Royal Decree 180/2015 of 13 March regulating waste transportation within the territory of the State

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Royal Decree 180/2015 (published in the Official Journal of Spain [abbrev. BOE] on 7 April 2015) is passed under the aegis of art. 25 of the Waste and Contaminated Soil Act 22/2011 so as to regulate waste transportation within the territory of the State, that is, "from one devolved region (*comunidad autónoma*) to another, for recovery or disposal", in compliance, too, of the mandate under Regulation (EC) 1013/2006[1].

Royal Decree 180/2015 (the "Royal Decree") has the nature of basic legislation. It supports itself both on art. 149(1)(23) of the Spanish Constitution, which grants the State exclusive authority over basic legislation related to environmental protection, without prejudice to the powers of the devolved regions to establish additional protective measures, and on art. 149(1)(13) of the same, which assigns the State exclusive authority over the terms and coordination of general economic activity planning. At this point we should remind ourselves of the economic importance of waste transportation and that waste (notwithstanding its peculiarities) is considered "goods", which accounts for its being subject to the rules on free movement and the principle of market unity.

The Royal Decree will come into force on 8 May 2015 and expressly repeals most of the provisions of Royal Decree 833/1988 of 20 July, approving the Regulations for the Implementation of the (since repealed) Toxic and Hazardous Waste Act 20/1986, including all those related to the transportation of waste. The competent public authorities shall have the time limit of one year to adapt the transport procedure and documents to the new Royal Decree and, while this adaptation occurs, to continue using the existing transport documents (single transitional provision).

The main changes brought by this Royal Decree can be summarised as follows:

1. **Type of waste:** The regulation applies *to all waste* (not only hazardous as provided by earlier regulation), broadening, therefore, the guarantees of traceability of all waste, albeit with different notification requirements, as we shall see below.

2. **Person responsible for transportation:** the figure of "*transport operator*" is introduced (art 2); a natural or legal person seeking to transport or cause the transportation of waste for treatment, from one devolved region to another, and who bears the duty to notify such transportation.

   As a rule, the operator will be the producer of the waste. In lieu of the producer, a dealer or broker may act as operator if involved in the transfer. In the event that the foregoing are unknown, the Royal Decree includes a saving clause that regards as transport operator the natural or legal person who is in possession of the waste.

[1] Regulation (EC) No 1013/2006 of the European Parliament and the Council, of 14 June 2006, regulates the cross-border shipment (i.e. transport) of waste and requires Member States to establish an appropriate system for the supervision and control of shipments of waste in their jurisdictions with a scope similar to that of the aforementioned Community regulation.

In addition, an exception to the consideration of the producer as an operator is included where waste is collected from different producers and transported in one vehicle to a storage or treatment facility in another devolved region; in this case, the manager of the (storage or treatment) facility may act as operator, giving prior notification of transportation from each place of production to the (storage or treatment) destination facility. Moreover, according to the explanatory notes to the Royal Decree, even if not incorporated in its provisions, in these cases of collection from different producers, the licensed collector may also be regarded as the operator. Therefore, if the licensed collector and manager of the facility are not one and the same person, as either of these can be considered the operator, we believe that both parties must agree, in the treatment contract discussed below, who is the operator for the purposes of the duty to notify the transport.

A common example of this situation would be, as noted by the explanatory notes to the Royal Decree, the collection, whether fixed-point or door-to-door, of industrial oil used in repair workshops by licensed collectors for transport to the destination facility in another devolved region. In these cases, it does not seem to make sense that the workshops act as operators, since this would involve an unjustified bureaucratic burden (sign treatment contracts and notify transfers), so it is logical that, under this exception, the licensed collector should be the operator for the purpose of signing the treatment contract and notifying the transfer. Moreover, if the used oil collector is not the owner of the destination facility, the manager of such facility may also be considered the operator, so both have to agree on who takes on such capacity in the treatment contract they are required to sign.

Moreover, the Royal Decree provides that legislation regulating the different waste streams can determine who is, in each case, the transport operator.

It is worth noting that there are already two separate cases of regulation of transport, namely the transport of waste electrical and electronic equipment (WEEE) and the transport of waste batteries. As regards WEEE, art. 23(3) of Royal Decree 110/2015 of 20 February on waste electrical and electronic equipment[2] provides that "the transport of WEEE from households or from the distributor's shop to the logistics platform, "reverse logistics" or, where appropriate, to the facilities of local authorities (...) may be carried out by the deliverers of the new EEE", in which case they shall meet the transport conditions established by this Royal Decree 110/2015, of 20 February, *and the regulation of the Royal Decree shall not apply to them.*

And as regards waste batteries, according to art. 10(3) of Royal Decree 106/2008 of 1 February on batteries and accumulators and the environmental management of their waste, administrative intervention mechanisms relating to production and waste management do not apply to separate collection points of waste batteries, including those located in the facilities of distributors which simply receive at their establishments used batteries for delivery to a manager; therefore, the transport of waste batteries to such establishments would not be subject to the Royal Decree's system. However, the draft Royal Decree amending Royal Decree 106/2008, which has been issued for public discussion and response, provides for the elimination of such art. 10(3); this, apart from other effects, would trigger the applicability of the Royal Decree to this case. Several concerned organisations have submitted responses to maintain in force the provision and prevent a change in the regulatory framework.

3. **Common requirements applicable to the transport of all types of waste** (art. 3): as common requirements for all transportation of waste, we find the prior existence of an operator-consignee "treatment contract" (formerly known as acceptance document) and an "identification document" (formerly known as scrutiny and supervision document or DCS), although in the case of waste transportation not subject to prior notification, the dispatch note, invoice or other documentation containing the information set out in Schedule I could serve as the identification document.

[2] Regarding Royal Decree 110/2015, vide Gómez-Acebo & Pombo's analysis, by P. POVEDA, B. LOZANO CUTANDA and A. LOPEZ MUIÑA, Royal Decree 110/2015 of 20 February on waste electrical and electronic equipment: key changes, available at: http://www.gomezacebo-pombo.com/media/k2/attachments/royal-decree-110-2015-of-20-february-on-waste-electrical-and-electronic-equipment-key-changes.pdf

(i) The **treatment contract** is a private law contract between the transport operator and the treatment entity or undertaking. This contract must stipulate at the very least: the estimated amount of waste to be treated; the identification of such waste by means of the waste classification code (LoW); the estimated frequency of transfers; the treatment the waste will undergo; and the obligations of the parties in the event of rejection of waste by the consignee (art. 5). The following individual cases are specifically regulated:

- *Transportation where waste is collected from different origins*: the treatment contract signed between the waste producer or holder and the manager of the destination facility. Therefore, returning to the case of fixed-point collection (for instance, of oils used in workshops) bound to a different region, as the collectors assume ownership of the waste and its possession as of removal from the workshop, these collectors may sign, in lieu of the waste producer, the treatment contract with the destination facility.

- *Transportation of waste between two facilities managed by the same legal person*: the maintenance contract is replaced here by a statement of said entity that includes the minimum content of the maintenance contract.

- *Management of a particular waste stream by the systems of extended producer responsibility (EPR, previous IM)*: EPR/IM may sign the treatment contract where provided by the appropriate waste stream rule. As the obligation to sign the contract lies with the operator, we can deduce that when the rule implementing a particular waste stream requires the EPR/IM to sign this treatment contract, this will be so because the same rule attributes to the EPR/IM the status of operator.

- *Transportation where the operator is a dealer* [3]: for one or several transfers of waste over a maximum period of one year, the dealer can provide evidence of treatments with a statement of delivery of the waste to the authorised manager and acceptance by said manager of the complete treatment. We understand, although not clarified, that this is the only case in which this statement of delivery would replace the obligation to sign the treatment contract, provided, of course, that such statement includes all mandatory terms of the contract. In addition, where non-hazardous waste is involved, the dealer may omit in this statement confidential information concerning the waste's destination facility, with the exception of the treatment operation undergone by the waste and the environmental identification number (abbrev. NIMA) of the destination facility (art. 6(6)).

(ii) The **identification document,** regulated in art. 5 of the Royal Decree, constitutes the instrument for monitoring waste from its origin to its final treatment. To this end, before transportation of waste, the operator must complete this identification document with the content set out in Schedule I, will hand it over to the carrier for identification of the waste during conveyance and finally the carrier will hand it over to the consignee. Both the carrier and the consignee will enter the information in their chronological records and will keep a copy of the document. Within thirty days from consignment, the consignee shall send to the operator the identification document indicating the acceptance or rejection of the waste in accordance with the treatment contract and, if the transportation is subject to prior notification, the consignee shall also send said document to the origin and destination regions within the same period.

4. Transport of waste subject to the specific requirement of prior notification:

(i) **Cases subject to prior notification** (art. 3(2)): The requirement of prior notification is seen as an additional

[3] "Dealer" is "any natural or legal person who acts on his or her own account to purchase and subsequently sell waste", as referred to in art. 3(k) of Act 22/2011.

requirement for the transport of waste under art. 25(3) of Act 22/2011: for elimination and, when for recovery, mixed hazardous and municipal waste (20 03 01 under the LoW). In addition, using the regulatory enablement of said provision, an additional case is included [art. 3(2)(c)]: "The transportation of waste to incineration plants classified as recovery, according to R1 operation of Schedule II to Act 22/2011, of 28 July, with regard to compliance with the energy efficiency formula." Based on the wording of this provision, it appears that the case concerns the incineration of all types of non-hazardous waste (the incineration of hazardous waste would be included as a general rule given the hazardous nature of the waste); however, again a global interpretation of legislation leads us to interpret that it only refers to the incineration of household waste because, firstly, the energy efficiency formula is envisaged in schedule II of Act 22/2011 (footnote of R1 operation) only for incineration of household waste; and, secondly, within the grounds of objection to transport for recovery (art. 9(3)(d)), reference is made to "municipal waste for incineration plants classified as recovery, pursuant to art. 3(2)(c)".

In any case, regardless of the foregoing consideration, what is beyond doubt is that this case refers exclusively to "*incineration*" facilities, which would exclude the transportation of non-hazardous waste to *co-incineration* facilities, as defined in art. 2(14) of the Industrial Emissions' Regulations, approved by Royal Decree 815/2013 ("all fixed or mobile facilities whose main purpose is the generation of energy or production of material products and which either uses wastes as regular or supplementary fuel, or waste receives therein heat treatment for disposal through incineration by oxidation of waste as well as other thermal treatment processes, if the substances resulting from the treatment are subsequently incinerated, such as pyrolysis, gasification and plasma process"). An example would be the transportation of out-of-use tires to another devolved region for use as substitute fuel in cement plants.

Finally, under art. 3(2)(d) of the Royal Decree "such waste as is established by regulation" shall also be subject to prior notification, whereby this provision does not exhaust the cases that require prior notification.

(ii) The **prior notification procedure** is regulated so as to make it as agile and simplified as possible, of which we can highlight the following:

a) transport operators shall submit to the devolved region of origin or destination the prior notification ten days prior to transportation;

b) administrations have a ten-day time limit to respond in respect of the transportation and, if not, it's silence will be deemed affirmative;

c) the operator can present a general notification effective for three years in respect of waste with similar physical and chemical characteristics that is transported to the same consignee and facilities;

d) operators may choose to send the prior notification only to the devolved region of origin, and the consignees may choose to forward the identification document only to the devolved region of destination. In both cases, the recipient devolved region shall send the documents electronically to the other devolved region within three days;

e) the transportation can be carried out if within ten days from serving of the notification the devolved region of origin and/or destination have either not requested information, supplementary documentation or the curing of errors, or have not expressly objected to such transportation;

f) formalities must be complied with electronically within a maximum time limit of one year from entry into force of the Royal Decree.

Keep in mind that until implementation of the electronic processing, if the date of receipt of the notification by the competent bodies of the devolved regions of origin and destination are not one and the same, the time limit shall run

from *the later date of receipt,* as evidenced by the appropriate acknowledgment of receipt these devolved regions must send to the operator.

(iii) **Objection to the transportation** (art. 9), the decisions objecting to waste transportation by the devolved region of origin or destination must be reasoned. Such objections must be notified to the Waste Coordination Committee and must not contravene the National Waste Management Framework Plan. In any case, the reasons for objection must always be based on any of the statutory grounds provided in art. 9(3) of the Royal Decree which, notwithstanding its substantial reproduction of Regulation (EC) 1013/2006, contains some specific aspects that merit attention.

a) Para. IV of the Preamble to the Royal Decree provides that "in the application of the Market Unity Guarantee Act 20/2013 of 9 December, the fact that certain services are held, in the territory of destination, a public service under the aegis of art. 14(6) of Act 22/2011 of 28 July" (strictly speaking, the article of Act 22/2011 is 12(6)) cannot serve as grounds for objection. This provision is positive, although (aside that a measure of this nature should be envisaged in art. 9 and not only in the Preamble) it is our understanding that the measure seems to seek the opposite of what it, possibly by mistake, enounces; i.e., that the services are held to be a public service in the devolved region *of origin* (or even in either the origin or destination, but in any case referring to the devolved region of origin) cannot be grounds of objection to the transfer. [4]

b) From the point of view of market unity, in the transport of waste, the provision that the devolved region of origin or destination may object to transport for recovery when "the transport for recovery provided does not conform to the provisions of Act 22/2011, in particular its art. 8 on waste hierarchy and art. 14 on waste management plans and programmes" [art. 9(3)(a)] is a source of concern.

Thus, with respect to the objection on grounds related to waste plans, facing such a broad provision, Act 22/2011 only provides as grounds for objection to transport for recovery those provided in art. 12(1) paras. a), b) and k) of Regulation (EC) 1013/2006 (art. 25(5)). In relation to waste plans, the grounds for objection are defined by letter k) of this regulation as follows: "that the waste concerned will not be treated in accordance with waste management plans drawn up pursuant to Article 7 of Directive 2006/12/EC *with the purpose of ensuring the implementation of legally binding recovery or recycling obligations established in Community legislation.*" The interpretation in conformity with Community law of the Royal Decree and its systematic and teleological interpretation lead us, therefore, to conclude that devolved regions may not object, without further ado, to transportation for breach of a waste plan (whether national, regional or local) if such breach does not prevent compliance with the ecological recycling and recovery objectives set out in basic European or national regulations.

And something similar is true of the possibility of objecting to transportation for breach of the principle of waste hierarchy. As we have seen, para. a) of art. 12(1) of Regulation (EC) 1013/2006 provides as grounds of objection the generic breach of Directive 2006/12/EC, in particular art. 3 thereof, which governs the principle of hierarchy. However, keep in mind that the principle of hierarchy was subsequently regulated in the current Waste Framework Directive (2008/98/EC), with a more limited scope than the aforementioned provision of the earlier directive, since said principle only intends to serve as an order of priority in legislation and policy on waste prevention and management. Therefore, the reference made by Royal Decree to the principle of hierarchy, as prescribed by a directive which was subsequently

[4] This point was raised in the CEOE's (Spain's premier business lobbying organisation) Environment Committee, where it was determined that it should be referred to the competent bodies to try to correct the Royal Decree as indicated.

amended, does not seem very appropriate. And we say this because to establish, without further ado, as grounds for objection to transport of waste for recovery the fact that such does not conform to the principle of hierarchy (even considering the proviso of art. 8(2) of Act 22/2011), would mean that the devolved regions could object to all kinds of transportation of hazardous waste for energy recovery or of any type of waste for disposal, providing as sole argument the fact that (as always occurs from a purely technical point of view) such waste is potentially recyclable or recoverable (respectively).

c) In any case, operators facing a decision objecting to transportation that may involve an unjustified or arbitrary restriction to the circulation of goods, could resort, in the alternative to the traditional administrative appeals, the supposedly more agile mechanisms to protect economic operators in the field of freedom of establishment and freedom of circulation under the Market Unity Guarantee Act No 20/2013 of 9 December.

(iv) **Transport of waste within the devolved region** (second additional provision). The Royal Decree requires devolved regions either to establish a system to survey and scrutinise waste movements exclusively on their territories within one year from entry into force (i.e., until 8 May 2016), or to directly apply its provisions in its territory. And although ensuring that any transport within the devolved region is consistent with this Royal Decree is a requirement, the provision that devolved regions must also guarantee "market unity" within their territory has been removed (with regards to the Royal Decree version approved by the Cabinet in December 2014). [5]

[5] In any case, the Royal Decree provides that the devolved regions should include, at least, the requirement that all movements of waste are backed by an identification document, a treatment contract and prior notification in the cases provided in art. 3(2) of the Royal Decree for the purposes of objection to treatment in the devolved region in the absence of adequate facilities or its waste plans provide for an alternative to treatment therein. The latter provision reintroduces a degree of legal uncertainty, since it is unclear whether, once the internal transportation of waste under art. 3(2) has been notified, the grounds for objection would be only those mentioned in the second additional provision or, in any case, the general grounds provided in art. 9 for transport between regions would also apply.