Better Safe Than Sorry

The end-of-waste definition and international shipments… it's a potential trap for those trying to operate within the limits of the law, say **Teresa Hitchcock** and **Noy Trounson** of DLA Piper UK LLP… and it's always better to be safe than sorry

Article 6 of the 2008 Waste Framework Directive contains provisions on end-of-waste statuses that were intended to encourage the reuse of production residues by formally enacting and clarifying with amendments of pre-existing case law of the Court of Justice of the European Communities. This was on whether certain materials, which would otherwise qualify as "waste", and would therefore be subject to stringent regulatory controls as such, could be regarded as not being waste if they had been subject to certain recovery processes.

This acknowledged that regulatory controls which, in general are necessary to ensure that waste is not abandoned into the environment, might act as a disincentive to operations that could lead to less waste generation.

Article 6 provides for criteria to be developed both at community level and nationally for carrying that policy forward. While progress has been slow in adopting such criteria at community level, a number of protocols have been adapted nationally. In England and Wales, some 15 protocols have been adopted since late 2010, which covers the criteria for a number of materials commonly recycled from production residues. In addition, provision has been made administratively for a determination to be made by the Environment Agency or Natural Resources Wales as to whether end-of-waste status can be said to have been achieved in the case of materials not covered by a quality protocol.

This determination is made on the basis of the provisions of the 2008 Directive and clarification of the pre-existing case law provided by the judgment of the Court of Appeal in an important case on the subject – the OSS case.

Taking It Further

THE EU Commission now proposes to carry the underlying policy further. In December last year, as part of its circular economy initiative, the Commission submitted a proposal for the amendment of the 2008 Waste Framework Directive. If adopted, this proposal will simplify the requirements for end-of-waste status under Article 6, and speed up the process for adopting criteria at community level by empowering the Commission to adopt such criteria under delegated powers. It also proposes to encourage the reuse of such materials by providing for waste that has acquired end-of-waste status to count towards targets set out in the 2008 Directive itself and certain other directives.

This policy seems to be entirely sensible. Businesses and their specialist managers should, however, be aware of a potential trap that may exist, should they wish to follow, and take advantage of, this policy.

The trap exists because in many cases the opportunity for beneficial use of such materials may exist overseas, rather than in this country. That may, for example, be because the recovered material may be suitable for use as an input into process operated business, but

would not be suitable for use as an input into process operated in this country, whether physically or economically.

If, however, the materials are to be shipped overseas, regard must be had to the Basel Convention on the control of transboundary movements of hazardous waste and their disposal, the Organisation for Economic Co-operation and Development (OECD) decision on control of transboundary movements of waste, and the legislation which implements those two instruments in the UK and in other member states of the EU.

The Basel Convention was adopted in 1989 as a response to public outcry over the discovery of toxic wastes in Africa, as well as other parts of the developing world which had been imported from developed OECD countries in an attempt to avoid the regulatory controls and associated costs imposed by such countries.

It provided for the prior notification of shipments of hazardous and other wastes by the state of export to the competent authorities of the states of destination and transit, and for the obtaining of prior written consent to the shipment from those authorities.

It also provided for shipments to be accompanied by a movement document. It provided for the transport packaging and labelling of hazardous wastes, according to international standards, and allows signatory states to ban the import of hazardous waste if it informs other parties of the decision. It also provided for the return of wastes made in breach of the provisions of the Convention and for the allocation of costs of storage and shipment or, where appropriate, environmentally sound disposal.

The OECD decision supplements the Basel Convention by setting out a control system for all wastes that are transported between OECD member countries for recovery.

The EU Waste Shipment Regulations implements both of those regimes in EU member states, but goes beyond it in a number of respects, notably by imposing extensive bans on the exports of all wastes for disposal and of hazardous wastes for recovery to most non-OECD countries.

It also provides for a system under which costs of storage and return of wastes shipped without prior notification, or otherwise unlawfully, may be billed to a number of parties, regardless of fault. These include, and do so in first order of priority, the producer of the waste.

That applies regardless of the fact that the producer may have acted entirely *bona fide*. In addition, in some member states, including the UK, the producer may have committed an offence of strict liability.

The obvious problem that may arise is that a material that has been recovered in accordance with a quality protocol, and also a material that has been through a specific end-of-waste determination will not necessarily be treated as waste and, accordingly, will not have been subject to the prior notification required by the Basel Convention and the implementing legislation.

If the competent authority in the destination country decides to return material that has been shipped there on the grounds that it is waste that has been consigned without the prior notification, the consequences could be costly for the producer.

That risk may be increased as a result of economic slow-down in the country concerned, as a material which may have been in demand in busier times, may become a waste in a slow-down due to lack of demand. The recent slow-down in China provides a good example of this possibility, but other countries may also experience such a slow down. The risk is one of which all producers of end-of-waste materials should be aware of if they are contemplating shipping them overseas.

They should be particularly aware of the additional risk involved in disposing of the material to other businesses for shipment abroad. In that case they are relinquishing control of both destination and timing, with particularly costly potential consequences.

Get Protected

WHAT CAN businesses do to protect themselves? In an ideal world, the regimes for end-of-waste and the transfrontier shipment of waste could be better coordinated. That point can be made with particular force with regard to the implementation of the regimes in the EU, since it is the EU implementation legislation that can bear down particularly harshly on innocent producers.

The Basel Convention itself contains some fairly reasonable rules on the allocation of costs based on fault. In reality, however, it is likely to be difficult to secure EU-wide agreement on reforms in that direction. Pending any such reform, it would clearly be safest for the producer to retain control of the process of shipment even at additional costs. In that way the producer can satisfy themselves that the material will be shipped to the ultimate user, with the consent of the appropriate competent authorities and with appropriate dispatch, so as to avoid the consequences of an economic downturn.

If the material must be sold to a third party, it will plainly be prudent to ensure that the contractual provisions provide appropriate indemnities and that those indemnities will not be rendered worthless if the buyer goes into insolvency. In that connection, it should be borne in mind that many companies operating in the waste recycling business are short lived. It may therefore be necessary for the buyer's covenant to be backed by a parent company guarantee, or the personal guarantee of a director. This is very much a case where it is better to be safe than sorry. ■

Teresa Hitchcock is DLA Piper's UK head of health, safety and environment and a partner in the firm's Litigation and Regulatory practice. In the area of health and safety, she specialises in advising on strategic health and safety management, compliance issues and documentation preparation.

Noy Trounson is a barrister in employed practice in the firm's Litigation and Regulatory practice. He mainly works on the non-contentious side of DLA Piper's regulatory group but with some involvement in contentious matters. He specialises in those aspects of regulation which affect the operational activities of industrial clients.