law. Cases such as *R v KV* [2011] EWCA Crim 2342; *R v Ideal Waste Paper Company* [2011] EWCA Crim 3237; and *R v Ezeemo* [2012] EWCA Crim 2064, have clarified UK law, particularly reg.23 of the TFSW, which prohibits certain waste exports to non-OECD countries (see panel, right).

It is now clear that transporting waste to a non-OECD country is a strict liability offence and the breadth of activities that can be caught by the transfrontier shipment of waste regime is very wide. Anyone involved in the transport of waste from the point of origin, where the waste is collected and stored, to the point of delivery is potentially liable if there is an unlawful shipment.

The Environment Agency is pushing for heavier fines for waste offences and to be able to recover significant amounts from the proceeds of such crimes through confiscation proceedings. The Sentencing Council has just finished consulting on new guidance for penalties for environmental offences ([environmentalstonline.com/LDTLJune](http://environmentalstonline.com/LDTLJune)), which will also raise levels of punishment.

Regulators are devoting more resources to tracking down illegal waste operations and the rules governing such activities are being strengthened. Responsible waste operators are also pushing for tighter controls and greater enforcement activity focused on less scrupulous exporters, who damage the waste industry as a whole.

However, spare a thought for the operators who, though generally compliant and responsible, can still fall foul of what are complicated rules. Many waste offences are strict liability crimes, so the defendant need not necessarily have been "at fault".

#### *R v KV*

*R v KV* [2011] EWCA Crim 2342 was the first Court of Appeal decision on the transfrontier shipment of waste regime and considered a prosecution related to the transport of waste for recovery in Nigeria and Ghana, which was contrary to art.36 of EU Regulation 1013/2006. The court considered whether reg.23 of Transfrontier to Shipment of Waste Regulations 2007, which makes it a criminal offence to breach art.36, created a broader offence than intended by 1013/2006. The appeal was dismissed.

#### *R v Ideal Waste Paper Company*

*R v Ideal Waste Paper Company* [2011] EWCA Crim 3237 concerned the transportation of waste to China for recovery. The appellants claimed the waste was mainly paper and paper products, whose export is not prohibited unless it is contaminated. However, inspection revealed the waste also contained household waste, plastic, cans and rotting meat. The appellants argued that the lack of guidance from the Environment Agency or standards (for example, what percentage of the waste needs to be contaminated) to determine whether their activities were criminal meant the proceedings against them amounted to an abuse of process. The appeal was dismissed.

#### *R v Ezeemo*

Seven individuals attempted to overturn their 21 convictions for transporting hazardous waste to Nigeria for recovery in *R v Ezeemo* [2012] EWCA Crim 2064. They appealed on several grounds, in particular whether the offence of transporting such waste, which in this case involved waste electrical equipment, to a non-OECD country was one of strict liability ([environmentalstonline.com/LDTLFeb](http://environmentalstonline.com/LDTLFeb)). The appeal was dismissed.

Ross Fairley is a partner at Burges Salmon. Contact him at [ross.fairley@burges-salmon.com](mailto:ross.fairley@burges-salmon.com).