
Submitted by the Basel Action Network

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The following comments supplement BAN’s previous comments on the Draft Technical Guidelines on the Transboundary Movement of e-Waste.

Need for More Control and Clarity, Not Less

BAN’s research indicates that the illegal and unsustainable exportation of hazardous electronic waste to developing countries unfortunately continues unabated to this day, more than 10 years after having first been exposed by BAN. Very clearly e-waste is the most traded hazardous waste today and is desperately in need of control. The Basel Parties have, to date been largely ineffective at stemming this toxic tide. This in our view is not as much the fault of the Convention itself as it is the fault of the Parties to properly and rigorously apply the Convention to post-consumer waste. Sometimes this has been due to a lack of political will, sometimes due to a lack of resources but too often it is due to a lack of clarity as to when used electronic or electrical equipment is legally a waste under the Convention and when it is a product. The Basel Convention and Basel Ban Amendment’s control mechanisms are correctly designed to prohibit and minimize exportation that takes place to externalize costs to weaker economies and need to be respected and better enforced for e-waste. The purpose of the present guideline in our view is to aid in that cause and to remove any ambiguities which to date have only aided and abetted those wishing to pursue the profitable but exploitative practice of exporting problematic hazardous wastes rather than ensure that hazardous wastes are recycled at home and used equipment that is exported to developing countries is fully functional and has a long useful market life ahead of it.

Currently we are in serious need of providing far more rigorous application to the Basel rules -- not less. We are in need to provide more clarity, to err on the side of the environment, and certainly not to create more loopholes and ambiguity.
Exemptions to Basel Convention Application are not Legally Appropriate

It is with this in mind that BAN is concerned that, as recently occurred in the European Union’s WEEE Recast legislation, exemptions to the Basel Convention waste and hazardous waste definitions are being proposed by some stakeholders based primarily on economic considerations and not scientific or legal ones. These exemptions are in fact not legal under the Basel Convention. The Basel Convention does not recognize any criteria other than ultimate destination of material or objects (Annex IV) in order to define waste, and constituents (Annex I) and hazardousness (Annex III) based on hazardous properties of the waste, or national definitions to define hazardous waste. Any new criteria to define or exempt waste and hazardousness on other than those criteria can only be done by amendment, not by guidelines.

And yet at the last SIWG (Small Intercessional Working Group) conference call the following list was elaborated as possible exemptions to the Basel Convention waste definitions to be considered by the OEWG.

- Equipment under warranty exported for repair with the intention of re-use
- Used equipment for professional use exported for refurbishment or repair with the intention of re-use
- Used equipment for professional use exported for root cause analysis
- Equipment under leasing (not agreed by EU as this was not included in the EU Directive on WEEE)

Each of these exemptions appear to have no scientific or legal basis as recognized in the Basel Convention. For example a piece of leased equipment is no less likely to be a waste and is no less likely to be a hazardous waste than that which is non-leased. Further, it is well known that waste exports for re-use very often involve export of non-functional hazardous parts that are every bit as hazardous as part of a component in whole equipment as they would be transported in a barrel or intermodal container. Non-working components or parts will be as readily discarded as part of the repair process as they would be if they were exported for disposal. They will be discarded in either case and are thus waste in the recipient country upon arrival.

Rather, the proposed exemptions appear to imply value judgments or additional criteria that are not found in the Basel Convention and are thus not acceptable in a guideline on Basel implementation.

We will take these each in turn:

- Equipment under warranty exported for repair with the intention of re-use

This exemption existed (with more qualification) in the PACE and MPPI guidelines. However those negotiations did not enjoy the widespread participation of Basel Parties, particularly from developing countries and were heavily skewed toward certain business stakeholder interests. The present guideline effort is an opportunity to close this loophole and provide greater legal clarity and unambiguous implementation of the Basel Convention. The loophole (especially as loosely defined above) could be quite large as a warranty can be written for anything and again exports for repair usually entail the replacement of hazardous parts such as circuit boards. The exemption has no basis in the Convention. We strongly urge that guidance documents are not used to “amend” the
Convention. Very simply, these exports either need to be shown to be fully functional or non-hazardous to fall outside of Basel Convention rules.

- Used equipment for professional use exported for refurbishment or repair with the intention of re-use

This exemption exists, as does the following one, due to a last minute industry lobby which injected this into the WEEE recast in the European Union with the help of Germany. However, despite the EU acceptance of this, it is absolutely inappropriate as worded, as it fails to limit or define “professional use”. Most IT equipment on earth today can be considered equipment for “professional use” and thus the exemption is open-ended. This exemption does not exist in the PACE and MPPI guidelines. Again it has no basis in the Basel Convention and as such is illegal. Very simply these exports either need to be shown to be fully functional or non-hazardous to fall outside of Basel Convention.

- Used equipment for professional use exported for root cause analysis

This exemption BAN has more sympathy for if it is tightly defined and does not result in hazardous parts being discarded in the recipient country. However, this exemption does not exist in the PACE and MPPI guidelines and as worded above it appears to be yet another unsupported exemption from Basel definitions.

- Equipment under leasing

This exemption has been argued for by certain Original Equipment Manufacturer associations for a long time now. Yet it was never accepted in the PACE and MPPI context. Off-lease equipment can amount to a massive volume of e-waste in the marketplace today. There is no scientific basis for exempting it. There is no legal basis in Basel for exempting it. Very simply these exports either need to be shown to be fully functional or non-hazardous to fall outside of Basel Convention. However BAN does believe that a demonstration of functionality in the leasing context need not require a functionality test but might be accomplished in a manner of enforceable leaser declarations of the material having been working at the time of decommissioning.

Summary

BAN believes that it would be a very big mistake for the Basel Parties to create a precedent of creating exemptions to the Basel definitions of waste and hazardous waste through a “Guideline”. Such exemptions can only be done via amendment. The MPPI and PACE TBM guidelines made that mistake in one instance (warranty). The OEWG and Basel COP have an opportunity to correct that mistake in the over-arching TBM of e-Waste guideline which will replace the partnership guidelines. These exemptions are not legally appropriate nor do they add greater clarity to those wishing to properly enforce the Basel Convention for e-waste. Rather they muddy the waters. Very simply, if used electronic equipment is to fall outside of the Basel Convention it either needs to be fully functional and destined for a reuse market or it needs to be non-hazardous. This is a well understood and legally appropriate reading of the Basel Convention that must be articulated clearly in any Guidance adopted by the Parties.

END