Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 24 January 2019[1]

Case C-689/17

Conti 11. Container Schiffahrts-GmbH & Co. KG Ms 'MSC Flaminia'
v
Land Niedersachsen

(Request for a preliminary ruling from the Landgericht München I (Regional Court, Munich I, Germany))

(Reference for a preliminary ruling — Environment — Basel Convention — Regulation (EC) No 1013/2006 — Shipment of waste — Residues from damage to a ship on the high seas — Article 1(3)(b) — Exclusion from the regulation's scope — Waste generated on board ships)

1. Although the Court has not previously had occasion to interpret Article 1 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste,[2] this case and *ReFood* (C-634/17)[3] give it the opportunity to provide important clarifications regarding the scope of that legislation.

2. In the present case, following damage to a ship on the high seas,[4] the Court is asked by the Landgericht München I (Regional Court, Munich I, Germany) to determine whether residues from that damage, in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues on board a ship, fall within the scope of Article 1(3)(b) of Regulation No 1013/2006, which excludes from the scope of that regulation 'waste generated on board vehicles, trains, aeroplanes and ships, until such waste is offloaded in order to be recovered or disposed of'.

3. The issue of the interpretation of Article 1 of Regulation No 1013/2006 is not only new but also delicate. It cannot be denied that waste management and shipment are currently very sensitive issues particularly as regards environmental protection matters concerning waste.

4. The difficulties raised by this reference for a preliminary ruling are heightened by the fact that the damage occurred on the high seas, the preservation of which is crucial for environmental protection and, in particular, the protection and conservation of marine flora and fauna.

1 Original language: French.

2 OJ 2006 L 190, p. 1.

3 See my Opinion also delivered today.

4 Within the meaning of Article 86 of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, which came into force on 16 November 1994 and was approved, on behalf of the Community, by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1; 'UNCLOS'). According to that article, the high seas extend to all parts of the sea other than territorial sea, the exclusive economic zone, internal waters and archipelagic waters.

5. In this Opinion, I shall argue, principally, that, in the light of the wording of Article 1(3)(b) of Regulation No 1013/2006, and of the scheme and purpose of that regulation, residues such as those at issue in the main proceedings constitute 'waste generated on board … ships' within the meaning of that provision and that that regulation is therefore not applicable to those residues.

6. Since the Court has been asked during the proceedings to rule on the applicability of Article 1(3)(b) of Regulation No 1013/2006 where the ship and the waste have reached a port in a Member State of the European Union, I shall propose in the alternative that the Court decline to answer that question, which was not referred by the national court, or that it reply in the negative in order to respect the very clear wording of that provision.

I. Legal framework

A. International law

7. Article 1 of the Convention on the control of transboundary movements of hazardous wastes and their disposal, signed in Basel on 22 March 1989 and approved, on behalf of the Community, by Council Decision 93/98/EEC of 1 February 1993,[5] defines the scope of that convention. To that end, it provides in paragraphs 1 and 4:

'1. The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention:

(a) wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and

(b) wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

…

4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention.'

8. Article 2(3) of the Basel Convention states:

'For the purposes of this Convention:

…

(3) "transboundary movement" means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement'.

9. Article 4(1) and (2)(d) of the Basel Convention provides:

'1. (a) Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other Parties of their decision pursuant to Article 13.;

5 OJ 1993 L 39, p. 1; 'the Basel Convention'.

(b) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above.;

(c) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.

2. Each Party shall take the appropriate measures to:

…

(d) ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement'.

B. EU law

10. Recitals 1, 3, 7, 8, 9, 14 and 31 of Regulation No 1013/2006 state:

'(1) The main and predominant objective and component of this Regulation is the protection of the environment, its effects on international trade being only incidental.

…

(3) ... By adopting Regulation (EEC) No 259/93, [6] the Council has established rules to curtail and to control such movements designed, inter alia, to make the existing Community system for the supervision and control of waste movements comply with the requirements of the Basel Convention.

…

(7) It is important to organise and regulate the supervision and control of shipments of waste in a way which takes account of the need to preserve, protect and improve the quality of the environment and human health and which promotes a more uniform application of the Regulation throughout the Community.

(8) It is also important to bear in mind the requirement laid down in Article 4(2)(d) of the Basel Convention that shipments of hazardous waste are to be reduced to a minimum consistent with environmentally sound and efficient management of such waste.

(9) Furthermore, it is important to bear in mind the right of each Party to the Basel Convention, pursuant to Article 4(1) thereof, to prohibit the import of hazardous waste or of waste listed in Annex II to that Convention.

…

6 Council Regulation of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1).

(14) In the case of shipments of waste destined for disposal operations and waste not listed in Annex III, IIIA or IIIB destined for recovery operations, it is appropriate to ensure optimum supervision and control by requiring prior written consent to such shipments. Such a procedure should in turn entail prior notification, which enables the competent authorities to be duly informed so that they can take all necessary measures for the protection of human health and the environment. It should also enable those authorities to raise reasoned objections to such a shipment.

…

(31) This Regulation should be applied in accordance with international maritime law.'

11. Article 1(1) and (3)(a) and (b) 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.

…

3. The following shall be excluded from the scope of this Regulation:

(a) the offloading to shore of waste, including waste water and residues, generated by the normal operation of ships and offshore platforms, provided that such waste is subject to the requirements of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Marpol 73/78), [7] or other binding international instruments;

(b) waste generated on board vehicles, trains, aeroplanes and ships, until such waste is offloaded in order to be recovered or disposed of'.

12. Article 2(1) and (2) of that regulation defines 'waste' and 'hazardous waste' as follows for the purposes of the regulation:

'(1) "waste" is as defined in Article 1(1)(a) of Directive 2006/12/EC; [8]

(2) "hazardous waste" is as defined in Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste'. [9]

13. Under Article 2(33) of that regulation, 'transport' means 'the carriage of waste by road, rail, air, sea or inland waterways'.

14. Article 2(34) of Regulation No 1013/2006 defines 'shipment', for the purposes of the regulation, as the transport of waste destined for disposal or recovery which is planned or takes place, inter alia, between a country and another country or from a geographic area not under the jurisdiction of any country to a country.

7 Signed in London on 2 November 1973 and supplemented by the Protocol of 17 February 1978; 'the Marpol Convention'.

8 Directive of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9). That article defines 'waste' as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

9 OJ 1991 L 377, p. 20. The list of hazardous waste is in Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC and establishing a list of hazardous waste pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 2000 L 226, p. 3).

15. According to Article 3(1) of Regulation No 1013/2006, shipments of waste destined for disposal operations and waste destined for recovery operations, in the latter case where, in particular, wastes on the amber list are involved,[10] are subject to the procedure of prior written notification and consent as laid down by that regulation. Under Article 3(2) of the regulation, the general information requirements laid down in Article 18 of the regulation are applicable if the shipment involves an amount exceeding 20 kg of mixtures of certain wastes or of certain contaminated wastes.

II. Facts of the main proceedings and the question referred for a preliminary ruling

16. The vessel *MSC Flaminia* is a container ship which, during the relevant period, sailed under the German flag and belongs to Conti 11. Container Schiffahrts-GmbH & Co. KG Ms 'MSC Flaminia',[11] the applicant in the main proceedings.

17. While that container ship, loaded with 4 808 containers, including 151 'hazardous substance' containers, was on a voyage from Charleston (United States) to Antwerp (Belgium), a fire which was accompanied by explosions broke out on board on 14 July 2012.

18. On 21 August 2012, Conti was authorised to tow the container ship into German waters. According to the letter of 25 August 2012 from the Havariekommando (Central Command for Maritime Emergencies, Germany), Conti was required to draw up an action plan and to specify any contractor undertaking measures under that plan.

19. On 8 September 2012, the vessel reached the standby position to which it was directed by the Central Command for Maritime Emergencies at the deep water roads west of Heligoland (Germany) and on 9 September 2012 it was towed to Wilhelmshaven (Germany). Following discussions with the German authorities, Conti undertook to ensure safe transfer of the *MSC Flaminia* to the ship-repair yard in Mangalia (Romania) and appropriate treatment of the substances on board.

20. By letter of 30 November 2012, the Niedersächsisches Umweltministerium (the Ministry of the Environment of the *Land* of Lower Saxony) informed Conti that the ship itself 'and the water on board used to extinguish the fire as well as the sludge and scrap metal are to be classified as waste' and that a notification procedure was therefore necessary. By letter of 3 December 2012, Conti challenged that assessment.

21. By decision of 4 December 2012, the Gewerbeaufsichtsamt Oldenburg (Trade and Industry Inspectorate, Oldenburg, Germany) required Conti to carry out a notification procedure on account of the presence on board of scrap metal and of fire-extinguishing water mixed with sludge and cargo residues. In addition, Conti was prohibited from moving the ship from its location before completion of the notification procedure and submission of a verifiable waste disposal plan in German.

22. On 18 February 2013, when the notification procedure for the shipment of the extinguishing water to Denmark had been completed, the pumping of the extinguishing water began. Once it was possible to estimate the amount of extinguishing water which could not be pumped out, the further notification procedure was initiated with Romania on 26 February 2013.

10 List based on the rules of the Organisation for Economic Cooperation and Development (OECD) and the Basel Convention. The classification of wastes into two lists, green and amber, depends on the hazardousness of the wastes and the procedures applicable to their shipment. On the classification and its implications, see Sadeleer, N., *Droit des déchets de l'UE, De l'élimination à l'économie circulaire*, Bruylant, Brussels, 2016, pp. 360, 364 and 378 to 382.

11 'Conti'.

23. On 4 January 2013, Conti lodged an administrative appeal against the decision of 4 December 2012. In order to avoid delays, Conti submitted to the notification procedure under protest and without acknowledging that it was thereby fulfilling a legal requirement. By letter of 3 April 2013, the Trade and Industry Inspectorate, Oldenburg, declared that the administrative appeal had become devoid of purpose.

24. The heads of damage claimed by Conti before the national court include the costs of the notification procedures which it had to bear. In that regard, Conti considers that the assessment of the substances within the ship as 'waste' and the resulting order to carry out a notification procedure were unlawful.

25. The referring court points out that, in so far as the costs of carrying out the notification procedure are claimed by Conti as damages, a right to compensation presupposes that Regulation No 1013/2006 was not applicable in the present case to residues from damage at sea and that those costs were incurred only because the Trade and Industry Inspectorate, Oldenburg, required that procedure to be carried out.

26. The referring court wonders whether Article 1(3)(b) of that regulation is applicable to residues from maritime damage, in which case the shipment of the residues at issue in the main proceedings is excluded from the scope of the regulation. According to that court, it is not apparent from the wording of Article 1(3)(b) of Regulation No 1013/2006, from the preparatory documents, from the recitals or from the scheme of that regulation that waste/residues from damage to a ship at sea are to fall within that provision.

27. In those circumstances, the Landgericht München I (Regional Court, Munich I) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are residues from damage to a ship at sea in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues on board the ship "waste generated on board vehicles, trains, aeroplanes and ships" for the purposes of Article 1(3)(b) of Regulation No 1013/2006?'

III. Analysis

28. By its question, the referring court asks the Court whether Article 1(3)(b) of Regulation No 1013/2006 is applicable to the waste in question, namely residues due to damage to a ship at sea, in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues.

29. It is apparent that that question relates to the applicability *ratione materiae* of the exclusion laid down in Article 1(3)(b) of Regulation No 1013/2006 to waste such as that at issue in the main proceedings.

30. I also note that the referring court clearly and expressly stated in the order for reference that 'the question … as to whether Article 1(3)(b) of Regulation No 1013/2006 continues to apply *ratione temporis* even where the vessel has found safe harbour and already unloaded a part of the waste has not been referred to the [Court]'. Therefore, it cannot be denied that, by this reference for a preliminary ruling, the referring court is only asking the Court about the applicability *ratione materiae* of Article 1(3)(b) of Regulation No 1013/2006 in the context of the assessment of the applicability of the regulation between the place in which the damage occurred and Germany.

31. The Commission, in its pleadings and at the hearing, invited, and even urged, the Court to rule also on the applicability of that provision to subsequent shipments of waste.

32. In that regard, it is certainly true that, since the shipment of the waste in question was divided into several stages, the question of the interpretation of Article 1(3)(b) of Regulation No 1013/2006 may arise in that respect too.[12] I consider, however, for reasons which I shall explain more fully in points 75 to 77 of this Opinion, that it is not for the Court to reply to a question which has not been referred to it and which the referring court has expressly excluded from the scope of the reference.

33. Therefore, first and principally, I shall answer the question as formulated by the referring court while respecting the boundaries of the reference as outlined by that court. Secondly, but only in the alternative, I shall examine the issues raised by shipments of waste following the arrival of the *MSC Flaminia* in Germany. Thus, in addition to considering the question raised by the referring court, I shall determine whether Article 1(3)(b) of Regulation No 1013/2006 is applicable to the subsequent shipments of the waste at issue in the main proceedings.

A. Principal issue

34. With regard to the question as asked by the referring court within the framework which it has itself established, the answer is, in my view, obvious.

35. At the outset, I note that the classification as waste of the residues to be disposed of which were on board the *MSC Flaminia* was not discussed before the Court[13] and, furthermore, seems not actually open to discussion. Under Article 2(1) of Regulation No 1013/2006, objects which meet the definition in Article 1(1)(a) of Directive 2006/12[14] are to be regarded as waste for the purposes of that regulation. As the Commission has rightly pointed out, the residues at issue are destined for disposal or recovery.

36. As regards the applicability of Article 1(3)(b) of Regulation No 1013/2006, it is necessary, for the purpose of replying to the referring court, to recall the rules governing the interpretation of EU law.

37. According to the settled case-law of the Court, it is necessary, in interpreting a provision of EU law, to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part.[15] Moreover, since Article 1(3)(b) of Regulation No 1013/2006 provides for a derogation from the application of the provisions of that regulation, it must, in principle, be interpreted strictly.

38. Although Land Niedersachsen (the *Land* of Lower Saxony, Germany) and the Commission have argued that the wording of Article 1(3)(b) of Regulation No 1013/2006 is not on its own sufficient to enable a reply to be given to the referring court, I consider, on the contrary, that that wording is not confusing.

39. Indeed, it should be noted that the EU legislature merely laid down an exclusion from the scope of Regulation No 1013/2006 in respect of 'waste generated on board … ships until such waste is offloaded in order to be recovered or disposed of'.

12 Thus, it is apparent from the file submitted to the Court that the waste generated by the damage was first shipped from the location of the damage to Germany. Then, part of the fire-extinguishing water was pumped out and shipped to Denmark, and it is quite clear from the order for reference that that shipment was not carried out on board the *MSC Flaminia*. Finally, on 15 March 2013, the vessel left for Romania where it was to be repaired and the waste still on board was to be dealt with.

13 Although it is not possible to determine to what extent the applicant in the main proceedings argued before the German authorities and courts that the objects were not to be classified as 'waste', it has to be noted that it confined itself, before the Court, to commenting on the meaning and applicability of Article 1(3)(b) of Regulation No 1013/2006 in the present case, apparently assuming that the residues at issue were to be classified as 'waste'.

14 Directive 2006/12 has been repealed and replaced by 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). Under Article 3(1) thereof, waste is 'any substance or object which the holder discards or intends or is required to discard'; the new directive has therefore hardly altered the definition and simply deleted the reference to Annex I (see footnote 8 of this Opinion).

15 See judgment of 17 October 2018, *Günter Hartmann Tabakvertrieb* (C-425/17, EU:C:2018:830, paragraph 18 and the case-law cited).

40. The meaning of the various terms is, in my view, unambiguous.

41. The term 'waste' must be understood by reference to the definition of that concept in EU legislation concerning waste management policy. Thus, that term used in Article 1(3)(b) of Regulation No 1013/2006 necessarily includes all types of waste provided that they are destined for disposal or recovery.

42. As for the fact that the residues at issue in the present case were generated in connection with damage to a ship at sea, I note that all the EU legislature requires for the exclusion to apply is that the waste has been 'generated on board [a] ship'. In the present case, it is not disputed that, since the damage and the fires occurred on board the *MSC Flaminia*, those residues were generated on board the vessel.

43. Moreover, since the referring court seems to doubt whether the expression 'waste generated on board' includes waste generated by chance or outside the normal operation of a ship, the parties to the main proceedings and the Commission have discussed the importance, for the purpose of interpreting Article 1(3)(b) of Regulation No 1013/2006, of the fact that the waste at issue was not generated during the 'normal' operation of the vessel, but 'by chance' during damage at sea.

44. In that regard, the *Land* of Lower Saxony has argued, in particular, that the generation of waste during maritime damage is an event so unusual that it should be specifically mentioned in order to justify an exception to the applicability of Regulation No 1013/2006.

45. That argument does not convince me.

46. The terms used in the Spanish, Danish, German, English, French and Swedish versions of Article 1(3)(b) of Regulation No 1013/2006, namely the terms 'generados', 'opstået', 'anfallen', 'generated', 'produits', and 'uppkommit', respectively, do not support that argument. None of those terms implies that the waste must have been generated in connection with the normal operation of vessels. On the contrary, the term 'opstået' used in the Danish version includes a nuance that suggests that the waste has not been generated normally but unpredictably.

47. Moreover, the EU legislature merely indicated the place where the waste must have been generated without laying down specific requirements as to the circumstances in which it must have been generated. Therefore, the usual meaning of the words 'waste generated on board' cannot be understood as a requirement that the waste must result from the normal operation of the vessel.

48. That is all the more true because it cannot be argued that the EU legislature did not envisage the case of waste generated outside the regular operation of vessels, it having made such provision in Article 1(3)(a) of Regulation No 1013/2006.

49. The fact pointed out by the Commission that, in the present case, there was no waste at the beginning of the voyage is not, in my view, significant. The expression 'generated on board' implies that the waste was generated during the voyage. I would point out, moreover, that the term 'shipment' defined in Article 2(34) of Regulation No 1013/2006 does not require the waste to have been on board the vessel before the beginning of the voyage and means, therefore, that unanticipated shipments and waste generated accidentally are also covered.

50. It follows that, since the EU legislature made no distinction based on the nature of the waste or the circumstances in which it was generated, it is to be inferred from the wording of Article 1(3)(b) of Regulation No 1013/2006 that that provision applies to waste due to damage to a ship at sea in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues.

51. That interpretation is supported by the preparatory documents and the scheme and objective of Regulation No 1013/2006.

52. First, although the analysis of the preparatory documents for that regulation is not, in itself, crucial to the interpretation of Article 1(3)(b) thereof, it is nevertheless not irrelevant in that regard.

53. Although Article 1(3)(b) of the Commission proposal which led to the adoption of Regulation No 1013/2006[16] provided that 'shipments of waste generated on board civil aeroplanes whilst airborne, for the duration of the flight and until landing',[17] were excluded from the scope of the regulation, the Parliament proposed at second reading to extend that exclusion to waste generated on board vehicles, trains and vessels, on the ground that 'the derogation for waste generated on board aeroplanes must be extended to all the types of transport, otherwise the provisions of the regulation would be disproportionate with regard to waste generated on board vehicles other than aeroplanes'.[18]

54. Neither the Commission's original proposal nor the amendments proposed by the Parliament, nor the explanations relating to those proposals, indicate any intention of the EU legislature to exclude certain waste from the scope of Article 1(3)(b) of Regulation No 1013/2006 and to limit that provision to waste generated in the context of the normal operation of the means of transport concerned.

55. Admittedly, as the *Land* of Lower Saxony has maintained, the exclusion concerning civil aviation as set out in Regulation No 259/93 was liable to apply above all to waste generated on board aeroplanes and during flights. I note, however, that the EU legislature did not specify the nature of the waste concerned, or indeed the circumstances in which it should be generated.

56. Furthermore, I note that the scope of the exclusion has been significantly extended in that it no longer covers only civil aviation, but waste generated on board various means of transport, including aircraft. It therefore seems to me that, in deciding to extend the scope of the exclusion laid down in Article 1(3)(b) of Regulation No 1013/2006 to other means of transport, the EU legislature necessarily included waste which may be specifically generated in each of those means of transport. Consequently the fact, pointed out by the referring court, that, since damage is rare in the context of air transport, it is not covered by that regulation cannot alter the interpretation of Article 1(3)(b) of Regulation No 1013/2006 resulting from the wording of that provision.

57. Secondly, the systemic interpretation of Article 1(3)(b) of Regulation No 1013/2006 supports the interpretation resulting from the wording of that provision.

58. I consider, as does Conti, that it is apparent from a comparison of the exclusions in Article 1(3)(a) and (b) of Regulation No 1013/2006 that, in the case of the second exclusion, the EU legislature did not wish to introduce any restriction concerning the manner in which the waste has been generated.

59. In addition, I agree with the Commission's analysis that, since Article 1(3)(a) of Regulation No 1013/2006 is intended to avoid an overlap between the legislation on waste shipments and Directive 2000/59/EC,[19] that exclusion is irrelevant to the interpretation requested by the referring court.

16 Proposal for a Regulation of the European Parliament and of the Council on Shipments of Waste (COM(2003) 379 final).

17 I note that that provision reiterated in essence the exclusion in Article 1(2)(b) of Regulation No 259/93.

18 Recommendation for second reading of 10 October 2005 on the Council common position for adopting a regulation of the European Parliament and of the Council on shipments of waste (15311/4/2004 — C6-0223/2005 — 2003/0139(COD)).

19 Directive of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues (OJ 2000 L 332, p. 81).

60. The scope of Article 1(3)(a) of Regulation No 1013/2006 is defined in the light of the Marpol Convention. Directive 2000/59, which is applicable to waste generated by the normal operation of vessels,[20] covered by that convention, requires Member States to provide and use port reception facilities for ship-generated waste. Thus, the wording of Article 1(3)(a) of Regulation No 1013/2006 ensures that waste resulting from the normal operation of a vessel within the meaning of the Marpol Convention is governed exclusively by Directive 2000/59.

61. Thirdly, when the objectives of Regulation No 1013/2006, and in particular the objective of environmental protection,[21] are taken into account, the interpretation of Article 1(3)(b) of that regulation as resulting from its wording is not altered.

62. In that regard, the arguments put forward by the Commission are, in my view, particularly persuasive.

63. Accordingly, I consider, as does the Commission, that, owing to the sudden and unforeseeable nature of damage, it is in practice very difficult, if not impossible, for the master of a ship to have, before docking in a port, the information necessary for the notification provided for by Regulation No 1013/2006.[22]

64. Moreover, the objective of the exclusion laid down in Article 1(3)(b) of Regulation No 1013/2006 requires that provision to be interpreted in such a way as to limit the period of time for which waste generated during damage at sea remains on board the vessel.

65. It is not unreasonable to expect that the application of that regulation to waste such as that at issue in the main proceedings would have the effect of delaying the entry into the nearest port of the vessel carrying such waste and would de facto increase the risk of the waste remaining at sea. Such a circumstance is, as the Commission has rightly pointed out, contrary to the objective of environmental protection pursued by Regulation No 1013/2006.

66. On the other hand, the risk highlighted by the *Land* of Lower Saxony is, in my view, hypothetical.

67. Relying on the purpose of that regulation and on the principle that exceptions are to be interpreted strictly, the *Land* of Lower Saxony has argued, in particular, that, if the Member State were not aware of that waste, it could not assess the risks that it represents, particularly for the environment. It is therefore necessary to avoid the master of the vessel alone deciding what is to be done with the waste, because that would create a risk that vessels loaded with waste would continue to sail in order to dispose of that waste elsewhere more cheaply or unlawfully.

68. In that regard, I note that the notification procedure laid down in Regulation No 1013/2006 in no way guards against the risk of vessels loaded with waste continuing their journey in order to dispose of it at lower cost or unlawfully. Thus, the application of that procedure does not have the effect of deterring the master of a ship from disposing of the waste unlawfully or of trying to dispose of it at lower cost than the cost within the European Union. On the contrary, it is conceivable that the cost of that procedure may have the effect of encouraging such conduct.

20 In accordance with Article 2(c) of that directive, read in conjunction with the Marpol Convention.

21 See recitals 1 and 7 of Regulation No 1013/2006.

22 Under Article 4 of that regulation, notification is to be effected by means of the forms set out in Annexes IA and IB to the regulation. Those forms require a great deal of information relating inter alia to the waste concerned.

69. Also, in view of the obligations under international law addressed both to the State and to private operators in the maritime domain, sometimes set out in acts of EU law,[23] the risks created by the lack of application of Regulation No 1013/2006[24] must not, in my view, be exaggerated.

70. As regards, first of all, deliberate discharges of waste, the London Convention of 29 December 1972 on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, as amended by the London Protocol of 1996, aims to introduce effective control of the various sources of marine pollution and measures to prevent marine pollution that results from dumping, understood as the deliberate disposal of waste. Under that convention, dumping is, in principle, prohibited but may, by way of exception, be subject to an authorisation. Compliance with the provisions of that convention is the responsibility of the flag State in particular, which is, in any case, responsible for imposing penalties in the event of infringement of the provisions of the convention.[25] In EU law, Directive 2005/35/EC[26] requires the Member States to ensure that discharges of polluting substances from ships into any of the areas to which it refers, including inter alia the high seas, are regarded as infringements if committed with intent, recklessly or by serious negligence, thereby ensuring that such discharges do not remain unpunished.[27]

71. Next, the obligations which international law and, in particular, Article 94 of UNCLOS impose on the flag State also make it possible to contain the risk invoked by the *Land* of Lower Saxony.[28] In addition to the adoption of measures necessary to ensure safety at sea through measures to control and monitor vessels, that provision requires the flag State to open an inquiry into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing serious damage to the marine environment. In EU law, the obligations of the flag State under international law and, in particular, in connection with the International Maritime Organisation, have been rendered more effective by Directive 2009/21/EC,[29] the purpose of which, according to Article 1(1) thereof, is to ensure that Member States effectively and consistently discharge their obligations as flag States and to enhance safety and prevent pollution from ships flying the flag of a Member State.

72. Finally, other rules, such as the International Maritime Dangerous Goods Code or the International Management Code for the Safe Operation of Ships and for Pollution Prevention,[30] also reduce the risks of pollution by imposing rules on shipping companies or the masters of vessels.

23 On that point, see Bissuel, J-L., 'L'Union européenne et l'application des normes adoptées par l'OMI', *Droit international de la mer et droit de l'Union européenne Cohabitation, Confrontation, Coopération*?, éditions Pedone, Paris, 2014, pp. 115 to 141, in particular pp. 121 and 122, and also Langlais, P., *Sécurité maritime et intégration européenne*, Bruylant, Brussels, 2018, pp. 189 to 196.

24 In that regard, it must also be pointed out that the Basel Convention does not apply to the initial leg of the *MSC Flaminia*'s journey. Furthermore, assuming that the waste at issue in the main proceedings is classified as 'hazardous waste', which does not seem incongruous in the light of the file submitted to the Court and the observations of the parties, that convention is not applicable to a shipment of hazardous waste between the high seas and a Member State of the European Union. Under Articles 1 and 2 of that convention, it applies only to movements of waste between areas falling within the national jurisdiction of the States which are parties, whereas, in the present case, the shipment began following the damage on the high seas. Also, according to the documents entitled 'Cooperation between the Basel Convention and the International Maritime Organisation' (UNEP/CHW.11/17) and 'Legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships' (UNEP/CHW.11/INF/22, available only in English) from the 11th meeting of the Conference of the Parties to the Basel Convention, held in Geneva from 28 April to 10 May 2013, Article 1(4) of that convention is intended to exclude waste generated outside a normal operation from the scope of the convention.

25 On that convention, see Vincent, P., *Droit de la mer*, Larcier, Brussels, 2008, pp. 179 to 181, and also Rothwell, D.R., and Stephens, T., *The International Law of the Sea*, 2nd edition, Hart Publishing, Oxford, 2016, pp. 402 to 406.

26 Directive of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11). With a view to attaining the objective pursued by that directive, Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution (OJ 2005 L 255, p. 164) provides for the adoption by the Member States of a certain number of measures relating to criminal law.

27 See Article 4 of that directive.

28 I would add that, in general, Part XII, entitled 'Protection and preservation of the marine environment', of UNCLOS requires the States to preserve and protect the marine environment. In particular, Articles 217, 218 and 220 state the competences and obligations of the flag State, the port State and the coastal State in that regard.

29 Directive of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements (OJ 2009 L 131, p. 132).

30 The requirements of that code apply, furthermore, to all vessels flying the flag of a Member State of the European Union under Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 (OJ 2006 L 64, p. 1). That regulation also requires the Member States to establish and implement a system of effective, proportionate and dissuasive penalties.

73. For all those reasons, I propose that the Court reply, by way of principal answer, to the question from the Landgericht München I (Regional Court, Munich I) that residues due to damage to a ship at sea in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues on board the ship are 'waste generated on board vehicles, trains, aeroplanes and ships' within the meaning of Article 1(3)(b) of Regulation No 1013/2006.

74. In the alternative, I shall consider, in the following section, the interpretation of that provision with regard to the second leg of the voyage of the waste at issue in the main proceedings.

B. Issue in the alternative

75. As regards, first, the shipment to Denmark of the fire-extinguishing water pumped out and, secondly, the shipment to Romania of waste not unloaded in Germany, I note that the referring court excluded that part of the problem raised by the facts in the main proceedings from the scope of the reference for a preliminary ruling.

76. It is admittedly apparent from settled case-law that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it, by extracting from the statement of grounds in the order for reference the elements of EU law which, having regard to the subject matter of the dispute, require interpretation and, if necessary, reformulating the questions referred to it.[31]

77. However, in view of the subject matter of the dispute in the main proceedings, it is questionable whether, in the present case, it would be really useful to the referring court for the Court to interpret Article 1(3)(b) of Regulation No 1013/2006 in order to determine whether that provision applies to the shipments of waste in question after the vessel left the German port. It appears from the description of that dispute that Conti is seeking compensation before the German courts for various losses, including the harm resulting from the notification procedure imposed by the German authorities. However, with regard to the journey between Germany and Romania, the question of whether a notification procedure is applicable concerns only the Romanian authorities.

78. If the Court were to consider that it must nevertheless interpret Article 1(3)(b) of Regulation No 1013/2006 in the context of the shipment of the waste from the German port to Denmark and Romania in order to determine the applicability of that instrument to those subsequent shipments, I would point out that the wording of that provision is very clear.

79. Thus, the exclusion laid down in Article 1(3)(b) of Regulation No 1013/2006 applies 'until such waste is offloaded in order to be recovered or disposed of'. Given the meaning of the word 'offload',[32] that provision necessarily presupposes that the waste has left the vessel and been put ashore in order to be recovered or disposed of.[33]

31 See, inter alia, judgments of 13 February 2014, *Crono Service and Others* (C-419/12 and C-420/12, EU:C:2014:81, paragraph 28 and the case-law cited), and of 21 December 2016, *Ucar and Kilic* (C-508/15 and C-509/15, EU:C:2016:986, paragraph 51).

32 According to the *Petit Robert* dictionary, the verb 'débarquer' (which in the French version corresponds to the term 'offload') means 'to ensure (people, things) leave a ship, to put them ashore'. I note that other language versions of Article 1(3)(b) of Regulation No 1013/2006 confirm that analysis, since the terms used there are still more specific. Thus, the terms 'descargado', 'losses', 'Abladens', 'offloaded' and 'lastas' employed in the Spanish, Danish, German, English and Swedish language versions convey the idea that the waste constituting the vessel's load has been removed from it.

33 I also note that the referring court seems to have the same interpretation of those terms, since it stated that 'according to its unambiguous wording, the derogation is applicable "until such waste is offloaded", that is to say, precisely not until the unloading of waste of any kind or until such time as it is possible to unload waste'.

80. Consequently, the interpretation advocated by the Commission, according to which the term 'offloaded' should be interpreted as meaning 'until the first home port' on the ground that Regulation No 1013/2006 must be interpreted in accordance with the Basel Convention cannot be followed.

81. Admittedly, it follows from settled case-law that the primacy of international agreements concluded by the European Union over instruments of secondary law requires that the latter be interpreted in a manner that is consistent with those agreements;[34] however, such a consistent interpretation is required only 'as far as possible'.

82. In the present case, it is not, in my view, possible to interpret Article 1(3)(b) of Regulation No 1013/2006 in such a way as to reconcile the wording of that provision with the Basel Convention.

83. Indeed, it is apparent from Article 1 and Article 2(3) of that convention that it applies when waste is transported from an area under the national jurisdiction of a State party thereto to an area under the national jurisdiction of another State party thereto, which is, in the present instance, the case of the shipment from Germany to Denmark[35] and Romania.

84. However, it follows from the interpretation of Article 1(3)(b) of Regulation No 1013/2006, in accordance with its wording, that the regulation is not applicable to the shipment of the waste which remained on board the *MSC Flaminia*, since this was offloaded only when it reached Romania.[36]

85. Therefore, to interpret Article 1(3)(b) of Regulation No 1013/2006 in accordance with the Basel Convention would radically alter the meaning of that provision, go against the wording chosen by the EU legislature[37] and pose a real problem of legal certainty.[38]

86. Moreover, by stating, in its written observations, that 'to equate entry into a port with "offloading" appears hardly reconcilable with that unambiguous wording', it seems to me that the Commission acknowledges that an interpretation in accordance with the Basel Convention is not possible.

87. For all those reasons, the issue of the compatibility of Article 1(3)(b) of Regulation 1013/2006 with the provisions of the Basel Convention may arise.

88. However, I am not inviting the Court to review of its own motion the validity of Article 1(3)(b) of Regulation 1013/2006 in the light of the Basel Convention.

89. First, I note that, if the question of the validity of a provision of EU law is clearly or implicitly apparent from the order for reference, then the Member States and interested parties may decide to submit observations not only so that that question may be discussed between the parties,[39] but also so that the author of the EU act may be party to the proceedings and may submit observations in that regard.[40] However, the present reference for a preliminary ruling concerns only the interpretation of

34 See, inter alia, judgment of 18 March 2014, 2014, *Z.* (C-363/12, EU:C:2014:159, paragraph 72 and the case-law cited).

35 The fire-extinguishing water shipped to Denmark was pumped out and therefore offloaded from the vessel.

36 I would point out that, in paragraph 44 of its observations, the Commission itself recognised that that waste 'certainly cannot be regarded as "offloaded", in the normal meaning of the term, before the beginning of that second voyage'.

37 Thus, as Conti rightly pointed out at the hearing, the EU legislature uses the term ' offload' and not 'next port' and that is a major difference in the application of the exclusion.

38 In my view, a parallel should be drawn here with the obligation on national courts to interpret domestic law consistently with EU law, an obligation which 'is limited by general principles of law and cannot serve as the basis for an interpretation of a national law *contra legem*' (see, inter alia, judgment of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 44)).

39 Naômé, C., *Le renvoi préjudiciel en droit européen — Guide pratique*, 2nd edition, Larcier, Brussels, 2010, p. 272.

40 As occurred in the case which gave rise to the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), since the Commission, the author of the act, participated in the proceedings. In that regard, I note the duty of the Court to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind that under that provision only the orders for reference are notified to the interested parties (see judgment of 14 April 2011, *Vlaamse Dierenartsenvereniging and Janssens*, C-42/10, C-45/10 and C-57/10, EU:C:2011:253, paragraph 44 and the case-law cited).

the exclusion laid down in Article 1(3)(b) of Regulation No 1013/2006 and the question of the validity of that provision does not arise either clearly or implicitly from the order for reference, so it has not been discussed between the parties [41] and neither the Parliament nor the Council, which are however the authors of that regulation, has participated in the proceedings before the Court.

90. Secondly, the validity of that provision is relevant only with regard to the shipment of the waste between Germany and Romania. However, as I have noted in point 77 of this Opinion, Conti is seeking compensation for damage arising from the cost of the notification procedure imposed by the German authorities. Therefore, in addition to the fact that Conti has no interest in the Court finding that Article 1(3)(b) of Regulation No 1013/2006 is invalid and that a notification procedure is required for the waste shipped to Romania, such a finding would be of no use in connection with the dispute in the main proceedings. [42]

91. In those circumstances, it seems to me to be incompatible with the Court's role under Article 267 TFEU for it to rule of its own motion on that provision.

92. I am also of the opinion that, in view of its nature and scheme and the fact that individuals do not, in principle, enjoy independent rights and freedoms under the Basel Convention, the provisions of that convention cannot serve as a basis for a review of the validity of Article 1(3)(b) of Regulation No 1013/2006. [43]

93. Therefore, since the waste shipped on board the *MSC Flaminia* from Germany to Romania was not offloaded, the exclusion laid down in Article 1(3)(b) of Regulation No 1013/2006 continues to apply so that that regulation is not applicable to that shipment.

IV. Conclusion

94. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Landgericht München I (Regional Court, Munich I, Germany) as follows:

Article 1(3)(b) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste is to be interpreted as meaning that residues due to damage to a ship at sea in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues on board the ship are 'waste generated on board vehicles, trains, aeroplanes and ships' within the meaning of that provision.

41 At the hearing that question was raised very briefly but the parties did not exchange arguments in that regard.

42 According to the case-law, in order for the Court to assess of its own motion the validity of a provision of EU law, that must be useful to the referring court. Thus, as Caroline Naômé points out, the Court so acts when the question relates from a formal point of view to the interpretation of a provision of EU law but it becomes apparent that the referring court is in fact asking about the validity of that provision (see Naômé, C., op. cit., p. 272).

43 See the circumstances in which the provisions of an international agreement to which the European Union is party can be relied on in support of an action for annulment of an act of secondary EU legislation or of a plea based on the illegality of such an act, as recalled in the judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 54 and the case-law cited).