



CASE NOTES

## The Aftermath of the MSC Flaminia Incident: Rethinking the Applicability of the Waste Shipments Regulation (Case C-188/23, *Conti I I. Container Schiffahrts II*)

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### Abstract

In its ruling of 25 January 2025, the Court of Justice of the European Union (CJEU) clarified the scope of the Waste Shipments Regulation in the context of hazardous waste generated during maritime accidents. The Court concluded that “contrary to the circumstances envisaged” in its previous ruling (Conti 11. Container Schiffahrts I), the shipment of the MSC Flaminia from Germany to Romania had to be subject to the prior written notification and consent procedure provided for by that Regulation. The difference between the two scenarios lies in the circumstance that, in the case at hand, part of the waste had already been offloaded, preventing the applicability of Article 1 (3) (b) exclusion. The latter, according to the Court, has a temporary nature and should be interpreted restrictively as to ensure compliance with the Union’s obligations under the Basel Convention. The judgment reinforces a precautionary, risk-based approach to hazardous waste shipments in line with supranational sustainability goals.

**Keywords:** Waste Shipments Regulation; Basel Convention; Waste Framework Directive; Hazardous Waste; Sustainable Development

### 1. Legislation

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

### 2. Facts

On 14 July 2012, the container ship MSC Flaminia was chartering from Charleston, South Carolina (*United States*) to Antwerp (*Belgium*) when chemical fires broke out and explosions ensued.<sup>1</sup> This incident caused extensive damage to the ship that was transporting 4808 containers – 151 of which were “hazardous substance” containers – and left the ship

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<sup>1</sup> These sections are based on: L.S. Braaksma and I. Sicignano, “The Aftermath of the MSC Flaminia Incident: lawfully imposed Procedures for Waste Management after all? (Case C-188/23, *Conti I I. Container Schiffahrts II*)”, *EU Law Live* 18 February 2025.

contaminated with dangerous and toxic residues. The aftermath of this incident includes multiple judgments by courts of different jurisdictions, one of which assigned fault for the fire aboard the vessel to the manufacturer of the tanks.<sup>2</sup> After the fire was brought under control – which took almost six weeks – and subsequent salvage operations were undertaken in the weeks after the incident, the MSC Flaminia was towed to Wilhelmshaven (Germany) on 9 September 2012.<sup>3</sup> This is where the legal dispute at hand began.

Conti, the owner of the container ship, contacted the German authorities to ensure a safe transfer of the vessel to a repair yard in Mangalia (Romania) and the appropriate treatment of (some of) the substances on board. The competent German authorities (The Trade and Industry Inspectorate Oldenburg) informed Conti that the water used to extinguish the fire on board and the sludge and scrap metal thereon were to be classified as “waste” within Regulation (EC) No 1013/2006 (“Waste Shipments Regulation”),<sup>4</sup> and decided that Conti had to complete the notification and consent procedure laid down therein before the ship could leave for Romania. Conti appealed this decision without success, and then issued a civil liability claim to receive compensation for the damage resulting in particular from the costs incurred by carrying out the notification and consent procedure. This action for compensation was brought against the Land Niedersachsen (Land of Lower Saxony) and is at the centre of the following proceedings.

In first instance, the Regional Court of Munich (Landgericht München I) requested the Court of Justice to interpret Article 1(3)(b) of the Waste Shipments Regulation. This provision excludes from the Regulation’s scope “waste generated on board vehicles, trains, aeroplanes and ships, until such waste is offloaded in order to be recovered or disposed of.” In its ruling of 16 May 2019 in *Conti 11*, *Container Schiffahrts* (“*Conti 11*”), the Court of Justice ruled that the residues on board of the MSC Flaminia “must be regarded as waste generated on board ships, within the meaning of that provision, which is, therefore, excluded from that Regulation’s scope until it is offloaded in order to be recovered or disposed of.” Consequently, the Landgericht partly upheld Conti’s claim, holding that the notification and consent procedure were not required under the Waste Shipments Regulation. The Land of Lower Saxony lodged an appeal against this ruling before the Higher Regional Court of Munich (Oberlandesgericht München), which is the referring court.

### 3. Judgment

The appeal brings us to the issue at hand. The Land of Lower Saxony questions the validity of the interpretation of Article 1(3)(b) of the Waste Shipments Regulation in *Conti 11* in light of the European Union’s obligation under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (“Basel Convention”).<sup>5</sup> The preliminary question asked to the Court of Justice was whether the non-application of the notification and consent procedure for shipments of waste from Wilhelmshaven (Germany) to Mangalia (Romania) would be contrary to the Basel Convention. To fully understand this argument, it is important to briefly introduce the relevance of this Convention.

<sup>2</sup> In re M/V MSC Flaminia 18-2974-cv, US Court of Appeals (2nd Cir, 30 June 2023). Subsequent decisions have addressed related issues arising from the same incident, the most recent being *MSC Mediterranean Shipping Company SA v Conti 11 Container Schiffahrts-GmbH & Co KG MS “MSC Flaminia”* (2025) UKSC 14.

<sup>3</sup> Case C-188/23 *Land Niedersachsen v Conti 11. Container Schiffahrts-GmbH & Co. KG MS “MSC Flaminia”* (2024) ECLI: EU:C:2024:410, Opinion of AG Ćapeta, para. 1.

<sup>4</sup> Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (2006) OJ L190/1.

<sup>5</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, (adopted on 22 March 1989 entered into force on 5 May 1992) 1673 UNTS 57.

The Basel Convention was adopted in response to growing international concern over the export of toxic waste from developed to developing countries, where inadequate regulatory frameworks and enforcement mechanisms often led to improper management and disposal, posing significant risks to human health and the environment.<sup>6</sup> Its objective is to realise a “comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes.”<sup>7</sup> The concept of prior informed consent (PIC) is the foundation of the entire regulatory regime and implies a duty for the State that exports waste to provide detailed information on the intended movement to the importing country before the shipment takes place.<sup>8</sup> Article 6 of the Basel Convention describes the procedure for prior written notification and consent which applies to any shipment of waste falling within its scope.<sup>9</sup> The *ratio* surrounding the whole framework is the idea that enhanced control of transboundary movement of hazardous waste represents an incentive to its environmentally sound management and its volume reduction.<sup>10</sup> Parties to the Convention are thus encouraged to cooperate with each other in order to achieve these results.<sup>11</sup>

The Waste Shipments Regulation rules are designed *inter alia* to ensure European Union’s compliance with this Convention. The Court points out that answering the referring court’s question on the applicability of the exclusion granted in *Conti 11* to the waste remaining on the ship after part of it was offloaded in Germany meant interpreting the Regulation’s provisions, as far as possible, in accordance with the Basel Convention.<sup>12</sup> Article 216(2) TFEU clearly states that the provisions of international agreements concluded by the Union form an integral part of its legal order and are binding upon its institutions. Their relevance for the Union’s legal order was addressed in the *KaiKai* case<sup>13</sup> in which the Court recalled its jurisdiction on the interpretation of international agreements concluded by the EU.<sup>14</sup> At the same time, it was reaffirmed that the latter should prevail when it comes to interpreting secondary law provisions falling within their scope.<sup>15</sup> Accordingly, the exclusion to the general rule establishing a prior notification and consent procedure for any shipment of hazardous waste, cannot be interpreted “in such a way as to call into question the achievement of the objectives pursued by that convention, namely the protection of human health and the environment.”<sup>16</sup>

Moreover, another essential premise was recalled by the Court: any interpretation of EU law must consider not only the provision’s wording, but also its context and objectives. Accordingly, by recalling its legal reasoning in *Lindenapotheke* (C-21/23),<sup>17</sup> the Court analysed the concepts of “waste” and “hazardous waste,” as framed within the Waste Framework Directive, expressly referred to by Article 2(1) of the Waste Shipments

<sup>6</sup> Katharina K Peiry, “International Chemicals and Waste Management,” in Malgosia Fitzmaurice et al. (eds), *Research Handbook on International Environmental Law* (Elgar 2021) p 441.

<sup>7</sup> Basel Convention, Art. 1.

<sup>8</sup> *Supra*, note 3, 442.

<sup>9</sup> Basel Convention, Art. 6.

<sup>10</sup> Basel Convention, Preamble.

<sup>11</sup> Basel Convention, Art. 10(1).

<sup>12</sup> Case C-188/23 *Land Niedersachsen v Conti 11. Container Schifffahrts-GmbH & Co. KG MS “MSC Flaminia”* (2025) ECLI:EU:C:2025:26, para. 44.

<sup>13</sup> Case C-382/21 P *European Union Intellectual Property Office v The KaiKai Company Jaeger Wichmann GbR* (2024) ECLI:EU:C:2024:172, para. 70.

<sup>14</sup> *ibid.*, para. 80.

<sup>15</sup> *ibid.*, para. 71. See also Joined Cases C-14/21 and C-15/21 *Sea Watch eV v Ministero delle Infrastrutture e dei Trasporti and Others* (2022) ECLI:EU:C:2022:604.

<sup>16</sup> Case C-188/23 *Land Niedersachsen v Conti 11*, para. 53.

<sup>17</sup> Case C-21/23 *ND v DR* (2024) ECLI:EU:C:2024:846, para. 52.

Regulation.<sup>18</sup> In this context, the particularly broad meaning assigned to these terms was highlighted as a clear sign of the EU legislator's intention to "confer a very broad scope on the prior written notification and consent procedure".<sup>19</sup>

Subsequently, the CJEU turned to the main objective pursued by the Regulation and by the Basel Convention, namely the protection of the environment.<sup>20</sup> Both instruments stress that effective control of shipments of hazardous waste rests on efficient international cooperation and information exchange. These processes make it possible to collect data and monitor waste flows, at the same time allowing national authorities to be duly informed of waste shipments. Only if properly carried out, they ensure that authorities of the importing country can take all necessary steps towards protecting human health and the environment, eventually raising objections to such movements.<sup>21</sup> Hence, only an interpretation which leaves no space for considerations other than those relating to the protection of the environment and human health would be coherent with the procedure's aim. Granting a margin of appreciation on the matter to authorities of the exporting country would indeed "risk depriving that procedure of any useful effect"<sup>22</sup> and compromise the attainment of both the Regulation and the Convention's objectives.<sup>23</sup>

In this context, the Court of Justice – confronted with its own ruling in *Conti 11* – recalled the reasons for initially excluding the residues on board of the MSC *Flaminia* from the scope of the Waste Shipments Regulation. The "sudden and unforeseeable nature of the generation of that type of waste," which makes it "impossible or excessively difficult" to get the necessary information in time for the correct application of the waste management procedure represented the main ground for its exclusion in that case.<sup>24</sup> "Contrary to the circumstances envisaged" in *Conti 11*, the Court reached the conclusion that the exclusion from the scope of the Waste Shipments Regulation no longer applies to "the waste (...) after part of that waste has been offloaded in a safe port in order to be recovered or disposed of," and that this interpretation is in conformity with the Basel Convention. The exclusion from the scope of the Waste Shipments Regulation of waste generated on board a ship following damage sustained by that ship on the high seas does indeed remain legitimate.

It was thus deemed compatible with international and EU waste shipment norms to let the operator skip the notification and consent procedure when the ship was moved to Wilhelmshaven (*Germany*) right after the incident in 2012. However, as the Court specified in *Conti 11*, this exclusion only applies as long as "the waste concerned has not left the ship in order to be shipped for recovery or disposal."<sup>25</sup> Hence, when it comes to the safe transfer of the ship to Mangalia (*Romania*), the question is whether, after part of the waste was already offloaded in a safe port, the subsequent shipment of the remaining materials should still fall under the exclusion's scope.

The Court observes that, at the moment that part of the waste had already been offloaded in Germany, *Conti* was reasonably in a position "to have information concerning the quantity and nature of the waste remaining on that ship"<sup>26</sup> which was to be shipped to

<sup>18</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (2008) OJ L312/3, Art. 2.

<sup>19</sup> Case C-188/23 *Land Niedersachsen v Conti 11*, para. 60.

<sup>20</sup> *ibid.*, para. 62. In particular, the Court refers to recitals 7 and 8 of the Waste Shipment Regulation and to Art. 4 of the Basel Convention.

<sup>21</sup> *ibid.*, para. 66.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*, para. 68.

<sup>24</sup> *ibid.*, para. 55.

<sup>25</sup> *ibid.*, para. 56.

<sup>26</sup> *ibid.*

Romania. Considering the danger posed by the hazardous waste and the provision's aim of protecting human health and the environment, allowing its transfer without the safeguards provided for by the Regulation would not seem justified. Indeed, the judgment clarifies that the exception granted to waste generated on board ships due to unforeseen incidents has only a temporary nature as, according to the Waste Shipments Regulation, its application ceases once the waste is offloaded. Subsequent intra-European Union shipments of such waste must therefore adhere to the Regulation's notification and consent procedure. Such an interpretation of the Regulation is also in conformity with the Basel Convention.

#### 4. Comment

Waste is linked to the “triple planetary crisis”: climate change, biodiversity loss and pollution. Improper waste management leads to soil and water contamination, impacting natural habitats and producing climate-altering emissions.<sup>27</sup> Assessing the precise environmental impact of each waste management operation remains challenging, as scientific evaluations often involve inherent uncertainties. As noted, “while the jurist seeks certainty, the scientist points to the uncertainty inherent in ecological risk.”<sup>28</sup> To address this dichotomy, the Waste Shipment Regulation meticulously defines the conditions under which the prior notification and consent procedure must be carried out.<sup>29</sup> By dispelling any uncertainty as to the scope of the mechanism, the legislator aims at ensuring that waste producers are held accountable for its environmentally sound management.<sup>30</sup> This approach seems coherent with balancing increased costs for operators with benefits for society in a strive towards a sustainable development model. Accordingly, considering the severity of risks associated with improper management of hazardous substances, the latter must be accorded with precedence over the first and a precautionary approach must be followed. This conclusion was reached, *inter alia*, in the judgement at hand.

The precautionary principle, representing one of the building blocks upon which the EU environmental policy is constructed, can also be seen as a general principle for risk regulation actions.<sup>31</sup> In the domain of hazardous waste management, the CJEU has recently adopted a restrictive reading of the principle, leading to stricter application of environmental provisions.<sup>32</sup> In particular, in *Verlezza*,<sup>33</sup> it was interpreted as implying an interpretation of the concept of “hazardous waste” as to cover cases in which doubts remain over the exact substances contained and their properties. Accordingly, in cases involving ship waste management, its settled jurisprudence points to the need to look at ships as hazardous waste despite the fact that the precise amount of hazardous substances contained

<sup>27</sup> United Nations Environment Programme, “Global Waste Management Outlook 2024: Beyond an age of waste – Turning rubbish into a resource,” Nairobi (2024).

<sup>28</sup> Nicolas De Sadeleer, “The Precautionary Principle in EC Health and Environmental Law” (2006) *European Law Journal*, 12 (2) 139, p 144.

<sup>29</sup> *ibid.*, para. 69.

<sup>30</sup> *ibid.*, para. 70.

<sup>31</sup> Elizabeth Fisher, “Precaution, Precaution Everywhere: Developing a ‘Common Understanding’ of the Precautionary Principle in the European Community” (2002) *Maastricht Journal of European and Comparative Law* 9(1) 7, p 10.

<sup>32</sup> Joonas Alaranta and Mirella Miettinen, “Precautiously Circular: Perspectives on the Application of the Precautionary Principle in European Union Waste and Chemicals Regulation” (2023) *European Journal of Risk Regulation* 14(1) 14.

<sup>33</sup> Joined Cases C-487/17 to C-489/17 *Criminal proceedings against Alfonso Verlezza and Others* (2019) ECLI:EU:C:2019:270.

cannot be determined.<sup>34</sup> As a matter of fact most vessels contain substances falling within the latter category, including asbestos, lead-based paints, other heavy metals such as cadmium and arsenic, biocides and polychlorinated biphenyls (PCBs).<sup>35</sup> In such circumstances, despite being uncertain about the presence or precise quantity of hazardous substances, waste must thus be considered as hazardous by virtue of the principle.<sup>36</sup>

In the case at hand, the person responsible for the ship would consequently be required to opt for a shipment of the waste remaining on the vessel “which best meets the requirements of protection of the environment and human health.”<sup>37</sup> As the CJEU noted, a strict interpretation of the exclusion is even more compelling considering that waste had merged with the ship, making it particularly difficult to separate them strictly.<sup>38</sup> The requirement of a “high level of protection” set out in Article 191(2) TFEU, in combination with the precautionary regulatory framework, thus lead to stricter requirements for operators in similar situations.<sup>39</sup> Overall, such an interpretation appears as the only satisfactory option considering the ambitious goals the Union is striving to achieve through the Green Deal<sup>40</sup> implementation.

In the aftermath the MSC Flaminia incident – which happened more than 10 years ago – it thus turns out that the German competent authorities did lawfully require Conti to carry out the notification and consent procedure before allowing the MSC Flaminia to move to Romania after all. Considering the presence of onboard hazardous waste that still needed to be taken care of and the purpose of the Waste Shipments Regulation and the Basel Convention, this outcome seems justifiable. By clarifying that turning a blind eye to the potential for dangerous substances to be handled irresponsibly cannot be legitimised, even in the face of extreme circumstances such as a tragic maritime incident like the one at hand, the Court has drawn a clear line between acceptable and unacceptable levels of risk. If in the earlier ruling on the same incident the unforeseeable nature of the situation required a more lenient approach, the mutated circumstances in the case at hand no longer justify it. According to the abovementioned precautionary approach, the general interest to environmental protection must indeed be prioritised against the individual right of the ship owner, which cannot be said to have suffered an intolerable interference.<sup>41</sup> Imposing an extra burden on him, namely the carrying out of the procedure, appears as a proportionate choice considering the relevance of ensuring an environmentally sound management of hazardous waste, especially in the context of the EU, known as a global standard setter for high environmental standards.<sup>42</sup>

The approach is all the more justifiable if one considers the operativity of the *sincere cooperation* principle, requiring Member States to cooperate in transboundary situations impacting the achievement of Union’s goals.<sup>43</sup> By providing the import country with

<sup>34</sup> Ioanna Hadjiyianni and Kleoniki Pouikli, “End-of-life ships as hazardous waste under the Basel Convention and the EU Waste Shipment Regulation” in Ioanna Hadjiyianni and Kleoniki Pouikli (eds), *The Regulatory Landscape of Ship Recycling: Justice, Environmental Principles, and the European Union as a Global Leader* (Edward Elgar Publishing 2024), pp 127–30.

<sup>35</sup> *ibid.*, p 130.

<sup>36</sup> *ibid.*

<sup>37</sup> Case C-188/23 *Land Niedersachsen v Conti 11*, para. 70.

<sup>38</sup> *ibid.*, para. 71.

<sup>39</sup> Alaranta et al., *supra*, note 26.

<sup>40</sup> European Commission, “The European Green Deal” (Communication) COM (2019) 640 final, 11 December 2019.

<sup>41</sup> De Sadeleer, *supra*, note 29.

<sup>42</sup> Ioanna Hadjiyianni and Kleoniki Pouikli, “The European Union as a global environmental regulator in the context of ship recycling” in Ioanna Hadjiyianni and Kleoniki Pouikli (eds), *The Regulatory Landscape of Ship Recycling: Justice, Environmental Principles, and the European Union as a Global Leader* (Edward Elgar Publishing 2024).

<sup>43</sup> For a general overview of the principle of sincere cooperation in EU law, Marcus Klamert, “Loyalty and Solidarity as General Principles” in Katja S Ziegler, Päivi J Neuvonen and Violetta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022); Federico

sufficient information to assess the hazards posed by the waste, export country authorities allow their environmentally sound management and avoid the risks of dispersing toxic substances in the environment against EU objectives.<sup>44</sup>

At this point, it is not yet known whether the Higher Regional Court of Munich (Oberlandesgericht München) will uphold the ruling of the Regional Court of Munich (Landgericht München I) insofar as it concerns compensating Conti for the costs incurred from following the notification and consent procedure. In the meantime, the MSC Flaminia is chartering again as the “CMA CGM San Francisco,” currently sailing under the flag of Liberia.<sup>45</sup>

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Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi* (Editoriale Scientifica 2020).

<sup>44</sup> It should be noted that the Environmentally Sound Management (ESM) of hazardous waste implies a number of legal obligations both for the exporting and the importing country authorities, for a more detailed assessment see Rosemary Rayfuse, “Principles of international environmental law applicable to waste management” in Katharina K Peiry et al., *Waste Management and the Green Economy* (Edward Elgar Publishing 2016).

<sup>45</sup> Case C-188/23 *Land Niedersachsen v Conti* 11, para. 33.

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