



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 28 February 2019¹

Case C-624/17

Openbaar Ministerie
v
Tronex BV

(Request for a preliminary ruling
from the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands))

(Request for a preliminary ruling — Environment — Directive 2008/98 — Waste — Concept —
Electrical appliances returned by consumers — Residual stock — Directive 2012/19 — Waste electrical
and electronic equipment — Shipment of used electrical and electronic equipment — Criminal law —
Requirement of precision)

I. Introduction

1. In this request for a preliminary ruling, the Court is faced once again with questions on the interpretation of the concept of waste in the Waste Directive.² It falls to be clarified now whether consumer returns of electrical appliances some of which are no longer usable because defective and residual stock are to be regarded as waste that may be exported only in accordance with the Waste Shipment Regulation.³

2. It is common ground that the concept of waste is not to be interpreted restrictively and that account must be taken of all the circumstances of each particular case. The present case, however, is not confined to such an individual assessment but also raises the question of the significance to be attached to the guidance provided by the EU legislature in the Waste Electrical and Electronic Equipment Directive,⁴ which was not yet applicable at the material time. It further befalls us to consider how the concept of waste is to be applied in criminal law.

¹ Original language: German.

² 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).

³ 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), as amended by Commission Regulation (EU) No 255/2013 of 20 March 2013 (OJ 2013 L 79, p. 19).

⁴ Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (OJ 2012 L 197, p. 38).

II. Legal framework

A. Charter of Fundamental Rights of the European Union

3. The principle of legality is laid down in Article 49(1) of the Charter:

‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. ...’

B. The Waste Shipment Regulation

4. Under Article 2(1) of the Waste Shipment Regulation, ‘waste’ is as defined in Article 1(1)(a) of the 2006 consolidated Waste Directive,⁵ which has since been replaced by the current Waste Directive.

5. Article 2(35)(a) of the Waste Shipment Regulation defines an ‘illegal shipment’ as, inter alia, any shipment of waste effected without notification to all competent authorities concerned pursuant to that regulation.

6. Article 50(1) of the Waste Shipment Regulation concerns penalties for infringements:

‘Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. ...’

C. The Waste Directive

7. Under Article 3(1) of the Waste Directive, which, pursuant to Article 41 and Annex V thereto, corresponds to Article 1(1)(a) of the 2006 consolidated Waste Directive, “waste” means any substance or object which the holder discards or intends or is required to discard’.

D. The Waste Electrical and Electronic Equipment Directive

8. The Waste Electrical and Electronic Equipment Directive was adopted on 4 July 2012 and was to be transposed by 14 February 2014. Accordingly, the Netherlands legislation transposing that directive, the *Regeling van de Staatssecretaris van Infrastructuur en Milieu, van 3 februari 2014, nr. IENM/BSK-2014/14758, houdende vaststelling regels met betrekking tot afgedankte elektrische en elektronische apparatuur* (Regulation of the State Secretary for infrastructure and environment of 3 February 2014, No IENM/BSK-2014/14758 establishing rules for waste electrical and electronic equipment), entered into force on 14 February 2014.

9. Article 3(1)(e) of the Waste Electrical and Electronic Equipment Directive defines such equipment as follows:

‘electrical or electronic equipment which is waste within the meaning of Article 3(1) of [the Waste] Directive ...’.

⁵ Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

10. Article 23 of the Waste Electrical and Electronic Equipment Directive governs inspections and monitoring. Paragraph 2 concerns the shipment of equipment:

‘Member States shall ensure that shipments of used EEE suspected to be WEEE are carried out in accordance with the minimum requirements in Annex VI and shall monitor such shipments accordingly.’

11. Annex VI to the Waste Electrical and Electronic Equipment Directive contains minimum requirements for shipments. Point 1 governs documentation requirements:

‘In order to distinguish between EEE and WEEE, where the holder of the object claims that he intends to ship or is shipping used EEE and not WEEE, Member States shall require the holder to have available the following to substantiate this claim:

- (a) a copy of the invoice and contract relating to the sale and/or transfer of ownership of the EEE which states that the equipment is destined for direct re-use and that it is fully functional;
- (b) evidence of evaluation or testing in the form of a copy of the records (certificate of testing, proof of functionality) on every item within the consignment and a protocol containing all record information according to point 3;
- (c) a declaration made by the holder who arranges the transport of the EEE that none of the material or equipment within the consignment is waste as defined by Article 3(1) of [the Waste] Directive ...; and
- (d) appropriate protection against damage during transportation, loading and unloading in particular through sufficient packaging and appropriate stacking of the load.’

12. Annex VI(5) of the Waste Electrical and Electronic Equipment Directive governs the consequences of an infringement of those provisions:

‘In the absence of proof that an object is used EEE and not WEEE through the appropriate documentation required in points 1, 2, 3 and 4 and of appropriate protection against damage during transportation, loading and unloading in particular through sufficient packaging and appropriate stacking of the load, which are the obligations of the holder who arranges the transport, Member State authorities shall consider that an item is WEEE and presume that the load comprises an illegal shipment. ...’

E. Netherlands criminal law

13. It follows from the request for a preliminary ruling that Article 10.60(2) of the Wet van 13 juni 1979, houdende regelen met betrekking tot een aantal algemene onderwerpen op het gebied van de milieuhygiëne (Wet Milieubeheer) (Law of 13 June 1979 regulating a number of general matters in the area of environmental health (Law on Environmental Management)) lays down a prohibition on the performance of operations as defined in Article 2(35) of the Waste Shipment Regulation. In accordance with Article 1(a)(1) of the Wet van 22 juni 1950, houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten (Law of 22 June 1950 laying down rules for the investigation, prosecution and trial of economic offences), any failure to observe that prohibition constitutes an economic offence punishable under Article 6 of that law.

III. Facts and the request for a preliminary ruling

14. Tronex BV operates a wholesale residual stock business. On 10 February 2014, it was found to be planning to ship a consignment of electrical equipment, or to have it shipped, in a container to a third party in Tanzania to which it had sold the consignment for a total amount of EUR 2 396.01. Tronex had bought up the goods from retailers, wholesalers and/or importers. The consignment of goods consisted of electric kettles, steam irons, fans and shavers. Most of the appliances were in their original packaging, although some of the appliances in the consignment were unpackaged. The consignment consisted of appliances which had been returned by consumers under a product guarantee, on the one hand, and goods which, because of a change to the product range, for example, were or could no longer be sold (normally), on the other. A number of the boxes in which the appliances were packaged carried a notice stating their defects. The glass in some of the glass kettles was damaged. The shipment was to take place without notification or consent in accordance with the Waste Shipment Regulation.

15. At first instance, the Rechtbank Rotterdam (District Court, Rotterdam, Netherlands) sentenced Tronex to a fine of EUR 5 000, suspended for two years, on the ground that it was about to ship waste from the Netherlands to Tanzania without having notified all of the competent authorities, as required by the regulation, and/or without having obtained their consent.

16. Tronex has brought an appeal against that judgment. It disputes the proposition that the appliances constituted waste.

17. The Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) has therefore referred the following questions to the Court:

‘Question 1

- (1.1) 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 the [Waste] Directive?
- (1.2) Would the answer to question 1.1 be different if the object is one which has an easily repairable fault or defect?
- (1.3) Would the answer to question 1.1 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?

Question 2

- (2.1) 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 the [Waste] Directive?
- (2.2) Is the answer to question 2.1 affected by the amount of the purchase price to be paid by the buyer to the retailer or supplier?
- (2.3) Would the answer to question 2.1 be different if the object is one which has an easily repairable fault or defect?

- (2.4) Would the answer to question 2.1 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?

Question 3

- (3.1) 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 the [Waste] Directive?
- (3.2) Is the answer to question 3.1 affected by the amount of the purchase price to be paid by the third party to the buyer?
- (3.3) Would the answer to question 3.1 be different if the consignment of goods also contains some goods which have an easily repairable fault or defect?
- (3.4) Would the answer to question 3.1 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?
- (3.5) Is the answer to questions 3.3 or 3.4 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?

18. Written observations have been submitted by Tronex B. V., the Openbaar Ministerie, Ressortsparket vestiging Den Haag (Public Prosecution Service, The Hague Office, Netherlands), the Kingdom of the Netherlands, the Republic of Austria, the Kingdom of Norway and the European Commission. Tronex, the Netherlands and the Commission participated in the hearing which took place on 12 December 2018.

IV. Legal assessment

19. The national court asks whether the electrical appliances at issue were to be regarded as waste when the consumer returned them to the retailer (first question), when they were sold to Tronex (second question) or at the point when they were detected during inspection (third question). In reality, however, the court must decide only whether the appliances were to be regarded as waste at the last-mentioned point in time. This is because the issue to be decided in the main proceedings is whether Tronex can be penalised for having prepared an illegal shipment of waste. It is nonetheless appropriate to look at all three questions together in order to arrive at an answer.

20. To that end, I shall first examine the concept of waste in the Waste Directive, then look at the Waste Electrical and Electronic Equipment Directive, which will confirm the result of my interpretation of the Waste Directive, and, finally, address the difficulties associated with applying the concept of waste in criminal law given the requirement that provisions of criminal law must be precise.

A. *The concept of waste in the Waste Directive*

21. With regard to the concept of ‘waste’, Article 2(1) of the Waste Shipment Regulation refers to the definition of that term in Article 1(1)(a) of the 2006 consolidated Waste Framework Directive. This has since been replaced by the new Waste Framework Directive. In accordance with Article 41 in conjunction with Annex V to the new Waste Framework Directive, the reference in Article 2(1) of the Waste Shipment Regulation is now to be regarded as a reference to Article 3(1) of the new Waste Framework Directive.

22. ‘Waste’ thus means any substance or object which the holder discards or intends or is required to discard.

23. It must therefore be clarified whether a buyer which sells on to a (foreign) third party a large consignment of goods bought from retailers or suppliers which have been returned by consumers and/or goods that have become redundant is to be regarded as a holder that discards a consignment of goods within the meaning of Article 3(1) of the Waste Directive.

24. It is true that, since the Waste Directive does not prescribe any criteria for determining when waste is discarded, the Member States are in principle free, in the absence of Community provisions, to choose the modes of proving the presence of the various elements constituting that act. Those rules of evidence must not, however, undermine the effectiveness of EU law, in particular the Waste Directive.⁶

25. Consequently, when applying any rules of evidence in the context of examining whether certain objects or substances are waste, national courts must take account of the criteria which the Court of Justice has developed in that context.

26. So far as concerns the term ‘discard’, it follows from case-law that this must be interpreted with due regard for the aim pursued by the Waste Directive, which, in accordance with recital 6 thereof, is to minimise the negative effects of the generation and management of waste on human health and the environment, and in the light of Article 191(2) TFEU, which provides that European Union 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 thus the concept of ‘waste’ within the meaning of Article 3(1)(a) of the Waste Directive, cannot be interpreted restrictively.⁷

27. First, particular attention must be paid to whether the object or substance in question is not or is no longer of any use to its holder and therefore constitutes a burden which the holder will seek to discard.⁸ If that is the case, there is a risk that the holder will dispose of the object or substance in his possession in a way capable of causing harm to the environment, in particular by surrendering possession of it, dumping it or disposing of it in an uncontrolled manner.⁹

28. This cannot be assumed to be the case here, since Tronex sold the electrical appliances and thus hoped to make some financial gain from their supply.

⁶ Judgments of 15 June 2000, *ARCO Chemie Nederland and Others* (C-418/97 and C-419/97, EU:C:2000:318, paragraphs 41 and 70); of 18 December 2007, *Commission v Italy* (C-194/05, EU:C:2007:806, paragraph 44); and of 3 October 2013, *Brady* (C-113/12, EU:C:2013:627, paragraph 61).

⁷ Judgments of 15 June 2000, *ARCO Chemie Nederland and Others* (C-418/97 and C-419/97, EU:C:2000:318, paragraphs 38 to 40); of 24 June 2008, *Commune de Mesquer* (C-188/07, EU:C:2008:359, paragraphs 38 and 39); and of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 38).

⁸ Judgments of 18 April 2002, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* (C-9/00, EU:C:2002:232, paragraph 37), and of 24 June 2008, *Commune de Mesquer* (C-188/07, EU:C:2008:359, paragraph 56).

⁹ Judgment of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 42).

29. However, the Court has also already held that a substance or object of which its holder disposes may constitute waste within the meaning of the Waste Directive even when it is capable of economic reutilisation,¹⁰ in particular if it is collected on a commercial basis for recycling, reclamation or reuse.¹¹

30. Tronex's aim is not to recycle the electrical appliances or reclamation, although their reuse appears to have been the purpose of exporting them.

31. Nevertheless, a distinction must be drawn between collected objects which the previous holder has discarded and those which the previous holder has not discarded. The mere fact that objects have been collected for the purpose of reuse does not in itself necessarily support the assumption that they have been discarded. Indeed, it seems sensible, both economically and from the point of view of the efficient use of resources, to make appliances which can no longer be sold on the market for which they were originally intended available on other markets where they may still sell.

32. Particularly in the case of residual stock which is still in its unopened original packaging, therefore, the request for a preliminary contains insufficient evidence to support the conclusion that there has been any discarding.

33. Returned appliances which, on account of serious defects, are no longer usable and can no longer be repaired at reasonable cost, on the other hand, must unquestionably be regarded as waste.

34. Conversely, Tronex's objection that a certain percentage of new goods too are unusable on account of defects cannot succeed. New goods must, as a rule, be assumed to be functional.¹²

35. In the case of appliances which have been returned by consumers, such a presumption is unjustified, however. Rather, the return of goods carries with it the risk that the consumer received a defective product or damaged the product himself before returning it. For the time being, therefore, it is doubtful that returned goods can be sold for functional use.

36. Those doubts do not for that matter indicate in and of themselves that the product is to be regarded as waste already at the stage when it is in the consumer's possession. After all, returning an item against a refund of the purchase price is not the same as discarding it. It is not to be regarded as disposal or recovery and there is no expectation that the consumer will discard the product in a way that is harmful to the environment.¹³

37. As soon as the returned goods are back in the retailer's possession, however, the position changes significantly, inasmuch as the future fate of those goods is shaped by doubts as to whether they can be sold for functional use.

38. It would not be justified to make goods, substances or products which the holder wishes to use or market on economically advantageous terms whether or not there is to be a subsequent recovery process also subject to the provisions of the Waste Directive, 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

10 Judgments of 28 March 1990, *Vessoso and Zanetti* (C-206/88 and C-207/88, EU:C:1990:145, paragraph 8); of 18 April 2002, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* (C-9/00, EU:C:2002:232, paragraph 29); and of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 50).

11 Judgment of 25 June 1997, *Tombesi and Others* (C-304/94, C-330/94, C-342/94 and C-224/95, EU:C:1997:314, paragraph 52).

12 See, to that effect, judgment of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 47).

13 Judgment of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 46).

to interpret the concept of waste widely, that reasoning should be confined to situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty, without the necessity of using any of the waste recovery processes referred to in the Waste Directive prior to reuse.¹⁴

39. On account of the abovementioned doubts, that certainty is lacking to begin with in the case of returned appliances. In so far as those doubts cannot be promptly dispelled by an inspection of the appliances, the latter must therefore be regarded as waste.

40. If the inspection shows that the item is still capable of functional use, its status as waste is precluded. The same is true of goods with minor defects which limit functionality only negligibly, meaning that these goods can still be sold without repair, in some cases at a reduced price.

41. In so far as the inspection identifies defects which need to be repaired before the product is capable of functional use, however, that product constitutes waste, since there is no certainty that the retailer will actually carry out the repair. Whether the repair is less or more expensive cannot be decisive in this regard, since a product that does not work constitutes a burden and its intended use is in doubt.

42. To impose such a duty of inspection and, where applicable, a duty of repair on the retailer is appropriate, necessary and reasonable, and thus generally proportionate, since it is the retailer who decides on the future fate of returned goods.¹⁵ On similar grounds, undertakings which produce by-products, such as leftover rock from mining, residual sand from ore dressing¹⁶ or slurry in agriculture,¹⁷ must demonstrate that such by-products do not constitute production waste.

43. Finally, with specific regard to shipment of the appliances at issue, the request for a preliminary ruling contains a further indication that, in making the shipment, Tronex would have discarded at least some of the appliances. For, according to the request for a preliminary ruling, some of the appliances were not packaged. It is therefore unlikely that they would have survived transportation without damage.

44. As an interim conclusion, it must be found that the shipment of a large consignment of electrical appliances bought from retailers or suppliers which have been returned by consumers is to be regarded as a shipment of waste within the meaning of the Waste Shipment Regulation, if it has not previously been established that the returned appliances are functional or the appliances are not appropriately protected against damage during transportation. Appliances which have become redundant and which are in unopened original packaging, on the other hand, are not, in the absence of any further evidence, to be regarded as waste.

B. The Waste Electrical and Electronic Equipment Directive

45. The foregoing interpretation of the concept of ‘discarding’ is also consistent with the Waste Electrical and Electronic Equipment Directive, although this was not yet applicable to the inspection carried out at Tronex on 10 February 2014. This is because the Netherlands, acting within the prescribed time limit, transposed that directive with effect only from 14 February 2014.

¹⁴ Judgments of 18 April 2002, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* (C-9/00, EU:C:2002:232, paragraph 36); of 24 June 2008, *Commune de Mesquer* (C-188/07, EU:C:2008:359, paragraph 44); and of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 53).

¹⁵ See, to that effect, judgment of 3 October 2013, *Brady* (C-113/12, EU:C:2013:627, paragraph 64).

¹⁶ Judgment of 11 September 2003, *AvestaPolarit Chrome* (C-114/01, EU:C:2003:448, paragraph 39).

¹⁷ Judgment of 3 October 2013, *Brady* (C-113/12, EU:C:2013:627, paragraph 65).

46. Point 1 of Annex VI to the Waste Electrical and Electronic Equipment Directive contains requirements which are intended to enable a distinction to be drawn between used equipment and waste equipment in cases where the holder of the object claims that he intends to ship or is shipping used electrical equipment rather than waste electrical equipment.

47. That distinction is relevant to the concept of waste, since, according to the definition given in Article 3(1)(e) of the Waste Electrical and Electronic Equipment Directive, waste electrical equipment is equipment which is to be regarded as waste within the meaning of the Waste Directive. Point 5 of Annex VI thus provides that a shipment of electrical equipment which does not satisfy the requirements set out in that annex is to be regarded as an illegal shipment of waste within the meaning of the Waste Shipment Regulation.

48. To this extent, Annex VI to the Waste Electrical and Electronic Equipment Directive supports the inference of two fundamental requirements that must be satisfied in order for a shipment of used electrical equipment not to be regarded as a shipment of waste. First, it must be ensured that all equipment is functional, as point 1(b) and point 3 in particular show, and, secondly, the equipment must be appropriately protected against damage during transportation, as is clear from point 1(d) and point 5. Point 2 permits limitations on functionality only in the case of shipments made specifically for the purposes of repair.

49. The abovementioned provisions of the Waste Electrical and Electronic Equipment Directive thus codify the interpretation, set out above, of the concept of waste in relation to electrical appliances which have been returned or are not protected adequately against damage during transportation.

C. Application of the foregoing interpretation of the concept of waste in the context of criminal penalties

50. Account must also be taken, however, of the fact that, in the present case, the concept of waste forms the basis of a criminal penalty provided for in Netherlands national law. On the one hand, this is required first of all by EU law, inasmuch as Article 50 of the Waste Shipment Regulation provides that effective penalties must be laid down for infringements of that regulation. So far as concerns other infringements of waste law which are also dependent on the concept of waste, Article 36(2) of the Waste Directive contains a comparable obligation.

51. It is reasonable to question, however, whether the concept of waste is defined with sufficient precision to justify a criminal penalty in the main proceedings. In accordance with the first sentence of Article 49(1) of the Charter of Fundamental Rights, after all, much importance is attached, both in the EU legal order and in national legal systems, to the requirements which the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) imposes with respect to foreseeability and precision.¹⁸

52. The requirement that the applicable law must be precise, which is inherent in that principle, means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable.¹⁹

¹⁸ Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 51).

¹⁹ Judgments of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraph 50); of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 162); and of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 56); as well as ECtHR, judgments of 15 November 1996, *Cantoni v. France* (17862/91, CE:ECHR:1996:1115JUD001786291, § 29); of 22 June 2000, *Coëme and Others v. Belgium* (32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, CE:ECHR:2000:0622JUD003249296, § 145); of 7 February 2002, *E.K. v. Turkey* (28496/95, CE:ECHR:2002:0207JUD002849695, § 51); and of 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia* (14902/04, CE:ECHR:2011:0920JUD001490204, § 567).

53. As regards the concept of waste, it is true that individuals are in a position to know that the question as to whether an object has been discarded must be determined by reference to all the circumstances of the individual case and that the concept of ‘discarding’ must be interpreted broadly. Moreover, there are many situations which have either already been the subject themselves of case-law or are at least similar enough to situations covered by case-law to enable individuals to come to a clear decision on that basis.

54. So far as concerns the circumstances of the present case, however, there is as yet no directly relevant case-law available. In particular, the Court has not as yet interpreted the concept of waste from the point of view of the shipment of defective or inadequately packaged equipment.

55. That said, it will be apparent to any informed legal practitioner that appliances which, on account of serious defects, are no longer usable and can no longer be repaired at reasonable cost, must be regarded as waste. The same is true of goods which are dispatched without adequate protection against damage during transportation.

56. What was not hitherto readily apparent, however (at least not until the Waste Electrical and Electronic Equipment Directive was fully transposed), was whether returned goods are to be regarded as waste solely because their functionality has not been checked or because repairs to restore their functionality have not yet been carried out.

57. It is not necessary (or possible), on the basis of the information available, to determine whether documents such as the ‘Correspondents’ Guidelines’,²⁰ mentioned by the Commission and Tronex, are capable of altering that position. The Court, after all, does not have before it any information as to whether, at the material time, that is to say on 10 February 2014, such documents already existed or should have been known to an undertaking such as Tronex.

58. I therefore propose that, for the purposes of establishing criminal liability, the Court limit the temporal effect of the interpretation of the concept of waste proposed by me, that is to say in relation to returned goods whose functionality has not been checked or which require repairs to restore their functionality which have not yet been carried out. To this extent, the foregoing interpretation of the concept of waste is to be applied in the case of criminal penalties for infringements only if the infringements have occurred after the full transposition of Annex VI to the Waste Electrical and Electronic Equipment Directive or, at the latest, after the Court’s judgment in the present case.

V. Conclusion

59. I therefore propose that the Court rule as follows:

The shipment of a large consignment of electrical appliances bought from retailers or suppliers which have been returned by consumers must be regarded as a shipment of waste within the meaning of Regulation (EC) No 1013/2006 on shipments of waste, as amended by Regulation (EU) No 255/2013, if it has not been previously established that all the appliances are functional or not all the appliances are appropriately protected against damage during transportation. Appliances which have become redundant and which are in unopened original packaging, on the other hand, are not, in the absence of any further evidence, to be regarded as waste.

²⁰ <http://ec.europa.eu/environment/waste/shipments/guidance.htm>, visited on 31 January 2019.

So far as concerns returned goods whose functionality has not been checked or which require repairs to restore their functionality which have not yet been carried out, the foregoing interpretation of the concept of waste is to be applied in the case of criminal penalties for infringements only if they have occurred after the full transposition of Annex VI to Directive 2012/19/EU on waste electrical and electronic equipment or, at the latest, after the Court's judgment in the present case.