JUDGMENT OF THE COURT (Second Chamber)
4 July 2019 (*)

(Reference for a preliminary ruling — Environment — Waste — Shipments — Regulation (EC) No 1013/2006 — Article 2(1) — Directive 2008/98/EC — Article 3(1) — Concepts of 'shipment of waste' and 'waste' — Consignment of goods initially intended for retail sale, returned by consumers or become redundant in the seller's product range)

In Case C-624/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands), made by decision of 22 September 2017, received at the Court on 6 November 2017, in the criminal proceedings against

Tronex BV,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, T. von Danwitz and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 December 2018,

after considering the observations submitted on behalf of

Tronex BV, by R.G.J. Laan, advocaat,

the Openbaar Ministerie, by W.J.V. Spek and L. Boogert, acting as Agents,

the Netherlands Government, by M.K. Bulterman, A.M. de Ree and C.S. Schillemans, acting as Agents,

the Austrian Government, by G. Hesse, acting as Agent,

the Norwegian Government, by C. Anker and I. Meinich, acting as Agents,

the European Commission, by E. Manhaeve and F. Thiran and by E. Sanfrutos Cano, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2019,

gives the following

Judgment

This request for a preliminary ruling concerns the interpretation of Article 2(1) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1), read in conjunction with Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

The request has been made in criminal proceedings against Tronex BV, which is charged with having shipped a consignment of waste from the Netherlands to Tanzania in breach of Regulation No 1013/2006.

Legal context

EU law

Article 1 of Regulation No 1013/2006 provides:

'1. This Regulation establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination.

2. This Regulation shall apply to shipments of waste:

...

(c) exported from the Community to third countries;

...'

Under Article 2 of that regulation:

'For the purposes of this Regulation:

"waste" is as defined in Article 1(1)(a) of Directive 2006/12/EC [of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9)];

...

35. "illegal shipment" means any shipment of waste effected:

without notification to all competent authorities concerned pursuant to this Regulation; or

without the consent of the competent authorities concerned pursuant to this Regulation; ...

...'

Article 3(1) of that regulation is worded as follows:

'Shipments of the following wastes shall be subject to the procedure of prior written notification and consent as laid down in the provisions of this Title:

(a) if destined for disposal operations:

stes;

...'

Directive 2006/12 defines, in Article 1(1)(a) thereof, the concept of 'waste'. By virtue of the first paragraph of Article 41 of Directive 2008/98, that directive was repealed and replaced with Directive 2006/12 with effect from 12 December 2010. In accordance with the third paragraph of Article 41 of Directive 2008/98, read in conjunction with Annex V thereto, the references to Article 1(1)(a) of Directive 2006/12 should be construed as now making reference to the definition of the concept of 'waste' in Article 3(1) of Directive 2008/98.

Article 3 of Directive 2008/98 provides:

'For the purposes of this Directive, the following definitions shall apply:

"waste" means any substance or object which the holder discards or intends or is required to discard;

…'

Netherlands law

Pursuant to Article 10.60(2) of the Wet houdende regelen met betrekking tot een aantal algemene onderwerpen op het gebied van de milieuhygiëne (Wet Milieubeheer) (Law regulating a number of general matters in the area of environmental health (Law on environmental management)) of 13 June 1979 (*Staatsblad* 1979, No 442), it is prohibited from engaging in acts such as those referred to in Article 2(35) of Regulation No 1013/2006.

The breach of that prohibition constitutes, by virtue of Article 1a(1) of the Wet houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten (Law laying down rules for the investigation, prosecution and judgment of economic offences) of 22 June 1950 (*Staatsblad* 1950, No 258), an economic offence, made punishable by Article 6 of that law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

The referring court, the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands), is hearing an appeal by Tronex, a wholesaler of residual consignments of electronic goods, against a judgment of the rechtbank Rotterdam (District Court, Rotterdam, Netherlands). At first instance, Tronex was ordered to pay a conditional fine for the alleged shipment of waste in breach of the provisions of Regulation No 1013/2006. On 10 February 2014, it was found that that company was intending to ship a consignment of electrical or electronic appliances ('the consignment at issue') to a third party, established in Tanzania. The consignment at issue, purchased for an amount of EUR 2 396.01, consisted of electric kettles, steam irons, fans and shavers. The appliances were mainly packed in their original boxes, but some were unpacked. The consignment comprised, on the one hand, appliances returned by consumers under the relevant product guarantee and, on the other hand, articles which, for example, had left the product range following a change in that range. Some appliances were defective. The shipment took place without the notification or consent referred to in Regulation No 1013/2006.

Before the referring court, the Openbaar Ministerie (public prosecution service, Netherlands) argues that the appliances making up the consignment at issue were no longer suitable for sale to consumers under normal conditions, leading Tronex's suppliers to 'discard' them. In its view, therefore, they are 'waste' within the meaning of Article 3(1) of Directive 2008/98. The fact that those appliances still had a residual value and that Tronex actually paid a sum for them was irrelevant in that regard. Therefore, the shipment of that consignment of 'waste' to a third party established in Tanzania had to comply with the requirements under Regulation No 1013/2006.

Tronex challenges the classification as 'waste' that the public prosecution service intends to confer on the appliances making up the consignment at issue. That company's suppliers did not 'discard' those devices within the meaning of Article 3(1) of Directive 2008/98, but sold them to it as regular market products with a specific market value.

In those circumstances, the Gerechtshof Den Haag (Court of Appeal, The Hague) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Is a retailer which sends back an object returned by a consumer, or an object in its product range that has become redundant, to its supplier (namely the importer, wholesaler, distributor, producer or anyone else from whom it has obtained the object) pursuant to the agreement between the retailer and its supplier to be regarded as a holder which discards the object, within the meaning of Article 3(1)of [Directive 2008/98]?

Would the answer to Question [1(a)] be different if the object is one which has an easily repairable fault or defect?

Would the answer to Question [1(a)] be different if the object is one which has a fault or defect of such extent or severity that it is, as a result, no longer suitable or usable for its original purpose?

Is a retailer or supplier which sells on an object returned by a consumer, or an object in its product range which has become redundant, to a buyer (of residual consignments) to be regarded as a holder which discards the object, within the meaning of Article 3(1) of [Directive 2008/98]?

Is the answer to Question [2(a)] affected by the amount of the purchase price to be paid by the buyer to the retailer or supplier?

Would the answer to Question [2(a)] be different if the object is one which has an easily repairable fault or defect?

Would the answer to Question [2(a)] be different if the object is one which has a fault or defect of such extent or severity that it is, as a result, no longer suitable or usable for its original purpose?

Is the buyer which sells on to a (foreign) third party a large consignment of goods bought from retailers and suppliers and returned by consumers, and/or goods that have become redundant, to be regarded as a holder which discards a consignment of goods, within the meaning of Article 3(1) of [Directive 2008/98]?

Is the answer to Question [3(a)] affected by the amount of the purchase price to be paid by the third party to the buyer?

Would the answer to Question [3(a)] be different if the consignment of goods also contains some goods which have an easily repairable fault or defect?

Would the answer to Question [3(a)] be different if the consignment of goods also contains some goods which have a fault or defect of such extent or severity that the object in question is no longer, as a result, suitable or usable for its original purpose?

Is the answer to Questions [3(c) or 3(d)] affected by the percentage of the whole consignment of the goods sold on to the third party that is made up of defective goods? If so, what percentage is the tipping point?'

Consideration of the questions referred

By its questions, which it is appropriate to answer together, the referring court asks, in essence, whether the shipment to a third country of a consignment of electrical and electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were sent back by the retailer to its supplier, is to be regarded as a 'shipment of waste' within the meaning of Article 1(1) of Regulation No 1013/2006, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98.

In accordance with Article 1(2)(c) of Regulation No 1013/2006, that regulation applies to shipments of waste exported from the European Union to third countries.

Regarding the concept of 'waste', it should be borne in mind that Article 3(1) of Directive 2008/98 defines it as any substance or object which the holder discards or intends or is required to discard.

In accordance with the Court's settled case-law, the classification of a substance or object as waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 37 and the case-law cited).

As regards the meaning of the term 'discard', it also follows from the Court's settled case-law that that term must be interpreted in the light of the aim of Directive 2008/98, which, in the words of recital 6 thereof, is to minimise the negative effects of the generation and management of waste on human health and the environment, having regard to Article 191(2) TFEU, which provides that EU policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. It follows that the term 'discard', and therefore the concept of 'waste' within the meaning of Article 3(1) of Directive 2008/98, cannot be interpreted restrictively (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 38 and the case-law cited).

It is apparent from the provisions of Directive 2008/98 that the term 'discard' covers both recovery and disposal of a substance or object, within the meaning of Article 3(15) and (19) of that directive (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 39 and the case-law cited).

More specifically, the existence of 'waste', within the meaning of Directive 2008/98, must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 40 and the case-law cited).

Thus, certain circumstances may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard it within the meaning of Article 3(1) of Directive 2008/98 (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 41).

Particular attention must be paid to the fact that the object or substance in question is not or is no longer of any use to its holder, such that that object or substance constitutes a burden which he will seek to discard. If that is indeed the case, there is a risk that the holder will dispose of the object or substance in his possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner. That object or substance, because it falls within the concept of 'waste' within the meaning of Directive 2008/98, is subject to the provisions of that directive, which means that the recovery or disposal of that object or substance must be carried out in such a way that human health is not endangered and without using processes or methods likely to harm the environment (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 42 and the case-law cited).

In that regard, the degree of probability that goods, a substance or a product will be reused without a prior processing operation constitutes a criterion relevant to assessing whether or not they constitute waste within the meaning of Directive 2008/98. If, beyond the mere possibility of reusing the goods, substance or product in question, there is also a financial advantage for the holder in so doing, the likelihood of such reuse is high. In such circumstances, the goods, substance or product in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product (see, to that effect, judgment of 18 December 2007, *Commission* v *Italy*, C-263/05, EU:C:2007:808, paragraph 38 and the case-law cited).

It would not be justified at all to make goods, substances or products which the holder intends to exploit or market on economically advantageous terms in a subsequent recovery process subject to the requirements of Directive 2008/98, which seek to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. However, having regard to the requirement to interpret the concept of 'waste' widely, it is only situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty that are envisaged, which it is for the referring court to ascertain, without the necessity of using any of the waste recovery processes referred to in Annex II to Directive 2008/98 prior to reuse (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 53 and the case-law cited).

It is ultimately for the referring court, which alone has jurisdiction to assess the facts of the case before it, to verify whether the holder of the object or substance in question did in fact intend to 'discard' it, taking into account all the facts of the case, while ensuring compliance with the objective of Directive 2008/98. That being so, it is for the Court of Justice to provide that court with any helpful guidance to resolve the dispute before it (see, to that effect, judgments of 3 October 2013, *Brady*, C-113/12, EU:C:2013:627, paragraph 47, and of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 48).

In the present case, it is necessary to examine whether the constituent electrical appliances of the consignment at issue were to be regarded as 'waste' at the time they were discovered by the Netherlands customs authorities.

In that regard, if it is the case that Tronex acquired appliances that had, at an earlier stage, already become waste and did not dispose of or recover them, it should be regarded as having carried out a shipment of waste in breach

of the relevant provisions of Regulation No 1013/2006.

However, regarding the fact, mentioned by the referring court, that the constituent electrical appliances of the consignment at issue were no longer fit for the purpose for which they were originally intended by their holders — the retailers, wholesalers and importers of that type of appliance in new condition — it is important to note that that fact may be an indication that the consignment at issue is a burden which its suppliers will seek to 'discard'.

As regards the fact that those appliances had a residual value and that Tronex paid a certain amount in respect of them, in accordance with the Court's settled case-law, the concept of 'waste' must not be understood as excluding substances and objects which have a commercial value and which are capable of economic reutilisation (judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 50 and the case-law cited).

The referring court's doubts relate in particular to the fact that, while those appliances were, for the most part, in their original packaging, some were unpacked. The consignment at issue comprised, on the one hand, electrical appliances returned by consumers under the product guarantee and, on the other hand, articles in the product range of the retailer, wholesaler or importer which had become redundant following, for example, a change in that range. Moreover, some appliances were defective.

In that regard, the mere fact that the seller and the buyer have categorised the sale as being that of a consignment and that that consignment contains appliances which must be regarded as waste does not mean that all the appliances contained in that consignment constitute waste.

First, as regards the redundant articles in the product range of the retailer, wholesaler or importer that were still in their unopened original packaging, it may be considered that those are new products that were presumably in working condition. Such electrical equipment can be considered to be market products amenable to normal trade and which, in principle, do not represent a burden for their holder, in accordance with the case-law cited in paragraph 22 of the present judgment.

The file before the Court does not contain any material indicating that their holder was intending to 'discard' those appliances, within the meaning of Article 3(1) of Directive 2008/98. It is nevertheless for the referring court to verify that there is nothing that raises doubts as to the good working condition of those articles.

Second, as regards the electrical appliances returned under the product guarantee, it should be stated that goods that have undergone a return transaction carried out in accordance with a contractual term and in return for the reimbursement of the purchase price cannot be regarded as having been discarded. Where a consumer effects such a return of non-compliant goods with a view to obtaining a reimbursement of them under the guarantee associated with the sale contract of those goods, that consumer cannot be regarded as having wished to carry out a disposal or recovery operation of goods he had been intending to 'discard' within the meaning of Article 3(1) of Directive 2008/98. Moreover, it is appropriate to add that, in circumstances such as those in the main proceedings, the risk that the consumer will discard those goods in a way likely to harm the environment is low (see, to that effect, judgment of 12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 46).

However, such a return operation under the product guarantee does not enable it to be determined whether, in such a context, it is certain that the electrical appliances concerned will be reused, as is required by the case-law cited in paragraph 24 of the present judgment. It will therefore be necessary to verify, for the purposes of determining the risk of the holder discarding them in a way likely to harm the environment, whether the electrical appliances returned under the product guarantee, where they show defects, can still be sold without being repaired to be used for their original purpose and whether it is certain that they will be reused.

If, however, such an appliance suffers defects that require repair, such that it cannot be used for its original purpose, that appliance constitutes a burden for its holder and must thus be regarded as waste, in so far as there is no certainty that the holder will actually have it repaired. As the European Commission noted in its written observations, the existence of doubts as to whether goods will still be able to be sold so as to be used for their original purpose is determinant as regards its classification as 'waste'.

Thus, the cost of the repair necessary in order for the goods concerned to be used again for their original purpose is of little consequence, since, first, the mere fact that they are not in working order makes them a burden for their holder and, second, as is apparent from the preceding paragraph, it is not certain that they will be used for that purpose in the future.

Therefore, it must be held that a defect that makes the goods in question no longer usable for their original purpose is such as to demonstrate that the reuse of such a product is not certain.

It should be noted in that regard that the way in which a holder treats a fault or defect may provide an indication as to whether there is an act, intention or obligation to discard the goods concerned. Thus, when he sells or transfers those goods to a third party without first having ascertained their working condition, it must be held that those goods represent for the holder a burden which he discards, with the result that those goods must be classified as 'waste' within the meaning of Directive 2008/98.

In order to prove that malfunctioning appliances do not constitute waste, it is therefore for the holder of the products in question to demonstrate not only that they can be reused, but that their reuse is certain, and to ensure that the prior inspections or repairs necessary to that end have been done.

Furthermore, it is for the holder, who intends to ship appliances such as those at issue in the main proceedings to a third party, to ensure that their working order is safeguarded from transport damage by means of adequate packaging. Without such packaging, it must be presumed, in so far as the holder accepts the risk of those appliances being damaged during transport, that he intends to discard them.

As the Advocate General stated in point 42 of her Opinion, such a duty of inspection and, where applicable, a duty of repair and of packaging is a measure proportionate to the objective of Directive 2008/98.

In view of the foregoing considerations, the answer to the questions asked is that the shipment to a third country of a consignment of electrical and electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were

sent back by the retailer to its supplier, is to be regarded as a 'shipment of waste' within the meaning of Article 1(1) of Regulation No 1013/2006, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98, where that consignment contains appliances the good working condition of which has not been previously ascertained or which are not adequately protected from transport damage. Such goods which have become redundant in the seller's product range and which are in their unopened original packaging, on the other hand, must not, without indications to the contrary, be regarded as waste.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

The shipment to a third country of a consignment of electrical and electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were sent back by the retailer to its supplier, is to be regarded as a 'shipment of waste' within the meaning of Article 1(1) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, where that consignment contains appliances the good working condition of which has not been previously ascertained or which are not adequately protected from transport damage. Such goods which have become redundant in the seller's product range and which are in their unopened original packaging, on the other hand, must not, without indications to the contrary, be regarded as waste.

[Signatures]

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* Language of the case: Dutch.