

# **Defra consultation: Controls on the handling, transfer and transport of waste**

## **Response of the Environmental Services Association**

### **Background**

1. The Environmental Services Association (“ESA”) is the sectoral trade association representing the UK's managers of waste and secondary resources, a sector with an annual turnover of around £6 billion. ESA's Members seek to align economic and environmental sustainability through delivering compliance with relevant waste and environmental legislation.
2. ESA's Members aim to exceed the minimum requirements of the law. They are, for example, subject to ESA's binding Code of Conduct and also report to environmental indicators developed by the Green Alliance and now incorporated in the Environment Agency Waste Sector Plan. Our Members have invested in externally verified environmental management systems and through, for instance, published annual environmental reports, are achieving much greater transparency in their environmental performance.
3. ESA believes that an effective regulatory regime is the single most important driver for the UK to develop a resource efficient economy. Our sector is overwhelmingly driven by regulation which sets the standards for how waste should be managed and which sets sanctions for those who break the rules. To recover more value from waste and comply with existing EU law, the UK Government estimates that about £10 billion investment is required by our industry. To make that investment, our industry requires a clear and precise legal framework and the certainty that there will be zero tolerance of environmental criminals who deliberately flout the rules. Without effective regulation and appropriate sanctions for environmental criminals, there would be no viable market for waste management services.
4. Unregulated environmental criminals annually siphon tens of millions of pounds from legitimate regulated businesses. Environmental criminals undermine legitimate regulated businesses and deny people the safe and protected employment conditions offered by legitimate businesses. Environmental criminals prevent controlled and environmentally benign management of waste.
5. In order for regulation to work effectively, regulated industry needs to know that the rules are being adequately and consistently enforced to ensure a level playing field for all operators. The UK's waste management industry needs a focussed environmental regulator providing high quality and good value regulatory services to industry on a nationally consistent basis. It is important that the Environment Agency is properly resourced to enforce the rules, and enforcement decisions must be consistent and transparent.

## **Duty of Care**

### **Q1: what sort of incentives would promote better compliance with the duty of care? How effective would they be?**

6. Clear legislation and guidance, accompanied by effective enforcement, a strong and consistent penalty regime and backed up by effective education would provide greater incentives to promote greater compliance with Duty of Care requirements.
7. The threat of penalties is likely to be a far greater incentive to drive a change in behaviour than education alone. ESA is concerned that in practice, many waste producers, and particularly SMEs, rarely show interest in how or where their waste is managed and have little or no incentive to comply with legislation. The lack of regulatory control at this level has resulted in there being little interest from the producer in complying with statutory legislation. For example, nearly two years after the introduction of the need to separate hazardous and non-hazardous wastes, many producers remain ignorant and/or reticent of the need to comply.

### **Q2: what could the government do to encourage greater use of such incentives?**

8. The Environment Agency should focus more resources on regulating and auditing the management systems of waste producers and should also be more proactive regarding enforcement of 'Duty of Care offences.
9. The Government could also consider the introduction of Environment Anti-Social Behaviour Orders to deter persistent environmental offenders, as advocated by the Magistrates Association.
10. A fundamental weakness is that the current system does not require any form of technical competence to be demonstrated for registration as a waste carrier. The Government should impose a mandatory requirement for waste carriers to become accredited to recognised technical competence standards which as a minimum should demonstrate knowledge of:
  - a. the different categories of waste that a producer is likely to have, i.e. knowledge of the European Waste Catalogue;
  - b. the requirement to separate hazardous and non-hazardous wastes;
  - c. the requirement to pre-treat wastes destined for landfill;
  - d. the process involved for managing waste transfer notes;
  - e. the types of disposal or treatment facility permitted to accept specific waste types.

### **Q3: what would be the most effective way of raising awareness of and compliance with the duty of care amongst waste producers and others covered by the legal requirement?**

11. More effort must also be directed at informing and involving waste-producers of their responsibilities and legal duties regarding their Duty of Care. While it reflects very well on ESA's Members that most SMEs who are aware of Duty

of Care requirements have learned about them from their waste management company, it is the duty of public authorities' to ensure information is made available well in advance of any regulatory changes and ESA has for many years urged the Government and the Agency to coordinate a national media campaign to inform waste producers of new requirements for the management of waste.

12. The scale of ignorance suggests potential merit in a substantial publicly funded information campaign on the duty of care to coincide with any revisions to the system made by Government.

**Q4: should the government withdraw circular 19/91 and replace it with up-to-date, accurate guidance and advice that is tailored to individual business sectors?**

**Q5: should the government withdraw the code of practice and replace it with up-to-date, accurate guidance and advice that is tailored to individual business sectors?**

13. Circular 19/91 and the Code of Practice should be revised and possibility combined in order to maintaining overarching detailed guidance on the application of Duty of Care.
14. Short, easy to understand, sector specific summaries should also be produced to make it easier for waste producers to understand the legal requirements.

**Q6: should the maximum fines available for cases heard in a magistrates' court be raised for an offence under the duty of care? If so, to what level?**

15. There is a widespread belief that the penalties available to those convicted of environmental crimes are too low. In reality however, the potential fines *available* for many offences are actually very high, and unlimited in some cases. The real problem lies in the courts' sentencing policy of imposing often pitifully small fines which serve as no deterrent to deliberate and often persistent regulatory non-compliance. Magistrates typically only see environmental cases rarely and often do not always appear to understand the serious character of environmental crime.
16. The current powers available to the Courts are capable of acting as a deterrent. However, to be fully effective, there needs to be a broad public understanding not only of the types of sentence liable to be imposed but also that there is a sufficiently high risk of detection and successful prosecution. Increasing detection rates, securing more prosecutions and the Courts using powers they already have is a clearer priority than amending the sentencing tariff.
17. Magistrates must make full use of their powers to fine to reflect the severity of the offence and the cost to both the environmental and human health. We support the continued training of magistrates to raise awareness of environmental crime.

18. The public must understand that unlawful deposit of waste without a waste management licence or registered exemption is a crime attracting an unlimited fine or imprisonment of up to five years.
19. The Environment Agency should maintain as a public database a brief factual summary of each prosecution resulting in conviction, together with a report of the sentence including mitigating and aggravating circumstances. In our view, for the Agency to publish such data in a manner the court requires for its own procedures would not only promote greater liaison but achieve much more meaningful transparency. The database could be of particular relevance in the courts where, because environmental cases are relatively rare, it is particularly difficult for the courts to acquire any 'feel' for the appropriate sentence.

**Q7: what other penalties could ensure compliance with the duty of care? How would they work? Would these be an improvement on the current system? Would they provide further confusion?**

20. Seizure of the proceeds of illegal activities could make a significant impact on organised crime.
21. Administrative penalties should be considered, however, we understand the courts' perception that environmental cases, and particularly more complex cases, can widely vary and therefore make the instigation of administrative penalties difficult. It is very important that any scheme addresses genuine environmental damage rather than providing an easy means to target large but essentially well run companies.

**Q8: should local authorities be given powers to issue fixed penalty notices of £100 to householders for offences under the duty of care?**

22. Fixed penalties may be appropriate in the future once the Government is adequately communicating, and the Agency effectively enforcing, the requirements of Duty of Care.

**Q9: should a general duty of care be placed on those involved in the export of waste to ensure that they take all measures as are reasonably possible to prevent the contravention of TFS controls?**

23. Yes, ESA agrees that Duty of Care should be extended to include those who export waste from the UK. It should be a specific duty for those involved in waste export to ensure that their waste is handled in a way that is in compliance with the TFS regulations and that export is consistent with the UK waste import export plan.

**Q10: should it be a specific offence to transfer waste where the person transferring it knows or ought to reasonably suspect that the waste is being, or will be illegally exported? If so, what should the penalties be? What are the costs and benefits of such a proposal?**

24. ESA agrees that the extension of liability for non-compliant shipments and the creation of a specific duty of care offence could assist the competent authorities' enforcement activities against illegal waste exports. It is also likely to increase transparency and the use of written formal contracts between handlers of waste, and would be in line with ESA's Recycling Registration Scheme. However, offences should be subject to proper statutory defences, including due diligence.

**Q11: should it be a specific offence to transfer waste where the person knows or ought to reasonably suspect that the waste has been illegally imported? If so, what should the penalties be? What are the costs and benefits of such a proposal?**

25. ESA agrees that the extension of liability for non-compliant shipments and the creation of a specific duty of care offence could assist the competent authorities' enforcement activities against illegal waste imports. However, offences should be subject to proper statutory defences, including due diligence.

**Q12: are there any other specific offences that need to be added to the duty of care legislation? If so, please provide details of what you think may be necessary. Or would guidance be helpful to clarify which practices fall within the current scope of the offence?**

26. The current wording of Section 34(1)(c)(ii) of the 1990 Act states that the written description should "*enable other persons to avoid contravention*" of the relevant Sections of the Act and of the PPC Act and the required description should be "*fit for purpose*". There does not appear to be a specific offence under the 1990 Act, which makes false and misleading statements on a transfer note a specific offence.
27. The Government could therefore extend the 'false and misleading statements offence' to the Duty of Care provisions of Section 34 of the 1990 Act, to assist regulators and to ensure consistency with the Hazardous Waste Regulations 2005, and other similar legislation.

**Q13: should the duty of care continue to be a self-regulating system? Or should the environment agency and local authorities take a more proactive approach to enforcement? If so, how should their work be funded? How could it be effectively streamlined with other enforcement and inspection work?**

28. The Duty of Care should continue to contain an element of self regulation, but the Environment Agency needs also to be more proactive regarding enforcement of 'Duty of Care offences. The Agency must be properly resourced to enforce the rules, but it must also make better use of the resources it already receives by focussing its resources better whilst ensuring a high quality and value for money regulatory services to industry on a nationally consistent basis.
29. The failure of the current Duty of Care system is largely due to lack of enforcement. Whilst the legitimate section of the industry will comply with the

self-regulating aspects of the Duty of Care, illegal and unscrupulous operators will not. Therefore, the Agency must target its enforcement efforts on unscrupulous operators in order to increase compliance with Duty of Care requirements.

30. ESA's Members have invested in externally verified environmental management systems and, through published annual environmental reports and otherwise, are achieving much greater transparency in their environmental performance. We are therefore keen to see the Agency make more use of companies' own environmental management systems as a regulatory tool to help better focus its resources in line with 'better regulation' principles, to achieve greatest environmental protection and benefit. The Agency should apply greater regulatory effort to those activities that pose greater environmental risk, and which show a blatant disregard for the law, such as flytipping.
31. Funding of additional enforcement activities should be addressed by central Government, and must not be borne by the legitimate operators in this sector.

**Q14: should the onus for recording basic characterisation and evidence of pre-treatment be targeted on the producer, subsequent holder or carriers? How can we ensure that those who are best placed to provide the basic characterisation information do so at the time the information is needed?**

32. Yes. Producers must given unambiguous responsibility for recording basic characterisation information and for providing the evidence that waste has been treated prior to landfill unless the producer has procured this service from a waste management service provider.

**Q15: should the duty of care regime be used to deliver the basic characterisation requirement and evidence of pre-treatment? If so, how would this be best done and what issues need to be considered? What would be the benefits and possible burdens of such an approach?**

33. Additional questions in the Duty of Care documentation coupled with a signed declaration from the waste producer that their waste has been pre treated should be sufficient proof for ESA's Members.

**Q16: are there other ways to deliver the basic characterisation and evidence of pre-treatment that might be more effective or lower cost? If so, what are these and how they might work?**

34. ESA is not aware of any alternative more effective approach.

**Q17: what is the best way of enforcing the requirements of the WEEE directive with respect to non-household end users? What are the costs and benefits associated with each option?**

35. ESA remains to be convinced by the Government's case for combining the WEEE treatment obligations with the Duty of Care. It would appear that a

cradle to grave tracking system, similar to that required for hazardous waste, would be required in order for an “end user” to obtain the necessary information required to prove that the WEEE had been recycled/ recovered.

36. The current waste transfer note system would require radical change to implement such a requirement, which would lead to a much more complex system than is necessary for the vast majority of wastes.

**Q18: what would be the benefits or disadvantages of giving the enforcing authorities a power to request the production of waste transfer notes within 24 hours?**

37. 24 hours would not be a more realistic timescale in which to obtain a waste transfer note.

**Q19: what could the government do to facilitate and encourage greater use of e-commerce in relation to the duty of care?**

38. The use of electronic waste transfer notes would reduce administrative burdens.
39. E-commerce would make retrieval of documentation much easier and could make the 24 hour timescale for providing waste transfer notes more realistic.

**Q20: would it be helpful for the government to clarify that the ‘season ticket’ arrangements remain valid for a maximum period of 12 months?**

40. Yes.

**Q21: how should the duty of care apply to commercial waste produced by the growing number of home workers?**

41. The Duty of Care should apply to commercial waste produced by home workers in the same way as it applies to other commercial and industrial waste produced at business premises.

**Q22: how should waste collection authorities deal with this source of commercial waste? Should it be dealt with in the same way as household waste from the same property?**

42. Waste collection authorities should treat this commercial waste in the same way that they treat commercial waste collected from business premises.

**Q23: should waste collection authorities charge for taking commercial waste produced by home workers?**

43. Yes.

**Q24: does the duty of care legislation need to be changed to deal with the fact that some waste management contractors and carriers complete waste transfer notes on behalf of waste producers?**

**Q25: what would be the costs and benefits of introducing greater transparency?**

44. No. The Government suggests that some companies charge excessive amounts to producers for filling out waste transfer notes. ESA is not aware of this in practice, but never the less would suggest that in the highly competitive industry in which waste management companies operate, market forces will dictate that prices are kept competitive.

## **Waste Carriers**

**Q1: Comments are invited on the information and data presented in the Initial Regulatory Impact Assessment about the numbers of producers who might be affected by the ECJ judgement on the Italian case.**

1. There is insufficient information in the RIA and we would welcome further details before making specific comments.

**Q2: What would be the benefits or disadvantages of combining the application and charging process for waste carrier registration with other applications for waste permits and licences issued by the Environment Agency?**

2. Holders of waste management licences or PPC permits should not be required to separately register as a waste carrier, provided operators can demonstrate that the carrier activity is linked specifically to the permitted activity.

**Q3: What would be the most effective way of raising awareness of the need to be registered amongst waste carriers, particularly small traders?**

3. More effective enforcement and increased penalties imposed by the courts would provide the greatest incentive to promote awareness and greater compliance with Duty of Care requirements. The threat of penalties is likely to be a far greater incentive to drive a change in behaviour than education alone.
4. The Environment Agency and Local Authorities should make more use of the power to seize the vehicles of waste carriers who have been convicted of environmental offences.
5. The scale of ignorance suggests potential merit in a substantial publicly funded information campaign on the duty of care, waste carriers requirements to coincide with any revisions to the system made by Government.
6. Seminars/events aimed at small traders, and possibly involving small business associations and Chambers of Commerce would help raise awareness.

**Q4: Should there be a tiered system of registration? If so, what would be the most effective way of differentiating between carriers? What would the costs and benefits be?**

7. ESA does not support charging differentially for carriers' registration depending on size of company. The current fees are low enough so as not to discourage the smaller operators and are set principally as a cost recovery mechanism for the Agency. Any additional fees applied to companies with a large number of vehicles would simply be a revenue generating exercise.
8. Larger operators have more incentive to comply as the loss of a registration of carrier certificate would effectively put the company out of business. Whereas as an unscrupulous 'one man band' operator would simply change the name of the company and continue operating.
9. As outlined in our response to the Duty of Care consultation above, a fundamental weakness in the current system is that waste carriers do not have to demonstrate any form of technical competence to register as a waste carrier. The Government should therefore impose a mandatory requirement for waste carriers to become accredited to recognised technical competence standards which as a minimum should demonstrate knowledge of:
  - a. the different categories of waste that a producer is likely to have, i.e. knowledge of the European Waste Catalogue;
  - b. the requirement to separate hazardous and non-hazardous wastes;
  - c. the requirement to pre-treat wastes destined for landfill;
  - d. the process involved for managing waste transfer notes;
  - e. the types of disposal or treatment facility permitted to accept specific waste types.

**Q5: Should registered waste carriers handling waste tyres be subject to enhanced reporting requirements? What would the costs and benefits be?**

10. ESA offers no comment.

**Q6: If so, would there be benefit in having a de minimis threshold below which separate registration for tyres would not be required?**

11. ESA offers no comment.

**Q7: Are any additional registration requirements or checks that are needed to help enforce the waste carrier regime? What would be the costs and benefits of implementing any of these?**

12. Competency schemes should be considered (see answer to Q2 above)

**Q8: What form of guidance would be helpful to applications and in what format?**

13. Simple easy to understand factsheets, referencing further more detailed information on websites such as Netregs. The guidance should highlight the legal requirements as well as specifying the penalties for non compliance.

**Q9: Do you have any comments and ideas about how local authorities, the Environment Agency and other enforcement authorities could share information?**

14. Regular liaison between local Environment Agency and Local Authority officers should be encouraged to share intelligence of environmental criminals

**Q10: Would it be helpful for carriers to have the option of including additional information on their application/renewal forms of the services they provide? If so, what type of information would it be helpful to include? What safeguards would need to be provided?**

15. Carriers that do not operate WML or PPC permits should be required to satisfy a level of competence when applying to obtain a Registration of Carriers/Brokers certificate.
16. Carriers could be invited to indicate whether they are Members of the Environmental Services Association. ESA's Members are subject to a binding Code of Conduct as Members of ESA and also report to environmental indicators developed by the Green Alliance and incorporated in the Environment Agency Waste Sector Plan. Our Members have invested in externally verified environmental management systems and, through published annual environmental reports and otherwise, are achieving much greater transparency in their environmental performance.

**Q11: Comments are invited on whether it should be an annual requirement to renew a waste carrier registration, or whether it should be a 'registration for life' regime with annual subsistence charges? What would the costs and benefits be?**

17. If a competency requirement were required for the holder of a waste carrier/brokers certificate, then a periodic perhaps two yearly re-registration would allow the regulator to ensure that the individual or company remained competent.
18. If there were no competency requirement, annual registration would be an onerous and unnecessary administrative burden, going against the principles of 'Better Regulation'.

**Q12: Would carriers find it helpful if their registration came with additional benefits? If so, what benefits would carriers want to have?**

19. Benefits could include a regular electronic legislative update provided by the Environment Agency.

**Q13: Should the Environment Agency carry out proactive site inspections of a sample of waste carriers? If so, how should these inspections be funded? What would the costs and benefits be?**

20. Yes. Inspections should properly targeted and be funded by the carrier registration fee.

**Q14: How could the link between the commission of other waste crimes and the revocation of a waste carrier's registration be strengthened? What would be benefits and disadvantages of each option?**

21. The Government should consider moving revocation provisions to the Courts, where due process could be applied to the defendant, including the right of appeal and the human rights of the defendant could also be considered.

**Q15: Are there other types of flexible penalties that could help to encourage minor offenders into compliance? How effective would they be?**

22. The seizure of the proceeds of illegal activities could make a significant impact on organised crime.

23. The Government could consider the introduction of Environment Anti Social Behaviour Orders to deter persistent environmental offenders.

**Q16: should it be made a specific offence to intentionally provide false or misleading information on a waste carrier registration form, and/or to forge them? If so, what should the penalty be? What would the costs and benefits be?**

24. Yes, a specific offence should be created to ensure better regulatory control of waste carriers.

**Q17: are there any other offences that are needed to help enforcement? If so, what should the penalties be?**

25. ESA offers no comment.

**Q18: the maximum penalty at the moment for transporting waste without being registered is liable on summary conviction only to a fine not exceeding level 5 (£5,000). Is this sufficient or should it be amended? If so, to what level?**

26. ESA would have no objection to the maximum fine being increased, but notes that the real problem lies in the courts' sentencing policy of imposing often pitifully small fines irrespective of the possible maximum fine, which serve as no deterrent to deliberate and often persistent regulatory non-compliance.

**Q19: Are any additional requirements necessary to aid enforcement? If so, which would be the most effective and what would be the costs and benefits?**

27. ESA offers no comment.

## **Waste brokers**

**Q1: Comments and views are invited on how brokering works in practice. Who is involved in doing it? In what circumstances? Do brokers ever take legal ownership of waste loads? Are overseas brokers regularly used?**

1. Brokers range from the large waste management companies (who often sub-contract the transport waste) to the smaller one-man operators, and a distinction needs to be made between the two extremes. It is doubtful that brokers ever take legal ownership of the waste, as they act mainly as middlemen, and often never actually see the waste at any point in the transaction.

**Q2: What additional checks might be needed on registration? Can this be done easily and at low cost?**

2. A fundamental weakness in the current system is that waste brokers do not have to demonstrate any form of technical competence to register. The Government should therefore impose a mandatory requirement for waste brokers to become accredited to recognised technical competence standards which as a minimum should demonstrate knowledge of:
  - a. the different categories of waste that a producer is likely to have, i.e. knowledge of the European Waste Catalogue;
  - b. the requirement to separate hazardous and non-hazardous wastes;
  - c. the requirement to pre-treat wastes destined for landfill;
  - d. the process involved for managing waste transfer notes;
  - e. the types of disposal or treatment facility permitted to accept specific waste types.

**Q3: Are regulatory changes needed to make regulation more effective, and if so, what? Is there any non-regulatory action that could be taken?**

3. Brokers should be under the same regulatory requirements to keep and furnish waste transfer notes as all the other parties in the “waste chain” are.

**Q4: Would it be more helpful if there was a separate, tailored set of regulations for brokers? Or would it be helpful to have clearer guidance on how the regulations apply to waste brokers?**

4. There is no need for separate regulations for waste brokers, but ESA would welcome much clearer guidance for the various types of waste broker, especially on the responsibilities of the Local Authorities who divest their collection duties to the commercial sector.

**Q5: How might the Government and the Agency gain a better understanding of the role of waste brokers? What should be the aim and focus of any inspection regime?**

5. ESA offers no comment.

**Q6: How might the current regulatory controls be strengthened? What supporting measures are needed? What would be the costs and benefits of such a proposal?**

6. The Government should consider the technical and financial competence of waste brokers. Brokers are involved in the movement of significant quantities of waste, both nationally, and internationally; they can also exert influence on all parties in the waste chain. The barriers to entry should be raised for anyone wishing to become a broker, in order to prevent the mismanagement of waste, whether through ignorance or illegal acts.

**Q7: Comments are invited on whether it should be an annual requirement to renew a broker registration, or whether it should be a 'registration for life' regime with annual subsistence charges? What would the costs and benefits be?**

7. If a competency requirement were required for the holder of a waste carrier/brokers certificate, then a periodic perhaps two yearly re-registration would allow the regulator to ensure that the individual or company remained competent.
8. If there were no competency requirement, annual registration would be an onerous and unnecessary administrative burden, going against the principles of 'Better Regulation'.

**Q8: should it be made a specific offence to intentionally provide false or misleading information on a waste carrier registration form, and/or to forge them? If so, what should the penalty be? What would the costs and benefits be?**

9. Yes. There should be shared responsibility for Duty of Care offences in this scenario.

**Q9: are there any other offences that are needed to facilitate enforcement of waste brokers? If so, what should the related penalties be?**

10. ESA offers no comment.

**Q10: would non-criminal sanctions be more effective or appropriate, especially given the international aspect of waste brokering?**

11. ESA offers no comment.

**Q11: What would be the most effective way of raising awareness of the need to be registered amongst waste brokers, particularly small operations?**

12. The Environment Agency must supply detailed information at the time of registration.

13. Detailed information must The Government and the regulators need to explore more innovative ways of raising awareness of the waste broker registration system, such as links to small business organisations, chambers of commerce, and information with Local Authority business rates bills.

***Q12: Would it be helpful for brokers to have the option of including additional information on their application/renewal forms of the services they provide? If so, what type of information would it be helpful to include? What safeguards would need to be provided?***

14. Brokers could be invited to indicate whether they are Members of the Environmental Services Association. ESA's Members are subject to a binding Code of Conduct as Members of ESA and also report to environmental indicators developed by the Green Alliance and incorporated in the Environment Agency Waste Sector Plan. Our Members have invested in externally verified environmental management systems and, through published annual environmental reports and otherwise, are achieving much greater transparency in their environmental performance.

***Q13: Would brokers find it helpful if their registration came with additional benefits? If so, what benefits would brokers want to have?***

15. Benefits could include a regular electronic legislative update provided by the Environment Agency.