Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 15 November 2018 [1]

Joined Cases C-487/17 to C-489/17

Alfonso Verlezza,
Riccardo Traversa,
Irene Cocco,
Francesco Rando,
Carmelina Scaglione,
Francesco Rizzi,
Antonio Giuliano,
Enrico Giuliano,
Refecta Srl,
E. Giovi Srl,
Vetreco Srl,
SE.IN Srl (C-487/17),
Carmelina Scaglione (C-488/17),
MAD Srl (C-489/17),
interveners:
Procuratore della Repubblica del Tribunale di Roma,
Procuratore generale della Repubblica presso la Corte Suprema di Cassazione

(Requests for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Preliminary ruling — Environment — Directive 2008/98/EC —Waste — Decision 2000/532/EC — European List of Waste — Classification of waste — Mirror codes — Waste to which codes for hazardous and non-hazardous waste can be assigned — Waste from the mechanical treatment of municipal waste)

1. Hazardous waste, which comes primarily from the chemical industry, does not form a large proportion of the overall waste produced in the EU, but its impact on the environment can be very high if it is not properly managed and controlled. In particular, hazardous substances can be present in waste from the mechanical treatment of municipal waste, as was the case in the disputes giving rise to the present references for a preliminary ruling.

1 Original language: Spanish.

2. On this occasion, the Court is required to rule — for the first time, unless I am mistaken — on the classification of waste under the so-called *mirror codes*[2] in the European List of Waste ('LoW'), laid down in Decision 2000/532/EC.[3] It will be necessary to clarify the criteria to be applied for that purpose, so that the referring court can determine whether, by treating as non-hazardous waste which was actually hazardous, the accused in a number of criminal proceedings have committed illegal waste trafficking in Italy.

I. Legal framework

A. EU law

1. Directive 2008/98/EC[4]

3. In accordance with Article 3:

'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;

2. "hazardous waste" means waste which displays one or more of the hazardous properties listed in Annex III;

…

6. "waste holder" means the waste producer or the natural or legal person who is in possession of the waste;

7. "dealer" means any undertaking which acts in the role of principal to purchase and subsequently sell waste, including such dealers who do not take physical possession of the waste;

8. "broker" means any undertaking arranging the recovery or disposal of waste on behalf of others, including such brokers who do not take physical possession of the waste;

9. "waste management" means the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or broker;

10. "collection" means the gathering of waste, including the preliminary sorting and preliminary storage of waste for the purposes of transport to a waste treatment facility;

…'

2 Waste which, due to the fact that it contains, or does not contain, a hazardous substance, can be categorised, in principle, as hazardous or as non-hazardous.

3 Commission Decision of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes 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 (notified under document number C(2000) 1147) (OJ 2000 L 226, p. 3), as amended by Commission Decision 2014/955/EU of 18 December 2014 (OJ 2014 L 370, p. 44) ('Decision 2000/532').

4 Directive of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

4. Article 7, headed 'List of waste', provides:

'1. The measures designed to amend non-essential elements of this Directive relating to the updating of the list of waste established by Decision 2000/532/EC shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 39(2). The list of waste shall include hazardous waste and shall take into account the origin and composition of the waste and, where necessary, the limit values of concentration of hazardous substances. The list of waste shall be binding as regards determination of the waste which is to be considered as hazardous waste. The inclusion of a substance or object in the list shall not mean that it is waste in all circumstances. A substance or object shall be considered to be waste only where the definition in point (1) of Article 3 is met.

2. A Member State may consider waste as hazardous waste where, even though it does not appear as such on the list of waste, it displays one or more of the properties listed in Annex III. The Member State shall notify the Commission of any such cases without delay. It shall record them in the report provided for in Article 37(1) and shall provide the Commission with all relevant information. In the light of notifications received, the list shall be reviewed in order to decide on its adaptation.

3. Where a Member State has evidence to show that specific waste that appears on the list as hazardous waste does not display any of the properties listed in Annex III, it may consider that waste as non-hazardous waste. The Member State shall notify the Commission of any such cases without delay and shall provide the Commission with the necessary evidence. In the light of notifications received, the list shall be reviewed in order to decide on its adaptation.

4. The reclassification of hazardous waste as non-hazardous waste may not be achieved by diluting or mixing the waste with the aim of lowering the initial concentrations of hazardous substances to a level below the thresholds for defining waste as hazardous.

…

6. Member States may consider waste as non-hazardous waste in accordance with the list of waste referred to in paragraph 1.

…'

5. Annex III to Directive 2008/98, as amended by Regulation (EU) No 1357/2014,[5] includes the list of properties which render waste hazardous. In relation to test methods, it states:

'The methods to be used are described in Council Regulation (EC) No 440/2008 and in other relevant CEN [European Committee for Standardisation] notes or other internationally recognised test methods and guidelines.'

2. Decision 2000/532

6. In the annex to the decision, under the heading 'Assessment and classification', point 2 ('Classification of waste as hazardous') reads:

'Any waste marked with an asterisk (*) in the list of wastes shall be considered as hazardous waste pursuant to Directive 2008/98/EC, unless Article 20 of that Directive applies.

5 Commission Regulation of 18 December 2014 replacing Annex III to Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives (OJ 2014 L 365, p. 89).

For those wastes for which hazardous and non-hazardous waste codes could be assigned, the following shall apply:

— An entry in the harmonised list of wastes marked as hazardous, having a specific or general reference to 'hazardous substances', is only appropriate to a waste when that waste contains relevant hazardous substances that cause the waste to display one or more of the hazardous properties HP 1 to HP 8 and/or HP 10 to HP 15 as listed in Annex III to Directive 2008/98/EC. The assessment of the hazardous property HP 9 'infectious' shall be made according to relevant legislation or reference documents in the Member States.

— A hazardous property can be assessed by using the concentration of substances in the waste as specified in Annex III to Directive 2008/98/EC or, unless otherwise specified in Regulation (EC) No 1272/2008, by performing a test in accordance with Regulation (EC) No 440/2008 or other internationally recognised test methods and guidelines, taking into account Article 7 of Regulation (EC) No 1272/2008 as regards animal and human testing.

…'

B. Italian Law

7. Article 184 of Legislative Decree No 152/2006[6] governs the classification of waste, differentiating by origin between municipal waste and special waste. The latter is classified as hazardous waste and non-hazardous waste, depending on whether or not it displays hazardous properties. Non-domestic waste expressly categorised as such by an asterisk in the list in Annex D is considered to be hazardous.

8. Annex D to part 4 provides for the creation of a list of waste in accordance with the EU legislation.

9. The original version of Article 184 provided, in paragraph (4), for a list of waste to be drawn up by ministerial decree, in accordance with Directive 75/442/EEC,[7] Directive 91/689/EEC[8] and Decision 2000/532. It further stated that, pending the adoption of the future decree, the provisions of the Directive of the Minister for the Environment and Territorial Protection of 9 April 2002, which were set out in Annex D, would continue to apply.

10. Annex D was subsequently amended a number of times:

— first, by Legislative Decree No 205 of 3 December 2010,[9] which gave it the title 'List of waste established by Commission Decision 2000/532/EC of 3 May 2000';

— second, by Law No 28 of 24 March 2012 laying down urgent special measures concerning the environment;[10]

6 Decreto legislativo 3 aprile 2006, n. 152, Norme in materia ambientale (GU Serie Generale n. 88 of 14 April 2006 — Supplemento Ordinario n. 96) (Legislative Decree No 152 of 3 April 2006 on environmental standards) ('Legislative Decree No 152/2006').

7 Council Directive of 15 July 1975 on waste (OJ 1975 L 194, p. 47).

8 Council Directive of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20).

9 Decreto legislativo 3 dicembre 2010, n. 205, Disposizioni di attuazione della direttiva 2008/98/CE del Parlamento europeo e del Consiglio del 19 novembre 2008 relativa ai rifiuti e che abroga alcune direttive (GU Serie Generale n. 288 of 10 December 2010 — Supplemento Ordinario n. 269).

10 Testo del decreto-legge 25 gennaio 2012, n. 2 (GURI Serie Generale n. 20 of 25 January 2012), coordinato con la legge di conversione 24 marzo 2012, n. 28, recante: «Misure straordinarie e urgenti in materia ambientale» (GURI Serie Generale n. 71 of 24 March 2012).

— third, by Law No 116 of 11 August 2014,[11] laying down, inter alia, urgent measures for environmental protection.

11. The latter Law amended the preamble to Annex D and inserted the provisions which I shall examine below.[12]

12. Article 9 of Decree Law No 91/2017 of 20 June 2017 (Urgent measures for economic growth in southern Italy),[13] in force since 21 June 2017 but not yet converted into law at the date of the order for reference, deleted points 1 to 7 of Annex D to Part 4 of Legislative Decree 152/2006 and replaced them with the following wording:

'Waste shall be classified by the producer, who must allocate to that waste the appropriate EWC code by applying the provisions of Decision 2014/955/EU and Commission Regulation (EU) No 1357/2014 of 18 December 2014.'

II. Main proceedings and questions referred for a preliminary ruling

13. The questions have arisen in three sets of criminal proceedings brought against around 30 persons who are accused of the offence of organised illegal waste trafficking, contrary to Article 260 of Legislative Decree No 152/2006.

14. The accused include landfill site operators, waste disposal companies, testing laboratories and professionals. The Public Prosecutor's Office accuses them of having classified, for illicit purposes, mirror waste as non-hazardous, by carrying out partial, complacent and non-exhaustive analyses. That waste was treated in landfill sites for non-hazardous waste.

15. On 22 November 2016 and 16 January 2017, at the request of the Public Prosecutor's Office, an investigating judge in Rome ordered the seizure (albeit with the right of use), for evidence-gathering purposes, of a number of landfill sites where the waste had been treated. The judge also ordered that the assets of the proprietors of those sites be frozen and appointed a judicial trustee to manage the landfill sites and the waste production and collection points.

16. On 28 February 2017, the Tribunale di Roma — Sezione per il riesame dei provvedimenti di sequestro (District Court, Rome, Italy — Section responsible for the re-examination of seizure orders) ruled on the requests for review submitted by a number of the accused. By three orders, it annulled the measures ordered by the judge since it disagreed with the Public Prosecutor's Office's interpretation based on the presumption that the waste was hazardous.

17. The Procuratore della Repubblica presso il Tribunale di Roma — Direzione distrettuale antimafia (Public Prosecutor at the District Court, Rome — District Anti-Mafia Prosecutor's Office) challenged those orders before the Corte suprema di Cassazione (Supreme Court of Cassation, Italy), arguing that, by accepting the arguments put forward in support of the defence, the first-instance court had misinterpreted the national and EU provisions on the classification of mirror waste.

11 Testo del decreto-legge 24 giugno 2014, n. 91 (GURI Serie Generale n. 144 of 24 June 2014), coordinato con la legge di conversione 11 agosto 2014, n. 116, recante: «Disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonche' per la definizione immediata di adempimenti derivanti dalla normativa europea.» (GURI Serie Generale n. 192 of 20 August 2014 — Supplemento Ordinario n. 72) ('Law No 116/2014').

12 Points 46 and 47 of this Opinion.

13 Decreto-legge 20 giugno 2017, n. 91, recante: «Disposizioni urgenti per la crescita economica nel Mezzogiorno.» (GURI Serie generale n. 141 of 20 June 2017).

18. The referring court notes that, in order to be able to establish whether the offence has been committed and, therefore, in order to ascertain whether or not the waste with mirror codes in question was characterised and classified correctly, it is necessary to clarify the scope of Decision 2014/955 and of Regulation No 1357/2014. Only in that way will it be possible to determine which (chemical, microbiological, and the like) analyses are necessary for the purpose of ascertaining whether dangerous substances are present in such waste in order to characterise it and subsequently classify it by attribution of a hazardous or non-hazardous code.

19. The referring court also notes that the classification of waste with mirror codes has been widely debated in Italy:

— Some legal commentators support the so-called 'certainty argument' or 'presumed hazardousness' argument, which, based on the precautionary principle, presumes that waste is hazardous in the absence of proof to the contrary. [14]

— Other legal commentators advocate the opposing so-called 'probability' theory, pursuant to which the principle of sustainable development makes it necessary to establish in advance whether waste is hazardous by means of suitable analyses. [15]

20. The Corte suprema di Cassazione (Supreme Court of Cassation) refers to its own case-law on the amendments introduced by Law No 116/2014. In that case-law, it laid down the principle according to which, in the case of waste with mirror codes, in order to classify the waste and assign a hazardous or non-hazardous code, the producer or holder must carry out the analyses necessary to ascertain whether dangerous substances are present and, if so, whether they exceed the concentration thresholds. Only when it is specifically confirmed that there are either no dangerous substances present in the waste or that those substances do not exceed the applicable thresholds may the waste be classified as non-hazardous. [16]

21. In order to dispel its uncertainties about the provisions of EU law in this area, the referring court decided to make three references to the Court of Justice for a preliminary ruling on the following questions, which are identical in all three cases:

'(1) Must the Annex to Decision 2014/955 and Regulation No 1357/2014 be interpreted, with reference to the classification of waste to which mirror codes have been assigned, as meaning that the producer of the waste must, when the composition of the waste is not known, carry out a prior classification of it, and, if so, within what limits?

(2) Must the examination as to hazardous substances be carried out on the basis of uniform, predetermined methods?

14 The advocates of that stance reacted positively to the procedures introduced by Law No 116/2014, drawing attention to the compliance of that law with Decision 2000/532, with the European Commission's guidelines and with the reports and the technical manuals on hazardous waste introduced by other Member States, as well as with Decision 2014/955 and Regulation No 1357/2014. Those reports include Report No 4/2/2016 drawn up by the French Ministry of Ecology (MEDDE) ('Classification réglementaire des déchets. Guide d'application pour la caractérisation et dangerosité') and 'Hazardous waste, Interpretation of the definition and classification of hazardous waste (Technics Guidance WM2)', first published in 2003 in the United Kingdom.

15 From that perspective, Law No 116/2014 has been decidedly negative, both technically and economically, for operators in the sector. Demonstrating the non-hazardous nature of waste involves a '*probatio diabolica*' [legal requirement to provide proof which is impossible to obtain], which requires the producer always to classify the waste as hazardous. Advocates of that view submit that that law is incompatible with EU law and argue that Decree-Law No 91/2017, which abolished the procedures introduced by Law No 116/2014, confirms their position.

16 Judgment No 46897 of 3 May 2016, *Arduini and Others*, Rv. 26812601.

(3) Must the examination as to hazardous substances be based on a precise and representative verification that takes into account the composition of the waste, if this is already known or has been identified during the classification phase, or may the examination as to hazardous substances instead be carried out according to criteria of probability by taking into consideration which hazardous substances might reasonably be present in the waste?

(4) Where there is doubt, or where it is impossible to establish with certainty whether or not hazardous substances are present in the waste, must that waste nevertheless be classified and treated as hazardous waste by application of the precautionary principle?'

22. Written observations were lodged by the Procuratore generale della Republica presso la Corte Suprema di Cassazione (General Public Prosecutor at the Supreme Court of Cassation), Vetreco Srl, Francesco Rando, MAD Srl, Alfonso Verlezza, Antonio and Enrico Giuliano, the Italian Republic and the European Commission.

23. At the hearing held on 6 September 2018, oral argument was presented by the representatives of Francesco Rando, E. Giovi Srl, Vetreco Srl, MAD Srl, the Procuratore della Repubblica presso il Tribunale di Roma (Public Prosecutor at the Rome District Court), the Italian Republic and the Commission.

III. Replies to the questions referred for a preliminary ruling

A. Admissibility

24. The Prosecutor at the Supreme Court of Cassation, Mr Rando and Vetreco Srl have put forward a number of arguments challenging the admissibility of the questions referred for a preliminary ruling.

25. Mr Rando submits that those questions are inadmissible because they are based on the application of Law No 116/2014, which is a technical regulation within the meaning of Article 8 of Directive 98/34/EC,[17] and, since that law was not notified to the Commission, it is not applicable to individuals.

26. I do not agree with that argument. The Italian provision on the classification of waste with mirror codes, laid down in Law No 116/2014, was adopted to transpose and implement the EU legislation on waste classification. Whether or not that law is a technical regulation within the meaning of Directive 98/34, Articles 8(1) and 10(1) of that directive provide that national technical regulations adopted to transpose EU harmonising provisions are exempt from the obligation of notification to the Commission. In any event, the determination of whether the Italian law is a technical regulation entails a reply on the substance which cannot be transferred to the admissibility stage of the references for a preliminary ruling.

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 (OJ 1998 L 204, p. 37). With effect from 6 October 2015, that directive was consolidated and replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

27. The other arguments concern the description (which, in the view of those putting forward those arguments, is insufficient) of the factual and legal context of the disputes:

— Mr Rando contends that the order for reference does not state that he was responsible for the dispatch of waste to certain landfill sites and that there is no question concerning the application of Directive 1999/31/EC or of Decision 2003/33/EC.[18] Nor has the referring court mentioned, in the context of the facts, the chemical analyses submitted by Mr Rando, in which a laboratory classified the waste with the CED code 19 12 12 (mirror non-hazardous code).

— Vetreco Srl submits that the questions referred for a preliminary ruling are unnecessary because the referring court has case-law on the criteria applicable to the classification of waste with mirror codes. The referring court should, therefore, confine itself to an examination of the facts and the application of its case-law, for which purpose it does not need to seek a ruling from the Court of Justice.

— The Prosecutor at the Supreme Court of Cassation submits that the questions referred do not accurately identify the provisions of EU law of which an interpretation is sought, since only the first question makes a general reference to Decision 2014/955 and Regulation No 1357/2014. In addition, the questions fail to satisfy the requirement of self-sufficiency, since they are not comprehensible in themselves without it being necessary to refer to the reasoning on which they are based. There is no explanation in the order for reference of the events which took place in 2013, 2014 and 2015, and the referring court merely sets out its uncertainties regarding the interpretation of a term in point 2 of Annex II to Decision 2014/955.

28. To my mind, none of those arguments is sufficient to rule the three references for a preliminary ruling inadmissible. The Court has repeatedly held in its case-law that it may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[19]

29. It is for the national court, and not the parties appearing before it, to refer to the Court of Justice the questions on which it has uncertainties as regards interpretation. The national court is, therefore, entitled to refrain from referring questions about Directive 1999/31 and Decision 2003/33 in the proceedings involving Mr Rando if it does not consider it necessary to do so. The national court may also refer other questions if it believes that its earlier case-law may be modified or may conflict with that which is derived from the answer provided in the reference for a preliminary ruling. In any event, the Court of Justice is free to refer to EU provisions other than those mentioned in the order for reference where it considers it necessary for the purposes of answering the questions referred for a preliminary ruling.

30. There is an undeniable link in this case between the questions and the subject matter of the dispute, and the need for interpretation of the EU provisions can be inferred from the explanations provided by the national court. Moreover, the order of the national court sets out in essence the factual and legislative context of the criminal proceedings underway, including a fairly comprehensive

18 Council Directive of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1), and Council Decision of 19 December 2002 establishing criteria and procedures for the acceptance of waste at landfills pursuant to Article 16 of and Annex II to Directive 1999/31 (OJ 2003 L 11, p. 27).

19 For example, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 24 and 25); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraphs 15 and 16); of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19); of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 54); and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 50 and 155).

description of the applicable Italian provisions. It is true that the account of the facts could have included additional information concerning the type of waste and the analyses carried out. However, nothing has prevented the parties from submitting observations and I believe that the Court has sufficient material to enable it to give a helpful reply to the referring court.

31. In short, the requirements of Article 94 of the Rules of Procedure of the Court of Justice are satisfied.

B. The substance

32. The classification of waste is crucial at all stages of its existence, from production to final treatment. It determines decisions regarding waste management and the feasibility and economic viability of waste collection, the choice between recycling and disposal and, where appropriate, the recycling method.

33. The classification of waste as hazardous creates important legal effects,[20] for Directive 2008/98 lays down strict conditions regarding the management of such waste. Among other conditions, the directive requires the provision of evidence to enable the monitoring of hazardous waste, in accordance with the method established by the Member State (Article 17); prohibits the mixing of hazardous waste (Article 18); lays down specific obligations regarding labelling and packaging (Article 19); and provides that hazardous waste can only be treated at specifically designated facilities which have obtained a special permit (granted under Articles 23 to 25).[21]

34. By its first three questions, which may be answered together, the referring court asks about the manner in which Directive 2008/98 (as amended by Regulation No 1357/2014) and Decision 2000/532 (as amended by Decision 2014/955) govern the procedure for the classification of waste to which mirror codes may be assigned. By its fourth question, the referring court asks whether, where there is doubt or where it is impossible to establish with certainty whether or not hazardous substances are present in waste, the precautionary principle means that that waste must be classified with a mirror code for hazardous waste.

35. The arguments put forward in the proceedings before the court hearing the case help to shed light on the questions:

— The Public Prosecutor's Office submits that a waste producer or waste holder is responsible for classifying waste, taking account of the precautionary principle, and following exhaustive analyses. The Public Prosecutor's Office relies on European guidelines and national technical manuals in support of its contention that the methodology laid down in the Italian legislation constitutes a technical complement to Decision 2014/955 and Regulation No 1357/2014.

— The accused contend that the investigation and allegations against them are based on a presumption of the hazardous nature of waste with mirror codes, which is contrary to the spirit of the law and impossible to rebut in the specific case. In their submission, there is no suitable methodology for identifying all or almost all of the components in waste; therefore, the classification they carried out, by means of sample analysis, is correct. Moreover, Decision

20 See, in that connection, the systematic approach of De Saeleer, N., *Droit des déchets de l'UE. De l'élimination à l'économie circulaire, Bruylant*, Brussels, 2016, pp. 253 and 254.

21 In addition, hazardous waste may only be disposed of in landfill sites for hazardous waste, in accordance with certain conditions (Articles 6 and 11 of Directive 1999/31), while shipments of hazardous waste between Member States are subject to the requirements of notification and authorisation. The import and export of hazardous waste is banned or subject to stringent controls in accordance with the provisions of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190 p. 1).

2014/955 and Regulation No 1357/2014, which are to be interpreted as meaning that analyses of hazardousness should refer solely to the substances 'that are relevant on the basis of the production process' are applicable as from 1 June 2015. [22]

1. Questions 1, 2 and 3

36. According to the information in the case file and the submissions made by the parties in writing and at the hearing, the proceedings are concerned solely with waste from the mechanical biological treatment of municipal waste; [23] doubts exist regarding whether or not such waste is hazardous and it may, therefore, be classified under mirror codes. If that waste contains hazardous substances or substances with traces of hazardous properties, it will be classified with the mirror hazardous waste code 19 12 11*, whereas if there are no such traces of hazardous properties, it will be classified with the mirror non-hazardous waste code 19 12 12. [24]

37. It is important to make clear that the referring court's questions are not concerned with the classification of mixed municipal waste, which benefits from the presumption of non-hazardousness under Article 20 of Directive 2008/98, and is therefore exempt from application of the primary restrictions imposed on hazardous waste. [25]

38. The referring court's uncertainties are therefore confined to the classification of waste resulting from the mechanical treatment of municipal waste, which is not to be confused with mixed municipal waste which is taken to landfill. In my opinion, that distinction has two outcomes:

— the non-application of the provisions on the disposal and acceptance of waste at landfill sites to waste resulting from the mechanical treatment of municipal waste; [26]

— the presumption that mixed municipal waste is non-hazardous cannot be applied to waste from the mechanical treatment of municipal waste. Waste from such mechanical treatment may contain substances with traces of hazardous properties simply because products like batteries, printer cartridges, or any other kind of waste containing hazardous substances, were incorrectly included in mixed municipal waste.

39. I shall therefore confine my analysis to waste in respect of which doubts exist as to its hazardousness and which can therefore be classified with mirror codes, and in particular to waste from the mechanical biological treatment of municipal waste, which is the waste at issue in the main proceedings.

22 The accused refer to a report from the Lazio Region prepared in response to the seizure and produced by the defence, and to a note of 26 January 2017 from the competent ministry confirming 'the applicability from 1 June 2015 of the European provisions'. The accused further contest the Prosecutor's allegation based on Decree-Law No 91/2017 which, in particular, repeals the national provisions on the investigations to be carried out with regard to the classification of waste.

23 Mixed municipal waste certainly constitutes waste for the purposes of Directive 2008/98. The judgment of 12 December 2013, *Ragn-Sells* (C-292/12, EU:C:2013:820, paragraph 56), states that, as regards mixed municipal waste, Article 11(1)(a) of Regulation No 1013/2006, read in the light of recital 20 thereof and Article 16 of Directive 2008/98, permits Member States to adopt measures of general application restricting shipments of that waste between Member States, in the form of general or partial prohibitions of shipments, by way of implementation of the principles of proximity, priority for recovery and self-sufficiency under Directive 2008/98.

24 Code 19 12 11* covering 'other wastes (including mixtures of materials) from mechanical treatment of waste containing dangerous substances' or code 19 12 12 covering 'other wastes (including mixtures of materials) from mechanical treatment of wastes other than those mentioned in 19 12 11'.

25 According to the first sentence of Article 20 of Directive 2008/98, 'Articles 17, 18, 19 and 35 shall not apply to mixed waste produced by households.'

26 Directive 1999/31 on landfill governs the management, the conditions relating to permits, the closure and the post-closure management of landfill sites. Decision 2003/33 stipulates the criteria for the acceptance of waste at different types of landfill, in which connection the classification of waste as hazardous or non-hazardous according to the LoW is decisive. That classification is different and must not be confused with the assessment of waste in order to verify conformity with the waste acceptance criteria laid down in Annex II to Directive 1999/31 and in Decision 2003/33. Therefore, analyses made in the context of waste acceptance criteria cannot generally be used for the classification of waste according the LoW. See, in that connection, Commission notice of 9 April 2018 on technical guidance on the classification of waste (OJ 2018 C 124, p. 1), point 2.1.4.

40. Article 3 of Directive 2008/98 defines as 'waste' 'any substance or object which the holder discards or intends or is required to discard', and as 'hazardous waste' waste which displays one or more of the properties listed in Annex III to Directive 2008/98; that list of properties was adapted to reflect scientific progress by Regulation No 1357/2014, applicable from 1 June 2015. [27]

41. The difficulty in classifying waste and determining which waste is hazardous is the reason why the EU legislature drew up a list of waste, in order to simplify the decision-making of producers and holders of this type of commodity.

42. Article 7(1) of Directive 2008/98 provides that that list is to include hazardous waste and take into account its origin and composition and, where necessary, the limit values of concentration of hazardous substances. Article 7(1) further provides that, in principle, [28] the list is to be binding as regards determination of the waste which is to be considered as hazardous waste. The list is, therefore, mandatory for Member States but not definitive or absolute, since the harmonisation effected by Directive 2008/98 is not exhaustive. [29]

43. The LoW was established by Decision 2000/532 [30] and revised, in accordance with Article 7(1) of Directive 2008/98, by Decision 2014/955 [31] to adapt it to reflect scientific progress and bring it into line with advances in the legislation on chemicals. [32]

44. Classification in accordance with the LoW involves the assignment to each type of waste of a six-digit number, called the 'European Waste Code' ('EWC'), [33] from which it can be inferred whether or not the waste is hazardous. In that connection, the LoW recognises three types of code:

— 'Absolute hazardous (AH) codes': waste with these codes (marked with an asterisk (*)) is considered to be hazardous without the need for any further assessment.

— 'Absolute non-hazardous (ANH) codes': waste with these codes is considered to be non-hazardous without the need for any further assessment.

27 The list of properties was subsequently further adapted by Council Regulation (EU) 2017/997 of 8 June 2017 amending Annex III to Directive 2008/98/EC of the European Parliament and of the Council as regards the hazardous property HP 14 'Ecotoxic' (OJ 2017 L 150, p. 1). That regulation has been applicable since 5 July 2018 and is therefore not relevant *ratione temporis* to these cases.

28 Pursuant to Article 7(2) and (3), a Member State may reclassify hazardous waste as non-hazardous, and vice versa, where it has evidence to show that the waste concerns displays, or does not display, hazardous properties, and it must notify the Commission of this so that, where appropriate, the list may be amended. The judgment of 29 April 2004, *Commission* v *Austria* (C-194/01, EU:C:2004:248, paragraphs 66 to 71), ruled on the latitude enjoyed by the Member States.

29 It is possible to apply to Directive 2008/98 the Court's case-law to the effect that Directive 91/689 does not prevent the Member States, including, for matters within their jurisdiction, the courts, from classifying as hazardous waste other than that featuring on the list of hazardous waste laid down by Decision 94/904, and thus from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of such waste (judgment of 22 June 2000, *Fornasar and Others*, C-318/98, EU:C:2000:337, paragraph 51).

30 Directive 2008/98 and Decision 2000/532 form a unit and must be interpreted together in relation to the definition of and legal arrangements for hazardous waste. See Van Calster, G., *EU Waste Law*, Oxford University Press, 2nd edition, 2015, p. 86.

31 Since it is set out in an EU decision, the LoW is mandatory in all respects, is addressed to the Member States and does not require transposition.

32 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).

33 The LoW comprises 20 *chapters* (two-digit codes which refer to the source category) which are divided in turn into *sub-chapters* (four-digit codes which stipulate the sector of activity, the procedure or the holders creating the waste) and *entries* (six-digit codes designating the waste). For example, the code 19 12 11* is a mirror hazardous (MH) waste code, which breaks down as follows: 19 (wastes from waste management facilities, off-site waste water treatment plants and the preparation of water intended for human consumption and water for industrial use); 12 (wastes from the mechanical treatment of waste (for example sorting, crushing, compacting, pelletising) not otherwise specified); 11* other wastes (including mixtures of materials) from mechanical treatment of waste containing hazardous substances. Where the last two digits are different, there is an MNH code: 19 12 12 (other wastes (including mixtures of materials) from mechanical treatment of wastes other than those mentioned in 19 12 11).

— 'Mirror codes': where waste has not been classified with an absolute code, it can, in principle, be assigned an AH or an ANH code depending on the specific case and the composition of the waste. In other words, mirror codes can be defined as two or more related codes where one of the codes is hazardous and the other is non-hazardous, meaning that here are mirror hazardous (MH) codes (marked with an asterisk (*)) and mirror non-hazardous (MNH) codes for waste.

45. Where the composition of waste is known, the producer classifies it, in accordance with the LoW, with an AH code or an ANH code. However, the classification process is more complicated where the waste concerned can be classified with mirror codes because the waste producer or holder must carry out additional assessments with a view ultimately to assigning that waste an MH code or an MNH code. That is the situation before the referring court.

46. The Corte Suprema de Cassazione (Supreme Court of Cassation) states that it must apply points 4, 5 and 6 of Annex D to part 4 of Legislative Decree No 152/2006, as amended by Law No 116/2014, which established the procedure for determining in Italy whether or not waste classifiable with mirror codes is hazardous. That procedure for establishing whether waste is hazardous comprises the following three stages (in chronological order):

— identification of the components of the waste by means of the producer's data sheet; knowledge of the chemical process; the sampling and analysis of the waste;

— determination of the hazards connected to the components by means of EU legislation on the labelling of dangerous substances and preparations; European and international information sources; and the safety data sheets of the products from which the waste is derived; and

— establishment of whether the concentrations of the components present in the waste mean that the waste is hazardous, by comparing the concentrations detected by chemical analysis against the threshold limit for the specific risk elements of the components, or the conducting of tests to verify whether the waste displays hazardous properties.

47. That legislation also provides that, where chemical analyses do not enable identification of all the specific constituents of waste, the most hazardous constituents are to be used as a reference to determine the hazardousness of that waste, in accordance with the precautionary principle. Where the procedure has not been followed or has not made it possible to identify the constituents of the waste or whether that waste is hazardous, the waste must be classified as hazardous, in other words, with a mirror hazardous (MH) waste code (with an asterisk (*)).

48. The referring court asks, in short, whether national legislation worded in that way is compatible with Directive 2008/98 and Decision 2000/532, as amended by Regulation No 1357/2014 and Decision 2014/955, respectively.

49. In my view, the Italian legislation is basically compatible with EU law for the reasons I shall set out below.

50. Under Article 3(2) of Directive 2008/98, the assessment of whether waste is hazardous requires, first, knowledge of the composition of the waste in order to identify the hazardous substances it contains which may afford it one or more of the 15 hazardous properties (HP 1 to HP 15) referred to in Annex III. It is for the waste producer or holder to carry out the necessary checks if the composition of the waste is unknown.

51. When determining the composition of waste, it must be borne in mind that the LoW classifies waste according to the source that creates the waste (the specific process or activity during which the waste is produced) and the 'type of waste' (or types of waste, in the case of a mixture). Investigations to establish the composition of waste must enable identification of the source and/or type of waste, thereby making it possible to classify the waste under one of the codes in the LoW.

52. There are a number of methods whereby a waste producer or holder can obtain information about the composition of waste, the hazardous substances in waste and its potential hazardous properties. These include: [34]

— information on the manufacturing process and waste-generating chemical process and its input substances and intermediates including expert opinions. Useful sources may be BREF reports, [35] industrial process handbooks, process descriptions and lists of input materials provided by the producer;

— information from the original producer of the substance or object before it became waste. This can be found in the Safety Data Sheets (SDS), product label or product fiches;

— databases on waste analysis available in the Member States; and

— sampling and chemical analysis of the waste.

53. Once the producer has gathered information about the composition of the waste, he must establish whether that waste is a substance identified as hazardous (this will not normally be the case) or whether it contains substances with hazardous properties (this is the usual situation and what occurred in the present cases). The substances are classified in accordance with Regulation (EC) No 1272/2008, [36] whereas the examination of whether there are hazardous substances in the waste is carried out in accordance with Annex III to Directive 2008/98. [37]

54. Regulation No 1272/2008, which adapts for the EU the UN system of classification of chemicals (Globally Harmonised System ('GHS')), provides detailed criteria for the evaluation of substances and determination of their hazard classification.

55. Under Article 1(3) of that regulation, waste is not a substance, mixture or article; accordingly, the obligations laid down in the regulation do not apply to waste producers or holders. However, Annex VI to Regulation No 1272/2008 lays down a set of harmonised hazardous substance codes which must be used for the classification of waste, in view of the fact that many mirror codes refer specifically to 'hazardous substances'. [38]

34 Commission notice of 9 April 2018 on technical guidance on the classification of waste (OJ 2018 C 124, p. 1), paragraph 3.2.1. That document, which is not legally binding, was drawn up following wide consultation with the Member States and economic operators.

35 The EU Best Available Techniques Reference Documents ('BREF'), drawn up by the European Integrated Pollution Prevention and Control Bureau, are available at http://eippcb.jrc.ec.europa.eu/reference/

36 Regulation of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

37 Those two sets of provisions are not fully harmonised and the Commission refers to situations where the same material, containing a hazardous substance, can be considered to be hazardous or non-hazardous depending on whether the material is waste or a product. That discrepancy means that it cannot be assumed that materials which are reintroduced into the economy as a result of the recovery of non-hazardous waste will necessarily result in a non-hazardous product. The Commission launched an initiative to eliminate those dysfunctions in the document COM(2018) 32 final of 16 January 2018, which contains the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the circular economy package: options to address the interface between chemical, product and waste legislation.

38 Thus, 16 01 11* (brake pads containing asbestos) is an MH entry, whereas 16 01 12 (brake pads other than those mentioned in 16 01 11) is an MNH entry.

56. The assessment of whether hazardous substances are present must be carried out by the waste producer or holder, in accordance with Annex III to Directive 2008/98, which, as I have already pointed out, refers to 15 properties of waste which make it hazardous.[39] That assessment can be made: (a) by means of a calculation, that is, by calculating whether the substances present in the waste are equal to or exceed the limit values based on the hazard statement codes (individually, on the basis of the properties HP 4 to HP 14); and (b) by means of a direct test to determine whether the waste displays hazardous properties (particularly suitable for the properties HP 1 to HP 4).[40]

57. Under the heading relating to the assessment of hazardous properties of waste (point 1 *in fine*), the Annex to Decision 2000/532 states that 'where a hazardous property of a waste has been assessed by a test and by using the concentrations of hazardous substances as indicated in Annex III to Directive 2008/98/EC, the results of the test shall prevail.'

58. Where waste displays one or more of the 15 hazardous properties, the producer or holder must classify it with a mirror hazardous (MH) code. Where waste does not display any of those properties, it may also be classified in that way if it contains any of the persistent organic pollutants[41] referred to in the Annex to the LoW (point 2, indent 3) above the limit values provided for in Annex IV to Regulation (EC) No 850/2004.[42]

59. The foregoing considerations allow me to rule out what the referring court calls the probability theory, according to which waste producers can classify waste covered by mirror codes as hazardous or non-hazardous at their *discretion*, because it would be impossible to carry out tests to establish all the substances present in waste and all waste would ultimately be classified with MH codes.

60. As I have already explained, the EU legislation requires waste producers or holders to carry out a reasonable identification of the composition of waste and to check subsequently whether the substances identified might be hazardous in order to establish whether or not, on the basis of their concentration values, they come under Annex III to Directive 2008/98 or Annex IV to Regulation No 850/2004. That approach also rules out the 'certainty argument or presumed hazardousness', mentioned by the referring court, which would require an exhaustive analysis of the composition of waste and all possible hazardous substances, together with their concentration levels, as the only way of avoiding classification of waste as hazardous.

61. The referring court is uncertain about the interpretation of two terms in point 2, under the heading 'Assessment and classification', in the Annex to Decision 2000/532, as amended by Decision 2014/955. According to the Italian version of that provision, '... l'iscrizione di una voce nell'elenco armonizzato di rifiuti contrassegnata come pericolosa, con un riferimento specifico o generico a "sostanze pericolose", è *opportuna* solo quando questo rifiuto contiene sostanze pericolose *pertinenti* che determinano nel rifiuto una o più delle caratteristiche di pericolo ...'. The referring court states

39 Those hazardous properties are as follows: HP 1 Explosive; HP 2 Oxidising; HP 3 Flammable; HP 4 Irritant — skin irritation and eye damage; HP 5 Specific Target Organ Toxicity (STOT)/Aspiration Toxicity; HP 6 Acute Toxicity; HP 7 Carcinogenic; HP 8 Corrosive; HP 9 Infectious; HP 10 Toxic for reproduction; HP 11 Mutagenic; HP 12 Release of an acute toxic gas; HP 13 Sensitising; HP 14 Ecotoxic; HP 15 Waste capable of exhibiting a hazardous property listed above not directly displayed by the original waste.

40 Commission notice of 9 April 2018 on technical guidance on the classification of waste (OJ 2018 C 124, p. 1), point 3.2.2.

41 Persistent organic pollutants (POPs) are organic chemicals with a certain combination of physical and chemical properties which means that, once they are released into the atmosphere, they remain there for a long time, become widely distributed throughout the environment, accumulate in the adipose tissue of living organisms, including humans, and are toxic to people and wildlife. For example: polychlorinated dibenzo-p-dioxins and dibenzofurans (PCDD/PCDF), DDT (1,1,1-trichloro-2,2-bis(4-chlorophenyl)ethane), chlordane, hexachlorocyclohexane (including lindane), dieldrin, endrin, heptachlor, hexachlorobenzene, chlordecone, aldrin, pentachlorobenzene, mirex, toxaphene, hexabromobiphenyl.

42 Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC (OJ 2004 L 158, p. 7).

that, according to some interpretations, use of the terms 'opportuna' and 'pertinenti' in relation to mirror codes confirms that there is scope for discretion in the assessment and that the determination of whether waste is hazardous is confined to the *relevant* components of waste based on their hazardousness.

62. In accordance with the case-law of the Court,[43] it is necessary to look at other language versions of that provision in order to find out whether there are differences and, if so, to interpret it by reference to the purpose and general scheme of the rules of which it forms part.

63. The Spanish,[44] Portuguese,[45] French[46] and English[47] versions of the provision all state that, as regards waste with mirror codes, an entry in the harmonised list of wastes marked as hazardous is only *justified* or *appropriate* '… when that waste contains relevant hazardous substances *that cause the waste to display* one or more of the hazardous properties …'. Waste to which a mirror code is applicable is only to be classified with an MH code if it contains substances which *cause it to display* one or more of the 15 hazardous properties laid down in Annex III to Directive 2008/98. Therefore, there is no scope for discretion or *chance* in that regard. I believe that those language versions faithfully reflect the purpose and general scheme of the provision.

64. As regards the methods of analysis and testing that the waste producer or holder may use to assess the toxicity or hazardousness of waste and to classify that waste with a mirror code (question 2), neither Directive 2008/98 nor Decision 2000/532 contain specific and direct guidelines, since those methods have not been harmonised by EU law. However, Annex III *in fine* to Directive 2008/98, as amended by Regulation No 1357/2014, stipulates, in relation to test methods, that the methods which '… are described in Council Regulation (EC) No 440/2008 and in other relevant CEN notes or other internationally recognised test methods and guidelines' must be used.

65. Point 2 of the section headed 'Assessment and classification' in the Annex to Decision 2000/532 also provides some further information regarding analyses and test methods:

— Point 2, second indent, states that a hazardous property can be assessed on the basis of substances in the waste or, unless otherwise specified in Regulation No 1272/2008, by performing a test in accordance with Regulation (EC) No 440/2008[48] or other internationally recognised test methods and guidelines.

43 According to the Court's settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgments of 28 July 2016, *Edilizia Mastrodonato*, C-147/15, EU:C:2016:606, paragraph 29, and of 17 March 2016, *Kødbranchens Fællesråd*, C-112/15, EU:C:2016:185, paragraph 36 and case-law cited).

44 'Solo se justifica la inclusión de un residuo en la lista armonizada de residuos marcado como peligroso y con una mención específica o general a «sustancias peligrosas», si el residuo contiene sustancias peligrosas que le confieren una o varias de las características de peligrosidad …'

45 In the same vein, the Portuguese version provides: 'só se justifica a inclusão de um resíduo na lista harmonizada de resíduos, assinalado como "perigoso" e com uma menção específica ou geral a "substâncias perigosas", se o resíduo em causa contiver substâncias perigosas que lhe confiram uma ou mais das características de perigosidade …'

46 'Une référence spécifique ou générale à des «substances dangereuses» n'est *appropriée* pour un déchet marqué comme dangereux figurant sur la liste harmonisée des déchets que si ce déchet contient les substances dangereuses *correspondantes* qui lui confèrent une ou plusieurs des propriétés dangereuses …'

47 'An entry in the harmonised list of wastes marked as hazardous, having a specific or general reference to "hazardous substances", is only *appropriate* to a waste when that waste contains *relevant* hazardous substances that cause the waste to display one or more of the hazardous properties …'

48 Commission Regulation of 30 May 2008 laying down test methods pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2008 L 142, p. 1).

— Point 2, fifth indent, states that 'where applicable, the following notes included in Annex VI to Regulation (EC) No 1272/2008 may be taken into account when establishing the hazardous properties of wastes: — 1.1.3.1. Notes relating to the identification, classification and labelling of substances: Notes B, D, F, J, L, M, P, Q, R, and U. — 1.1.3.2. Notes relating to the classification and labelling of mixtures: Notes 1, 2, 3 and 5.'

66. Both references provide a clue about the types of tests and chemical analyses [49] that waste producers or holders may use to analyse whether the substances contained in waste are hazardous. Naturally, the test methods applicable to chemicals in the context of the REACH Regulation, laid down in Regulation No 440/2008, will be valid. Also valid are the test methods and methods of calculating the hazardous properties of waste stipulated by the Commission in Annex III to its notice of 2018. [50]

67. For its part, Annex 4 to that notice lists the CEN standards and methods for the characterisation of waste by means of different types of chemical analysis. [51]

68. I believe, however, that any other type of test accepted by international, EU or national legislation [52] would be equally valid for the purposes of determining whether substances present in waste are hazardous or non-hazardous. Annex III *in fine* to Directive 2008/98, as amended by Regulation No 1357/2014, and point 2, second indent, under the heading 'Assessment and classification', of the Annex to Decision 2000/532 both stipulate that 'other internationally recognised test methods and guidelines' may be used. It should be pointed out again that the results of a test take precedence over the method of calculating the concentration of such hazardous substances, in accordance with paragraph 1 *in fine*, under the heading 'Assessment and classification', of the Annex to Decision 2000/523.

69. As regards the scope of tests and chemical analysis, I believe, in line with the foregoing considerations, that such analyses can be performed by sampling but there must be full guarantees that the samples are effective and representative. Those guarantees can be achieved, for example, by applying the technical standards and specifications drawn up by the CEN on the 'characterisation of waste — sampling of waste materials'. [53]

70. In the light of the above, Article 7 of and Annex III to Directive 2008/98, and point 2, 'Classification of waste as hazardous', under the heading 'Assessment and classification', of the Annex to Decision 2000/532 must be interpreted as meaning that a mirror waste producer or holder is required to identify the composition of waste and to verify subsequently, by means of a calculation or a test, whether that waste contains any of the hazardous substances or substances with traces of the hazardous properties listed in Annex III to Directive 2008/98 or Annex IV to Regulation No 850/2004. For those purposes, it is necessary to use sampling, chemical analyses and tests, as provided for in Regulation No 440/2008, or any sampling, chemical analyses or tests which are internationally recognised or accepted by the national law of the Member State.

49 Chemical analysis is generally used to identify the substances present in waste, whereas testing is usually used to determine the concentration of a substance known to be present in waste.

50 Annex III, headed 'Specific approaches to determine hazard properties (HP1 to HP15)', to the Commission Notice of 9 April 2018 on technical guidance on the classification of waste (OJ 2018 C 124, p. 1), pp. 87 to 123.

51 Commission Notice of 9 April 2018 on technical guidance on the classification of waste, Annex 4, pp. 129 to 131.

52 In the Notice of 2018, the Commission refers to the document 'Characterization of waste — Determination of elements and substances in waste' described in the experimental standard AFNOR XP X30-489, which proposes an exhaustive method for the determination of elements and substances in liquid and solid waste. The Commission also refers to the United States Environmental Protection Agency Document, *Test Methods for Evaluating Solid Waste (SW-846)*, 2014, available at: http://www3. epa.gov/epawaste/hazard/testmethods/sw846/online/index.htm

53 The CEN technical standards are: EN 14899 Framework for the preparation and application of a sampling plan; CEN/TR 15310-1:2006 Guidance on selection and application of criteria for sampling under various conditions; CEN/TR 15310-2:2006 Guidance on sampling techniques; CEN/TR 15310-3:2006 Guidance on procedures for sub-sampling in the field; CEN/TR 15310-4:2006 Guidance on procedures for sample packaging, storage, preservation, transport and delivery; and CEN/TR 15310-5:2006 Guidance on the process of defining the sampling plan.

2. Question 4

71. The referring court seeks to ascertain whether the precautionary principle requires that, where there is doubt, or where it is impossible to establish with certainty whether or not hazardous substances are present in waste, that waste must be classified with a mirror hazardous (MH) code.

72. In accordance with Article 191(2) TFEU, the precautionary principle is one of the principles on which EU environmental policy is based, in addition to the principles of prevention and rectification of pollution at source, and the principle that 'the polluter should pay'. The precautionary principle is a risk-management tool which can be used where there is scientific uncertainty regarding a suspicion of risk to human health or the environment, and which allows preventive measures to be adopted before that uncertainty is dispelled. [54]

73. The precautionary principle is, together with other principles, referred to in the last subparagraph of Article 4(2) of Directive 2008/98, [55] while Articles 1 and 13 of that directive refer to the obligation of Member States to take the necessary measures to ensure that waste management is carried out without endangering human health and without harming the environment.

74. As I have observed, the classification of waste with a mirror hazardous (MH) code has important consequences for the subsequent management of that waste (reuse, recycling, possible recovery and disposal). As the Commission states, the precautionary principle does not automatically require such classification where there is mere uncertainty regarding the presence of substances with hazardous properties of the kind provided for in Annex III to Directive 2008/98 or Annex IV to Regulation No 850/2004.

75. In order to determine whether it is necessary to assign waste an MH code or an MNH code, the waste producer or holder must use the procedure for classifying waste with mirror codes, establishing the composition of the waste first and then, if substances with traces of hazardous properties are identified, calculating their values or carrying out the relevant tests.

76. However, the waste producer or holder cannot rely on the precautionary principle as an excuse for not applying the procedure for classifying waste with mirror codes laid down by Directive 2008/98 and Decision 2000/532. Member States are permitted to reclassify or declassify waste as hazardous but they must inform the Commission so that, where appropriate, it may amend the LoW, in accordance with Article 7(2) and (3) of Directive 2008/98. Since there is that restriction for the Member States, the precautionary principle does not permit individuals to classify waste other than by means of the procedure laid down in the EU provisions concerned.

77. I believe that that is borne out by the Court's case-law. [56] In that connection, 'a correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the substances or foods concerned, and, second, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research'. [57] Accordingly, 'protective measures … cannot validly be based on a purely hypothetical approach to the risk, founded on mere assumptions which have not yet been scientifically

54 See Thieffry, P., *Manuel de droit européen de l'environnement*, 2nd ed., Bruylant, Brussels, 2017, p. 83, and, Esteve Pardo, J., *El desconcierto del Leviatán. Política y derecho ante las incertidumbres de la ciencia*, Marcial Pons, Madrid, 2009, pp. 141 to 146.

55 Which provides that 'Member States shall take into account the general environmental protection principles of precaution and sustainability, technical feasibility and economic viability, protection of resources as well as the overall environmental, human health, economic and social impacts, in accordance with Articles 1 and 13'.

56 For a detailed account of the case-law of the EU courts, see Da Cruz Vilaça, J.L., 'The Precautionary Principle in EC Law', in *EU Law and Integration: Twenty Years of Judicial Application of EU Law*, Hart Publishing, 2014, pp. 321 to 354.

57 See, inter alia, judgments of 28 January 2010, *Commission* v *France* (C-333/08, EU:C:2010:44, paragraph 92), and of 19 January 2017, *Queisser Pharma* (C-282/15, EU:C:2017:26, paragraph 56). See also the Opinion of Advocate General Bobek in *Confédération paysanne and Others* (C-528/16, EU:C:2018:20, points 48 to 54).

verified. On the contrary, such protective measures, notwithstanding their temporary character and even if they are preventive in nature, may be adopted only if they are based on a risk assessment which is as complete as possible in the particular circumstances of an individual case, which indicate that those measures are necessary'.[58]

78. Furthermore, it is not sufficient to rely on mere uncertainty as to the hazardous nature of waste in order to classify that waste with an MH code on the basis of the precautionary principle. If that were the case, all mirror codes would result in the classification of waste as hazardous. However, I repeat, that classification requires an individual analysis of the composition of waste and subsequent verification of whether the substances of which it is composed may be hazardous. The procedure laid down in Directive 2008/98 and Decision 2000/532 imposes similar requirements to those which the Court lays down for reliance on the precautionary principle.

79. I agree with the Italian Government that waste producers or holders are not under an obligation to conduct an exhaustive analysis in order to identify *all* the hazardous substances, for the purposes of Regulation No 1272/2008, which may be present in the waste, and *all* possible traces of hazardous properties which the waste may display for the purposes of Annex III to Directive 2008/98. That view is shared by the referring court, which considers that it is not the detection, at any cost, of all the substances that that waste might theoretically contain that is necessary, but rather an appropriate characterisation of the waste based, first, on the determination of its exact composition and, subsequently, on the examination of the hazardous nature of the substances identified.

80. Moreover, the principle of technical feasibility and economic viability, referred to in the last subparagraph of Article 4(2) of Directive 2008/98, precludes the requirement that a waste producer must conduct an absolutely exhaustive analysis of the composition of waste and of all the traces of hazardous properties of substances of which that waste is composed. An obligation of that nature would also be disproportionate.

81. In my opinion, the precautionary principle does justify the classification of waste with an MH code where the analysis of the composition of that waste and/or of the traces of hazardous properties in its components proves to be impossible, for reasons that cannot be attributed to the waste producer or holder. In that case, there is a real risk to public health or the environment which supports the classification of waste with an MH code, as a restrictive measure to 'neutralise' its hazardousness.[59]

IV. Conclusion

82. In the light of the foregoing considerations, I suggest that the answers to the questions referred for a preliminary ruling by the Corte suprema di Cassazione (Supreme Court of Cassation, Italy) should be as follows:

Article 7 of and Annex III to Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, as amended by Regulation (EU) No 1357/2014, and point 2, 'Classification of waste as hazardous', under the heading 'Assessment and classification', of the Annex to Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on

58 See, inter alia, judgments of 8 September 2011, *Monsanto and Others* (C-58/10 to C-68/10, EU:C:2011:553, paragraph 77), and of 13 September 2017, *Fidenato and Others* (C-111/16, EU:C:2017:676, paragraph 51).

59 The Court has held that 'where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures' (judgments of 2 December 2004, *Commission* v *Netherlands*, C-41/02, EU:C:2004:762, paragraph 54; of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 93; and of 19 January 2017, *Queisser Pharma*, C-282/15, EU:C:2017:26, paragraph 57).

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, as amended by Decision 2014/955/EU, must be interpreted as meaning that:

(1) A producer or holder of waste which may be classified with a mirror code is required to identify the composition of that waste and to verify subsequently, by means of a calculation or a test, whether that waste contains any of the hazardous substances or substances with traces of the hazardous properties listed in Annex III to Directive 2008/98 or Annex IV to Regulation (EC) No 850/2004. For those purposes, it is necessary to use sampling, chemical analyses and tests, as provided for in Regulation (EC) No 440/2008, or any sampling, chemical analyses or tests which are internationally recognised or accepted by the national law of the Member State.

(2) The precautionary principle cannot be relied on by a waste producer or holder as an excuse for failure to use the procedure for classification of waste with mirror codes laid down in Directive 2008/98 and Decision 2000/532, unless an analysis of the composition of the waste and/or of the traces of hazardous properties of its components proves to be impossible.