Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 December 2012 [1]

Case C-358/11

Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri -vastuualue

(Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

(Directive 2008/98/EC — Hazardous waste — Ceasing to be waste — Regulation (EC) No 1907/2006 — Registration, evaluation, authorisation and restriction of chemicals (REACH) — Substance subject to a restriction under Annex XVII to the REACH Regulation — Use of old telephone poles which were treated with a copper, chromium and arsenic solution)

I – Introduction

1. In the wilderness of Europe's far north, decommissioned telephone poles were used to repair a track. A dispute arose because the poles had originally been treated with wood preservatives that contained arsenic. The question has now arisen of whether using the poles in that way is compatible with the new Waste Directive [2] and the REACH Regulation. [3]

2. The first issue is whether the poles, which may have become waste when they were dismantled, ceased, if that was so, to be waste when they were used for the repair of the track. The new Waste Directive contains rules which for the first time expressly address the question of under what conditions waste is no longer to be regarded as such.

3. Second, the REACH Regulation must be taken into account because it deals with the handling of wood preservatives containing arsenic and of treated wood.

4. The importance of the present action lies in the fact that it entails interpretation of the relevant provisions for the first time, especially so far as the relationship between the Waste Directive and the REACH Regulation is concerned. The regulation does not apply to waste, but it contains the only express European Union rules concerning the handling of wood which has been treated with wood preservatives containing arsenic.

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; 'the Waste Directive' or 'the new Waste Directive').

3 — Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1), as amended by Commission Regulation (EU) No 836/2012 of 18 September 2012 amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards lead (OJ 2012 L 252, p. 4).

II – Legal context

A – *The law on waste*

5. Article 3 of the Waste Directive contains various definitions:

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

1. “waste” means any substance or object which the holder discards or intends or is required to discard;

…

13. “re-use” means any operation by which products or components that are not waste are used again for the same purpose for which they were conceived;

14. …

15. “recovery” means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations;

16. “preparing for re-use” means checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing;

…’

6. Article 6 of the Waste Directive contains provisions concerning ‘end-of-waste status’:

‘1. Certain specified waste shall cease to be waste within the meaning of point (1) of Article 3 when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:

(a) the substance or object is commonly used for specific purposes;

(b) a market or demand exists for such a substance or object;

(c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and

(d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

The criteria shall include limit values for pollutants where necessary and shall take into account any possible adverse environmental effects of the substance or object.

2. The measures designed to amend non-essential elements of this Directive by supplementing it relating to the adoption of the criteria set out in paragraph 1 and specifying the type of waste to which such criteria shall apply shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 39(2). End-of-waste specific criteria should be considered, among others, at least for aggregates, paper, glass, metal, tyres and textiles.

3. …

4. Where criteria have not been set at Community level under the procedure set out in paragraphs 1 and 2, Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case-law. …'

7. The second indent of recital 22 in the preamble to the Waste Directive sets out details concerning the implementation of Article 6:

'[This Directive should clarify] when certain waste ceases to be waste, laying down end-of-waste criteria that provide a high level of environmental protection and an environmental and economic benefit; possible categories of waste for which "end-of-waste" specifications and criteria should be developed are, among others, construction and demolition waste, some ashes and slags, scrap metals, aggregates, tyres, textiles, compost, waste paper and glass. For the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.'

8. The fundamental requirements concerning waste management are set out in Article 13 of the Waste Directive:

'Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment …'

B – *The REACH Regulation*

9. Article 2(2) of the REACH Regulation concerns the relationship with the law on waste:

'Waste as defined in [the Waste Directive] is not a substance, mixture or article within the meaning of Article 3 of this Regulation.'

10. Under Article 67(1) of the REACH Regulation, the manufacture, placing on the market and use of certain substances are subject to special restrictions:

'A substance on its own, in a mixture or in an article, for which Annex XVII contains a restriction shall not be manufactured, placed on the market or used unless it complies with the conditions of that restriction. …'

11. Article 67(3) of the REACH Regulation permits the Member States to deviate temporarily from the restrictions:

'Until 1 June 2013, a Member State may maintain any existing and more stringent restrictions in relation to Annex XVII on the manufacture, placing on the market or use of a substance, provided that those restrictions have been notified according to the Treaty. The Commission shall compile and publish an inventory of these restrictions by 1 June 2009.'

12. Article 68(1) of the REACH Regulation concerns the adoption of restrictions:

'When there is an unacceptable risk to human health or the environment, arising from the manufacture, use or placing on the market of substances, which needs to be addressed on a Community-wide basis, Annex XVII shall be amended … by adopting new restrictions, or amending current restrictions in Annex XVII, for the manufacture, use or placing on the market of substances on their own, in mixtures or in articles …'

13. Article 128 of the REACH Regulation regulates the free movement of the substances, mixtures and articles covered and the powers of the Member States to impose restrictions:

‘1. Subject to paragraph 2, Member States shall not prohibit, restrict or impede the manufacturing, import, placing on the market or use of a substance, on its own, in a mixture or in an article, falling within the scope of this Regulation, which complies with this Regulation and, where appropriate, with Community acts adopted in implementation of this Regulation.

2. Nothing in this Regulation shall prevent Member States from maintaining or laying down national rules to protect workers, human health and the environment applying in cases where this Regulation does not harmonise the requirements on manufacture, placing on the market or use.’

14. In the present case, the restrictions on arsenic compounds under point 19 of Annex XVII are relevant in particular. These were taken over from Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations: [4]

‘Arsenic compounds

…

3. Shall not be used in the preservation of wood. Furthermore, wood so treated shall not be placed on the market.

4. By way of derogation from paragraph 3:

(a) …

(b) Wood treated with CCA solution [CCA stands for copper, chromium, arsenic] in accordance with point (a) may be placed on the market for professional and industrial use provided that the structural integrity of the wood is required for human or livestock safety and skin contact by the general public during its service life is unlikely:

— …

— in bridges and bridgework,

— as constructional timber in freshwater areas and brackish waters, for example jetties and bridges,

— …

(c) …

(d) Treated wood referred to under point (a) shall not be used:

— …

— in any application where there is a risk of repeated skin contact,

— …

4 — Council Directive of 27 July 1976 (OJ 1976 L 262, p. 201).

5. …

6. Wood treated with CCA type C that was in use in the Community before 30 September 2007, or that was placed on the market in accordance with paragraph 4:

— may be used or reused subject to the conditions pertaining to its use listed under points 4(b), (c) and (d),

— …

7. Member States may allow wood treated with other types of CCA solutions that was in use in the Community before 30 September 2007:

— to be used or reused subject to the conditions pertaining to its use listed under points 4(b), (c) and (d),

— …'

III – Facts and the reference for a preliminary ruling

15. The Raittijärvi track runs for approximately 35 kilometres through the Municipality of Enontekiö in Northern Finland. The first section of the track runs for approximately 4.4 kilometres through areas not belonging to the Natura 2000 network. The rest of the track runs through the 'Käsivarren erämaa' area which belongs to the Natura 2000 network and covers a total of 264 892 hectares.

16. In 2008 to 2009, the Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri -vastuualue ('transport and infrastructure section' of the Lapland Centre for Economic Development, Transport and Environmental Responsibility; 'the Roads and Tracks Authority') had repair work carried out on the Raittijärvi track. It agreed to the use of CCA-treated wood as underlay for the track.

17. According to findings of the Finnish Environment Institute, the active ingredients in the treatment solution are chromium, copper and arsenic. Before 1985 the solution used was mainly the B-type. After that date, the C-type solution began to be used.

18. Until 2007 the treated wood had been used as telephone poles. In 2008 and 2009 it was utilised as underlay for duckboards over a distance of approximately 3.9 kilometres of the track. According to the plausible submissions of the Roads and Tracks Authority, that stretch was in marshy areas. However, according to the order for reference, the treated wood was not used by lakes and streams or in their immediate vicinity or in the groundwater zone. The Finnish Environment Institute presumes that active agents probably pass into the environment, albeit slowly, as a result of the construction of the duckboards.

19. By application of 17 October 2008 an environmental organisation, Lapin luonnonsuojelupiiri ry (the Lapland Nature Protection Association; 'the Nature Protection Association'), requested the environmental authority to prohibit the Roads and Tracks Authority from using wood treated with an arsenic compound or any other poisonous substance as material for repairing the Raittijärvi track.

20. The environmental authority rejected the application, but when an action was brought by the Nature Protection Association, the Vaasan hallinto-oikeus (Administrative Court, Vaasa) set aside the environmental authority's decision. The Roads and Tracks Authority lodged an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court of Finland), which has now referred the following questions to the Court for a preliminary ruling:

'(1) Is it possible to deduce directly from the fact that waste is classified as hazardous waste that the use of such a substance or object has overall adverse environmental or human health impacts within the meaning of Article 6(1), first subparagraph, point (d), of the Waste Directive? May hazardous waste also cease to be waste if it fulfils the requirements laid down in Article 6(1) of the Waste Directive?

(2) In interpreting the concept of waste and, in particular, assessing the obligation to dispose of a substance or an object, is it relevant that the re-use of the object which is the subject of the assessment is authorised under certain conditions by Annex XVII as referred to in Article 67 of the REACH Regulation. If that is the case, what weight is to be given to that fact?

(3) Has Article 67 of the REACH Regulation harmonised the requirements concerning the manufacture, placing on the market or use within the meaning of Article 128(2) of that regulation so that the use of the preparations or objects mentioned in Annex XVII cannot be prevented by national rules on environmental protection unless those restrictions have been published in the inventory compiled by the Commission, as provided for in Article 67(3) of the REACH Regulation?

(4) Is the list in point 19(4)(b) of Annex XVII to the REACH Regulation of the uses of CCA-treated wood to be interpreted as meaning that that inventory exhaustively lists all the possible uses?

(5) Can the use of the wood at issue as underlay and duckboards for a wooden causeway be treated in the same way as the uses listed in the inventory referred to in Question 4 above, so that the use in question may be permitted on the basis of point 19(4)(b) of Annex XVII to the REACH Regulation if the other conditions are met?

(6) Which factors are to be taken into account in order to assess whether repeated skin contact within the meaning of point 19(4)(d) of Annex XVII to the REACH Regulation is possible?

(7) Does the word "possible" in the provision mentioned in Question 6 above mean that repeated skin contact is theoretically possible or that repeated skin contact is actually probable to some extent?'

21. In the course of the procedure written observations were submitted by the Roads and Tracks Authority, the Nature Protection Association, the Republic of Austria, the Republic of Finland and the European Commission. No hearing took place.

IV – Legal assessment

A – *The admissibility and scope of the reference for a preliminary ruling*

22. At first sight it may seem doubtful whether, on account of the time factor, the provisions mentioned in the questions from the referring court are applicable. According to the referring court, the works which have given rise to the dispute were carried out in 2008 to 2009 and the application lodged by the Nature Protection Association is dated 17 October 2008. On the other hand, Article 40(1) of the new Waste Directive did not require the directive to be transposed until

12 December 2010. Until then the previous waste directive [5] remained in force under Article 41 of the new directive. Furthermore, according to Article 141(4) of the REACH Regulation, Article 67 thereof and Annex XVII have applied only since 1 June 2009.

23. However, since, in reply to an enquiry from the Court, the referring court stated that it was concerned with the legal situation at the date of its decision, the reply to the reference must be based on the law at that time, in particular the abovementioned version of the REACH Regulation. [6]

24. It should also be noted that the referring court has not yet established whether the telephone poles in question are waste, but it has not put questions on that point to the Court.

25. However, answering Questions 1 and 2 presupposes that the poles are first to be regarded as waste because otherwise the Waste Directive would not be applicable. On the other hand, answering the remaining questions concerning the REACH Regulation presupposes that the poles are not waste because Article 2(2) of the regulation states that it is not applicable to waste. Consequently, in replying to Questions 1 and 2, it is to be presumed first that the poles are waste but, in replying to the other questions, that they are not, or are no longer, waste.

B – *Questions 4 to 7 – Conditions of use*

26. First of all, I should like to consider under what conditions it is permissible under the first sentence of Article 67(1) of, and point 19(4)(b) of Annex XVII to, the REACH Regulation to use CCA-treated wood for constructing duckboards, as addressed in Questions 4, 5, 6 and 7.

27. Under the first sentence of Article 67(1) of, and point 19(3) of Annex XVII to, the REACH Regulation, arsenic compounds are not to be used in the preservation of wood. Furthermore, wood so treated may not be placed on the market.

28. However, there are various exceptions to that prohibition. In the present case, the first indent in each of points 19(6) and 19(7) of Annex XVII to the REACH Regulation could be applicable. Under point 19(6), wood treated with CCA type C that was in use in the Community before 30 September 2007 may be used or re-used subject to the conditions pertaining to its use listed under point 19(4)(b), (c) and (d). Under point 19(7), the Member States may permit the use of wood treated with other types of CCA solutions, subject to the same conditions. According to Finland, [7] permission has been given for CCA type B.

29. According to the reference for a preliminary ruling, until 2007 the wood was used as telephone poles and now, although not re-used in the same form, is being used again. Consequently that use is permissible or may be permitted, subject to compliance with the conditions of point 19(4)(b), (c) and (d) of Annex XVII to the REACH Regulation.

30. Therefore the referring court seeks interpretation of point 19(4)(b) and (d) of Annex XVII.

31. Under point 19(4)(b) of Annex XVII, the treated wood may be placed on the market for professional and industrial use, inter alia in bridges and bridgework (second indent), as constructional timber in freshwater areas (third indent) and in earth-retaining structures (eighth indent), provided that the structural integrity of the wood is required for human or livestock safety and skin contact by the general public during its service life is unlikely.

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).

6 — See footnote 3.

7 — Observations, footnote 15.

32. The question of skin contact is taken up again in the second indent of point 19(4)(d) of Annex XVII, which states that treated wood is not to be used in any application where there is a risk of repeated skin contact.

1. Question 4 – is point 19(4)(b) of Annex XVII to the REACH Regulation exhaustive?

33. Since use as an underlay for duckboards is not expressly referred to, Question 4 is designed to ascertain whether the list of possible uses in point 19(4)(b) of Annex XVII to the REACH Regulation is exhaustive.

34. As Article 68 of the REACH Regulation shows, the general prohibition of the use of arsenic compounds for preserving wood is based on the legislature's opinion that they give rise to unacceptable risks to human health. Consequently the exceptions to the prohibition are not open to broad interpretation. Accordingly all the parties concerned submit correctly that the uses set out in the provision are not given as examples, but constitute an exhaustive list.

35. Therefore the list contained in point 19(4)(b) of Annex XVII to the REACH Regulation of the uses of CCA-treated wood must be interpreted as exhaustively listing all permitted uses.

2. Question 5 – the duckboards as a permitted use

36. This leads to Question 5, namely whether using treated wood as an underlay for duckboards is a use permitted under point 19(4)(b) of Annex XVII to the REACH Regulation. In that connection the reference for a preliminary ruling mentions in particular the permitted use in bridges.

37. If there are doubts as to the interpretation of restrictions under Annex XVII to the REACH Regulation, the legislative history of the restriction in the procedure pursuant to Articles 69 to 73 should normally provide useful guidance. In that procedure the scientific basis of a restriction of that kind is worked out. [8]

38. However, the restrictions of the use of arsenic compounds in point 19 of Annex XVII to the REACH Regulation are not based on that procedure but were taken over from Directive 76/769 [9] when the regulation was originally adopted. The rules now included in point 19(4)(b) of Annex XVII to the REACH Regulation were inserted into that directive by Directive 2003/2/EC. [10] The last-mentioned directive and the opinions to which it refers of the Scientific Committee on Toxicity, Ecotoxicity and the Environment [11] do not however indicate the relevant considerations with regard to permitting the use of treated wood for bridges in particular.

39. In relation to structure and function, the duckboards have much in common with a bridge structure. As the photographs included in the file show, they are often used to bridge over particularly marshy areas where even standing water is discernible. However, at other places they may be more in the nature of a hard-surface path, without a definite bridging function.

8 — As is illustrated by Regulation (EC) No 836/2012, cited in footnote 3.

9 — Cited in footnote 4.

10 — Commission Directive of 6 January 2003 relating to restrictions on the marketing and use of arsenic (tenth adaptation to technical progress to Council Directive 76/769/EEC) (OJ 2003 L 4, p. 9).

11 — 'Opinion on the report by WS Atkins International Ltd (vol. B) "Assessment of the risks to health and to the environment of arsenic in wood preservatives and of the effects of further restrictions on its marketing and use" expressed at the 5th CSTEE plenary meeting, Brussels, 15 September 1998' (http://ec.europa.eu/health/scientific_committees/environmental_risks/opinions/sctee/sct_out18_en.htm), and the 'Position Paper on: Ambient Air Pollution by Arsenic Compounds – Final Version, October 2000. Opinion expressed at the 24th CSTEE plenary meeting, Brussels, 12 June 2001' (http://ec.europa.eu/health/scientific_committees/environmental_risks/opinions/sctee/sct_out106_en.htm).

40. Nevertheless, the decisive factor should be that, in respect of the risks to the environment and the need to use treated wood, the use of wood for duckboards is similar to use for a typical bridge. In both cases the wood is used in damp surroundings so that, on the one hand, there is a particular need for wood preservative while, on the other, there is also the risk that CCA solution will pass into the stretch of water concerned.

41. Consequently, the use in question in the present case of CCA-treated wood for the underlay of duckboards may be regarded as use for 'bridges' within the meaning of the second indent of point 19(4)(b) of Annex XVII to the REACH Regulation.

3. Questions 6 and 7 – Skin contact

42. Questions 6 and 7 concern the interpretation of the prohibition on the use of treated wood in applications where there is a risk of *repeated* skin contact, as laid down under the second indent of point 19(4)(d) of Annex XVII to the REACH Regulation.

43. The fundamental issue here is the meaning of 'risk'.

44. The wording appears to be clear: the risk of repeated contact of the skin with treated wood is unacceptable.

45. However, if that were taken to mean any risk, the permissible uses would be impossible in practice because such a risk can never be completely ruled out.

46. Recital 3 in the preamble to the abovementioned Directive 2003/2 mentions in particular risks to children's health from the use of CCA-treated wood in playground equipment. It might be inferred from that that the risk of repeated skin contact must be of a similar degree. However, recital 8 refers to the precautionary principle, so that it is to be presumed that the legislature was indeed aiming at greater protection.

47. That is supported by a comparison with a condition for use of treated wood under point 19(4)(b) of Annex XVII to the REACH Regulation, according to which skin contact by the general public during its service life must be *unlikely*. That is also the criterion that the Roads and Tracks Authority and Finland would wish to apply.

48. However, the risk of damage on account of skin contact once only is obviously smaller than in the case of repeated contact. Therefore the acceptable residual risk of repeated skin contact must be *smaller* than for skin contact which is only unlikely.

49. Inspiration for the degree of this still permissible, very slight, residual risk may be provided by another formulation of the REACH Regulation, namely likelihood which is negligible under normal or reasonably foreseeable conditions of use,[12] which in effect corresponds to the Commission's approach.

12 — Point 3.2(c)(ii) of Annex XI to the REACH Regulation.

50. The acceptable residual risk is characterised by two factors. First, there must be only a negligible likelihood that the risk will materialise. A degree of probability which is so small is normally acceptable. Secondly, there are the circumstances in which that probability is acceptable, namely, normal or reasonably foreseeable conditions of use. The possibility can admittedly not be ruled out that under other conditions, which would have to be abnormal or not reasonably foreseeable, a higher degree of probability would arise. But that risk would be hypothetical and could not normally justify precautionary measures. [13]

51. Consequently, the reply to be given to Questions 6 and 7 is that the use of wood treated with CCA type C is prohibited under the second indent of point 19(4)(d) of Annex XVII to the REACH Regulation if the likelihood of repeated skin contact is not negligible under normal or reasonably foreseeable conditions of use.

52. In the main proceedings it is necessary to consider how duckboards are used and whether, as a result, the probability of repeated skin contact may be disregarded. It may, depending on the circumstances, be necessary to examine possible changes in use to determine whether they would sufficiently reduce the probability. If it is not possible to achieve that, the second indent of point 19(4)(d) of Annex XVII to the REACH Regulation precludes the use of treated wood in the duckboards.

53. In practical terms, it may well be relevant to know whether the duckboards are used by pedestrians at all or whether there are places adjacent to the duckboards that are used as stopping places by the users of vehicles which are allowed on the track, which appear to be small cross-country vehicles. For safety purposes, consideration could, depending on the circumstances, be given to warning notices or to cutting off or covering the ends of the telephone poles projecting from beneath the roadway to prevent them being stepped on from above.

C – *Question 3 – More stringent national protection measures*

54. The purpose of Question 3 is to establish whether there may be national rules in addition to the requirements considered above of Article 67 of, and point 19 of Annex XVII to, the REACH Regulation. Consequently, to answer that question, it must again be presumed that the treated telephone poles are not waste and that the REACH Regulation is thus applicable.

55. According to Article 1 of the REACH Regulation, the objectives of the regulation are to 'ensure a high level of protection of human health and the environment … as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation'. [14] Free circulation in the internal market is ensured in particular by the fact that, under Article 128(1) of the REACH Regulation, the Member States must not prohibit, restrict or impede the use of a substance, on its own or in an article, falling within the scope of the regulation which complies with the regulation and, where appropriate, with European Union acts adopted in implementation of the regulation.

56. Under Article 128(2) of the REACH Regulation, however, nothing in the regulation is to prevent Member States from maintaining or laying down national rules to protect workers, human health and the environment applying in cases where the regulation does not harmonise the requirements on use.

57. Therefore, the question is whether the use of treated wood for the construction of duckboards was harmonised by Article 67 of, and point 19 of Annex XVII to, the REACH Regulation.

13 — See Case C-236/01 *Monsanto Agricultura Italia and Others* [2003] ECR I-8105, paragraph 106; Case C-95/01 *Greenham and Abel* [2004] ECR I-1333, paragraph 43; Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, paragraph 52; and Case C-333/08 *Commission* v *France* [2010] ECR I-757, paragraph 91. See also the EFTA Court judgment in Case E-3/00 *EFTA Surveillance Authority* v *Norway* [2000-2001] EFTA Ct. Rep. 73, paragraphs 36 to 38.

14 — Case C-558/07 *SPCM and Others* [2009] ECR I-5783, paragraphs 35 and 44.

58. Under the first sentence of Article 67(1) of the REACH Regulation, a substance on its own, or in an article, for which Annex XVII contains a restriction is not to be used unless it complies with the conditions of that restriction.

59. The wording of the restrictions laid down is exhaustive. They state that wood treated with arsenic compounds may be used if the requirements of the listed exceptions to the basic prohibition on its use are fulfilled. Those provisions therefore leave no room for additional requirements under national law for the purpose of Article 128(2) of the REACH Regulation.

60. That conclusion corresponds to the Court's interpretation of Directive 76/769 from which the restrictions on the use of arsenic compounds were taken over. According to that interpretation, a Member State could not impose on the use of a product the active substance of which (here, an arsenic compound) was included in Annex I to the directive any conditions other than those which the directive laid down. [15]

61. It appears from the wording of this question that the referring court proceeds on the assumption that, in the event of harmonisation within the meaning of Article 128(2) of the REACH Regulation, national measures may apply only in accordance with Article 67(3). Whilst that provision allows Member States to retain temporarily any existing and more stringent restrictions until 1 June 2013, the Commission must have been notified of them. However, according to information which it has itself provided, Finland has not given notice of any such measure. [16]

62. More stringent measures of that kind would by nature be technical regulations within the meaning of Directive 98/34 [17] which could impede the free movement of goods. Consequently, in contrast to the case of more stringent provisions for the protection of the environment pursuant to Article 193 TFEU, [18] notification of the Commission is a prerequisite for the application of measures as provided for in Article 67(3) of the REACH Regulation. [19]

63. In addition, the Commission rightly refers to the safeguard clause in Article 129 of the REACH Regulation, which enables Member States to take urgent action under certain conditions, and to Article 114(5) TFEU, under which Member States may apply for more stringent measures based on new scientific evidence. Neither option was used in the present case.

64. Therefore the reply to Question 3 must be that Article 67 of, and Annex XVII to, the REACH Regulation harmonise within the meaning of Article 128(2) of the regulation the requirements concerning the manufacture, placing on the market or use of the mixtures and products listed in that annex, so that more stringent national requirements concerning their use are possible only in accordance with the regulation, for example, in accordance with Article 129, and pursuant to Article 114(5) TFEU.

15 — Joined Cases C-281/03 and C-282/03 *Cindu Chemicals and Others* [2005] ECR I-8069, paragraph 49.

16 — Finland's observations, footnote 14.

17 — Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37).

18 — Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] ECR I-6561, paragraph 53.

19 — With reference to Directive 98/34, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 45 to 54; Case C-303/04 *Lidl Italia* [2005] ECR I-7865, paragraph 23; and Case C-433/05 *Sandström* [2010] ECR I-2885, paragraph 43.

D – *Questions 1 and 2*

65. In replying to Questions 1 and 2 it is to be presumed that the dismantled telephone poles at first became hazardous waste. The first question from the referring court is designed to ascertain whether they may have ceased to be hazardous waste if the requirements of Article 6(1) of the new Waste Directive were fulfilled and, in particular, whether that would also be the case if the poles were to be regarded as hazardous waste because of their treatment with wood preservatives. Question 2 concerns the significance of the provisions of the REACH Regulation concerning the use of treated wood in that connection.

66. As I shall show below, the question whether treated wood ceases to be waste is to be considered currently not by reference to Article 6(1) of the Waste Directive (see 1 below), but only by reference to the first sentence of Article 6(4) (see 2 below). In order nevertheless to provide the referring court with a helpful reply,[20] I shall consider both questions in the light of the latter provision, that is to say, on the basis of the Court's case-law (see 3 below).

1. Article 6(1) of the Waste Directive

67. Under Article 6(1) of the Waste Directive, certain *specified* waste ceases to be waste when it has undergone a recovery operation and complies with specific criteria *developed* in accordance with four stated conditions. Consequently that provision does not directly stipulate the conditions under which waste ceases to be waste, but lays down the framework conditions within which that question can be regulated for certain types of waste.[21]

68. The need for specific rules clarifying when certain waste ceases to be waste is confirmed by the second indent of recital 22 in the preamble to the Waste Directive. It mentions possible categories of waste for which such rules could be laid down.

69. Consequently, in the absence of implementing measures containing specifications and criteria, Article 6(1) of the Waste Directive is not a basis for determining whether certain types of waste are no longer to be regarded as such.

70. Under Article 6(2) of the Waste Directive, the implementing measures are to be adopted by the European Union in accordance with the regulatory procedure with scrutiny. At present there is a measure for certain types of scrap metal[22] and there are studies for further measures.[23] However, for wood, including chemically treated wood, no measure is being elaborated, in particular because there appears to be a limited benefit from recovery for further use by comparison with burning for generating power.[24]

71. Therefore, Article 6(1) of the Waste Directive is not applicable in the main proceedings.

20 — On the need to interpret the reference for a preliminary ruling with a view to a helpful reply, see in particular Case 244/78 *Union Laitière Normande* [1979] ECR 2663, paragraph 5; Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; and Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 42.

21 — Petersen, 'Entwicklungen des Kreislaufwirtschaftsrechts, Die neue Abfallrahmenrichtlinie – Auswirkungen auf das Kreislaufwirtschafts- und Abfallgesetz', *Neue Zeitschrift für Verwaltungsrecht* 2009, p. 1063, 1066, refers to a 'Konkretisierungsvorbehalt' (reservation for further elaboration).

22 — Council Regulation (EU) No 333/2011 of 31 March 2011 establishing criteria determining when certain types of scrap metal cease to be waste under Directive 2008/98/EC of the European Parliament and of the Council (OJ 2011 L 94, p. 2).

23 — See the survey at http://susproc.jrc.ec.europa.eu/activities/waste/index.html.

24 — Villanueva, A. and others, 'Study on the selection of waste streams for end-of-waste assessment', Luxemburg 2010 (http://ftp. jrc.es/EURdoc/JRC58206.pdf, pp. 62 and 63 and 118 et seq.).

2. The first sentence of Article 6(4) of the Waste Directive

72. The first sentence of Article 6(4) of the Waste Directive provides that the Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case-law.

73. So far as the substantive requirements for a decision under the first sentence of Article 6(4) of the Waste Directive are concerned, the Commission considers that the Member States must for that purpose observe the criteria of Article 6(1). That appears to be sensible, but according to the wording of Article 6(4) it is sufficient if the Member States take into account the applicable case-law.

74. It is not clear why the new Waste Directive refers to the case-law and not to Article 6(1). The Commission proposal made no provision for express powers of the Member States in that area. [25] They were inserted by the Council and were to be exercised initially on the basis of the current *legal situation*. [26] That reference could have included the requirements of Article 6(1) of the Waste Directive. Later on, however, the reference to the legal situation was replaced by a reference to the case-law. [27] That could have been a reaction to apprehensions that the case-law on the definition of waste could be called into question by rules on the question of when waste ceases to be waste. [28] On the other hand, there is no longer any indication that the criteria in Article 6(1) are applicable.

75. It must therefore be concluded that, under the first sentence of Article 6(4) of the new Waste Directive, the Member States must take into account the case-law on the question of when waste ceases to be waste. The Court's previous decisions are decisive for that purpose as otherwise uniform application of the law on waste could not be expected.

3. The case-law on ceasing to be waste

76. The Court's starting point is that waste remains waste as long as the holder, in accordance with the definition in Article 3(1) of the Waste Directive, discards or intends or is required to discard the substance in question. [29] This definition of 'waste' must be interpreted in the light of the aim of the Waste Directive which, according to recital 6 in its preamble, is intended to minimise the negative effects of the generation and management of waste on human health and the environment, and of Article 191(2) TFEU, which provides that Community 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 concept of waste must be interpreted broadly. [30]

77. The relevant judgments concern the recovery of waste. The fact that a substance is the result of a complete recovery operation is in principle only one of the factors to be taken into consideration for the purpose of determining whether the substance constitutes waste and does not as such permit a definitive conclusion to be drawn in that regard. [31]

25 — See Article 11 of the proposal of 21 December 2005, COM(2005) 667 final, p. 20.

26 — See Council documents 6891/07 of 28 February 2007, p. 11, and 7328/07 of 13 March 2007, p. 12.

27 — Council document 8465/07 of 17 April 2007, p. 13.

28 — See Denmark's position, Council document 7347/07 of 15 March 2007, p. 13.

29 — Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 94, and Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 46.

30 — *ARCO Chemie Nederland and Others*, cited in footnote 29, paragraphs 36 to 40; *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, cited in footnote 29, paragraph 23; and Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraphs 38 and 39.

31 — *ARCO Chemie Nederland and Others*, cited in footnote 29, paragraph 95.

78. Irrespective of the possibility that a substance may still be classified as waste, the requirements relating to a complete *recovery* operation in that connection are, moreover, stringent. A substance undergoes such an operation if, as a result, it acquires the same qualities and characteristics as a raw material and can be used in the same conditions of environmental protection. [32]

79. Only in relation to certain forms of recovery has the Court recognised that the resulting substance is necessarily no longer waste. This applies to the recycling of packaging waste [33] and to the processing of scrap metal into iron or steel products which are so similar to other iron or steel products made from primary raw materials that they can hardly be distinguished. [34] The treatment of waste to produce a purified gas which can be used as a fuel achieves a similar quality. [35]

80. In the present case, two procedures might entail recovery: first, the checking and removal of the dismantled telephone poles as construction material and, secondly, their actual use as underlay for duckboards.

a) The checking of the wooden poles

81. In the *first* step, the checking of the wooden poles, there is no sufficiently intensive reconditioning of the treated telephone poles.

82. It is true that, under Article 3(16) of the Waste Directive, the mere checking of material in preparation for re-use may be regarded as a recovery operation. Also, according to the last sentence of recital 22, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria. The check to be presumed in the present case cannot, however, be sufficient to equate the checked waste with raw materials and products.

83. First, the checking and selection of the poles had the aim not of *re*-using them for the same purpose in accordance with the definition in Article 3(16) of the Waste Directive, namely as telephone poles, but of use as construction material for duckboards.

84. Secondly, use of the material, in spite of the check, is still uncertain. For that reason alone, the possibility that the holder will discard it cannot yet be ruled out. [36]

85. Third and last, the Court has repeatedly pointed out that the continuing contamination of materials with toxic substances, in particular preservatives for wood, [37] suggests that they should continue to be regarded as waste. [38] The telephone poles remain polluted with preservatives.

86. One significant reason for assuming that polluted material continues to be waste lies in Article 13 of the Waste Directive, which states that waste management is to be carried out without endangering human health and without harming the environment. Consequently, in cases of doubt, the recovery of hazardous waste must not take it outside the scope of the law on waste so long as there is a fear of such hazards or damage.

32 — *ARCO Chemie Nederland and Others*, cited in footnote 29, paragraphs 94 and 96; *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, cited in footnote 29, paragraph 46; and judgment of 22 December 2008 in Case C-283/07 *Commission* v *Italy*, paragraph 61, summary in ECR [2008] I-198.

33 — Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraph 75.

34 — Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 52.

35 — Case C-317/07 *Lahti Energia* [2008] ECR I-9051, paragraph 35, and Case C-209/09 *Lahti Energia II* [2010] ECR I-1429, paragraph 20.

36 — See *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus,* cited in footnote 29, paragraph 38.

37 — *ARCO Chemie Nederland and Others,*cited in footnote 29, paragraphs 87 and 96.

38 — *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus,*cited in footnote 29, paragraph 43; *Commission* v *Italy*, cited in footnote 32, paragraphs 61 and 62; and *Lahti Energia II*, cited in footnote 35, paragraph 23 et seq.

b) The use of the poles in the construction of duckboards

87. As the referring court correctly observes, the *second* procedure, on the other hand, namely the use of the treated telephone poles in the construction of duckboards, rules out the possibility of the holder discarding or intending to discard them. It is clear from the documents on the file that the poles have a supporting function in the underlay of the duckboards. Without the poles, the stability and the function of the duckboards would be impaired. That cannot be the aim of the holder of the wood.

88. However, in the case of that recovery procedure also, the wood could still be regarded as waste because it remains polluted by the preservative and has therefore not lost the characteristics which justified its classification as *hazardous* waste. That could result in an *obligation to discard* it which, according to the definition of waste in Article 3(1) of the Waste Directive, would also lead to the wood being regarded as waste.

89. That obligation would arise if the use of the wood in the construction of duckboards were a recovery operation incompatible with the Waste Directive. On that point reference must again be made to Article 13 of the Waste Directive, that is to say, the prohibition on endangering human health and on harming the environment. Austria concludes from this that hazardous waste, such as the treated wood, cannot cease to be waste.

90. That view rightly provides a reminder that the special rules of the Waste Directive concerning hazardous waste, such as traceability to final destination under Article 17 and the ban on the mixing of hazardous waste under Article 18, must always be complied with.

91. However, apart from Article 13, the Waste Directive contains no rules on the use of hazardous wood waste. Therefore it is a matter for discussion whether the provisions of the REACH Regulation which have already been mentioned can give any guidance here.

92. It is true that Article 2(2) of the REACH Regulation provides that the regulation does not apply to waste. However, it would be inconsistent to infer from Article 13 of the Waste Directive requirements concerning the use of waste which the holder does not discard or intend to discard, or no longer discards or intends to discard, which are more stringent than those for identical substances which are not waste. An inconsistency of that kind must in any event be avoided if rules for such substances exist that have a similar objective to Article 13.

93. In this regard, the purpose of the REACH Regulation, under Article 1(1) thereof, is likewise to ensure a high level of protection of human health and the environment. [39]

94. In spite of that objective, not every use of substances, mixtures or products that would be permissible under that regulation is necessarily also to be regarded as permissible recovery of waste, particularly hazardous waste. The REACH Regulation covers a very large number of substances, mixtures and products, but specifically regulates their use in only very few cases, which are distinguished by particularly serious risks to human health and the environment. Correspondingly, Article 128(1) of the regulation frees the use of the materials covered but, under Article 128(2), the Member States may restrict their use to protect workers, human health and the environment unless it has been harmonised under the regulation.

95. As set out above, such harmonised rules for the use of CCA-treated wood already exist pursuant to the REACH Regulation. [40]

39 — *SPCM and Others*, cited in footnote 14.

40 — See above, point 56 et seq.

96. That assessment by the legislature must therefore serve as guidance on how similar waste may be used.

97. The reply to be given to Questions 1 and 2 is therefore that, under Article 6(4) of the Waste Directive, hazardous waste is no longer to be regarded as waste if it is to be presumed that the holder no longer discards or intends or is required to discard it because its recovery corresponds to a use which harmonised rules for the purpose of Article 128(2) of the REACH Regulation expressly permit for identical substances which are not waste.

V – Conclusion

98. I therefore propose that the Court answer the questions referred for a preliminary ruling as follows:

(1) The list contained in point 19(4)(b) of Annex XVII to Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), as amended by Regulation (EU) No 836/2012, of the uses of CCA-treated wood must be interpreted as exhaustively listing all permitted uses.

(2) The use in question in the present case of CCA-treated wood for the underlay of duckboards may be regarded as use for 'bridges' within the meaning of the second indent of point 19(4)(b) of Annex XVII to Regulation (EC) No 1907/2006.

(3) The use of wood treated with CCA type C is prohibited under the second indent of point 19(4)(d) of Annex XVII to Regulation (EC) No 1907/2006 if the likelihood of repeated skin contact is not negligible under normal or reasonably foreseeable conditions of use.

(4) Article 67 of, and Annex XVII to, Regulation (EC) No 1907/2006 harmonise within the meaning of Article 128(2) of the regulation the requirements concerning the manufacture, placing on the market or use of the mixtures and products listed in that annex, so that more stringent national requirements concerning their use are possible only in accordance with the regulation, for example, in accordance with Article 129, and pursuant to Article 114(5) TFEU.

(5) Under Article 6(4) of Directive 2008/98/EC of 19 November 2008 on waste, hazardous waste is no longer to be regarded as waste if it is to be presumed that the holder no longer discards or intends or is required to discard it because its recovery corresponds to a use which harmonised rules for the purpose of Article 128(2) of Regulation (EC) No 1907/2006 expressly permit for identical substances which are not waste.