Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

28 March 2019*

(Reference for a preliminary ruling — Environment — Directive 2008/98/EC and Decision 2000/532/EC — Waste — Classification as hazardous waste — Waste which may be assigned codes for both hazardous waste and non-hazardous waste)

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

REQUESTS for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decisions of 21 July 2017, received at the Court on 10 August 2017, in the criminal proceedings against

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 presso il Tribunale di Roma,

* Language of the case: Italian.

Procuratore generale della Repubblica presso la Corte suprema di cassazione,

THE COURT (Tenth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Tenth Chamber, F. Biltgen (Rapporteur) and E. Levits, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2018,

after considering the observations submitted on behalf of

– Mr Verlezza, by V. Spigarelli, avvocato,

– Mr Rando, by F. Giampietro, avvocato,

– Mr E. and Mr A. Giuliano, by L. Imperato, avvocato,

– E. Giovi Srl, by F. Pugliese and L. Giampietro, avvocatesse,

– Vetreco Srl, by G. Sciacchitano, avvocato,

– MAD Srl, by R. Mastroianni, F. Lettera and M. Pizzutelli, avvocati,

– the Procuratore della Repubblica presso il Tribunale di Roma, by G. Pignatone and A. Galanti, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,

– the European Commission, by G. Gattinara, F. Thiran and E. Sanfrutos Cano, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 4(2) 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 (OJ 2008 L 312, p. 3), as amended by Commission Regulation (EU) No 1357/2014 of 18 December 2014 (OJ 2014 L 365, p. 89, and corrigendum OJ 2017 L 42, p. 43) ('Directive 2008/98'), and point 2 of the section headed 'Assessment and classification' in 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 waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 2000 L 226, p. 3), as amended by Commission Decision 2014/955/EU of 18 December 2014 (OJ 2014 L 370, p. 44) ('Decision 2000/532').

2 The requests were made in criminal proceedings brought against Mr Alfonso Verlezza, Mr Riccardo Traversa, Ms Irene Cocco, Mr Francesco Rando, Ms Carmelina Scaglione, Mr Francesco Rizzi, Mr Antonio Giuliano and Mr Enrico Giuliano, Refecta Srl, E. Giovi Srl, Vetreco Srl, SE.IN Srl (Case C-487/17), Ms Carmelina Scaglione (Case C-488/17) and MAD Srl (Case C-489/17) for offences concerning, inter alia, illegal waste trafficking.

Legal context

EU law

3 Recital 14 of Directive 2008/98 states:

'The classification of waste as hazardous waste should be based, inter alia, on the Community legislation on chemicals, in particular concerning the classification of preparations as hazardous, including concentration limit values used for that purpose. Hazardous waste should be regulated under strict specifications in order to prevent or limit, as far as possible, the potential negative effects on the environment and on human health due to inappropriate management. Furthermore, it is necessary to maintain the system by which waste and hazardous waste have been classified in accordance with the list of the types of waste as last established by Commission Decision 2000/532 …, in order to encourage a harmonised classification of waste and ensure the harmonised determination of hazardous waste within the Community.'

4 Article 3 of Directive 2008/98 provides, inter alia, the following definitions:

'(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;

…'

5 The third subparagraph of Article 4(2) of that directive provides:

‘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.’

6 Article 7 of that directive, entitled ‘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 does not mean that it is waste in all circumstances. Furthermore, a substance or object is to 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 must 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.

…’

7 Annex III to Directive 2008/98 lists the various properties of waste which render it hazardous. With regard to the ‘test methods’, that annex provides:

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

8 The section headed ‘Assessment and classification’ of the Annex to Decision 2000/532 states:

‘1. Assessment of hazardous properties of waste

When assessing the hazardous properties of wastes, the criteria laid down in Annex III to Directive 2008/98/EC shall apply. For the hazardous properties HP 4, HP 6 and HP 8, cut-off values for individual substances as indicated in Annex III to Directive 2008/98/EC shall apply to the assessment. Where a substance is present in the waste below its cut-off value, it shall not be included in any calculation of a threshold. 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.

2. Classification of waste as hazardous

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

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]. 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] or, unless otherwise specified in Regulation (EC) No 1272/2008, by performing a test in accordance with Regulation [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.

…'

9 Recital 2 of Regulation No 1357/2014 states:

'Directive 2008/98/EC states that the classification of waste as hazardous should be based, inter alia, on the Union legislation on chemicals, in particular concerning the classification of preparations as hazardous, including concentration limit values used for that purpose. Furthermore, it is necessary to maintain the system by which waste and hazardous waste have been classified in accordance with the list of the types of waste as last established by [Decision 2000/532], in order to encourage a harmonised classification of waste and ensure the harmonised determination of hazardous waste within the Union.'

Italian law

10 According to the information provided by the referring court, the basic provisions concerning waste currently appear in Legislative Decree No 152 of 3 April 2006 (Ordinary Supplement to the GURI No 88 of 14 April 2006, 'Legislative Decree No 152/2006). In particular, Article 184 of that decree governs the classification of waste by distinguishing, on the basis of origin, municipal waste and special waste which in turn may be distinguished, on the basis of its hazardous properties, as hazardous waste and non-hazardous waste. Article 184 has been subject to a number of amendments.

11 Originally, paragraph 4 of that article provided for a waste list to be drawn up, by means of an inter-ministerial decree, in accordance with various provisions of EU law, in particular Decision 2000/532, and stipulated that, until that decree is adopted, the provisions of a directive of the

Minister for the Environment and the Protection of Natural Resources of 9 April 2002 would apply, which directive is set out in Annex D to Legislative Decree No 152/2006. In addition, Article 4 classified as dangerous non-domestic waste expressly specified as such by way of an asterisk to that effect on the list set out in Annex D.

12 Law No 116 of 11 August 2014 (Ordinary Supplement to GURI No 192 of 20 August 2014, 'Law No 116/2014'), which converted, with amendments, Decree-Law No 91 of 24 June 2014 into law, amended the preamble to Annex D to Legislative Decree No 152/2006 by introducing the following provisions:

'1. The classification of waste shall be carried out by the producer, who shall assign to that waste the appropriate EWC [European Waste Catalogue] code in accordance with the provisions of Decision [2000/532].

2. If waste is classified under an EWC code as "absolute" hazardous waste, it is hazardous without any further qualification. The hazardous properties, defined under H 1 to H 15, of the waste must be determined in order to manage that waste.

3. If waste is classified under an EWC code as "absolute" non-hazardous waste, it is non-hazardous without any further qualification.

4. If waste is classified under mirror codes, one which is hazardous and one which is non-hazardous, then, in order to establish whether or not that waste is hazardous, the hazardous properties of that waste must be determined. The checks which must be carried out in order to determine the hazardous properties of waste are as follows: (a) identify the compounds present in the waste by using the producer's fact sheet, having an understanding of the chemical process and sampling and analysing the waste; (b) determine the hazards connected with those compounds using European legislation on the labelling of hazardous substances and preparations, European and international sources of information and the safety data sheet for the products which generate the waste; (c) establish whether the concentrations of those compounds imply that the waste has hazardous properties by comparing the concentrations measured during the chemical analysis with the threshold for the specific risk phrases for the compounds, or by tests carried out in order to verify whether the waste has hazardous properties.

5. If the chemical analyses reveal the components of the waste with no further qualification, and if the exact compounds of that waste are unknown, then, in order to identify the hazardous properties of the waste, it will be necessary to take into consideration the most hazardous compounds, in compliance with the precautionary principle.

6. Where the substances present in the waste are not known or are not determined in accordance with the methods laid down in the preceding paragraphs, or where the hazardous properties cannot be determined, the waste shall be classified as hazardous.

7. In any event, the classification shall take place before the waste is taken away from the place of production.'

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

13 These requests for a preliminary ruling have been made in three cases concerning criminal proceedings brought against around thirty defendants charged with offences connected with the treatment of hazardous waste.

14 It is apparent from the orders for reference that those defendants, in their respective capacities as landfill managers, waste collection and production companies, and companies responsible for carrying out chemical analyses of waste, are accused of illegal waste trafficking, contrary to Article 260 of Legislative Decree No 152/2006. They are accused of having treated waste which could have been assigned either hazardous waste codes or non-hazardous waste codes ('mirror codes') as non-hazardous waste. It is alleged that, on the basis of non-exhaustive, partial chemical analyses, they assigned to that waste non-hazardous waste codes and then treated it in landfill sites for non-hazardous waste.

15 In that context, the Giudice per le indagini preliminari del Tribunale di Roma (judge responsible for preliminary investigations at the Rome District Court, Italy) ordered various seizure measures targeting the landfill sites where the waste at issue had been treated and the capital assets of the owners of those landfill sites, and, in that context, appointed a court commissioner to manage those landfill sites, and the waste collection and production sites for a period of six months.

16 Hearing a number of appeals brought by the defendants against those measures, the Tribunale di Roma (Rome District Court) issued three separate orders setting those measures aside.

17 The Procuratore della Repubblica presso il Tribunale di Roma (Public Prosecutor at the Rome District Court, Italy) brought three appeals against those orders before the Corte suprema di cassazione (Court of Cassation, Italy).

18 According to that court, the cases in the main proceedings concern the determination of the criteria to be applied when assessing the hazardous properties of waste to which mirror codes may be assigned. In that regard, that court states that the determination of those criteria has been a question of interest in Italian case-law and legal literature over the past 10 years and that two different solutions have been adopted in connection with the interpretation to be given to the relevant provisions both of national law and of EU law.

19 Thus, on the one hand, according to the so-called 'safety' or 'presumed hazardousness' theory, based on the precautionary principle, in a case of waste to which mirror codes may be assigned, the holder must rebut the presumption that that waste is hazardous and is therefore required to carry out analyses in order to ensure that the waste in question is devoid of any hazardous substance.

20 On the other hand, in accordance with the so-called 'probability' theory, based on the sustainable development principle and relying on the Italian-language version of point 2 of the section headed 'Assessment and classification' in the Annex to Decision 2000/532, the holder of waste to which mirror codes may be assigned has a discretion when determining beforehand the hazardous nature of the waste in question using the appropriate analyses. Thus, the waste holder could limit its analyses to the substances which, with a high degree of probability, may be found in the products at the start of the waste production process at issue.

21 In those circumstances, the Corte suprema di cassazione (Surpeme Court of Cassation) decided to stay the proceedings and to refer the following questions, which are worded identically in Cases C-487/17 to C-489/17, to the Court for a preliminary ruling:

'(1) Must the Annex to Decision [2000/532] and [Annex III to Directive 2008/98] 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?

(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 By order of the President of the Court of 7 September 2017, Cases C-487/17 to C-489/17 were joined for the purposes of the written and oral procedure, and the judgment.

Consideration of the questions referred

Admissibility

23 Mr Rando, Vetreco and the Procuratore generale della Repubblica presso la Corte suprema di cassazione (Public Prosecutor at the Court of Cassation, Italy) submit that the requests for a preliminary ruling are inadmissible and must therefore be dismissed.

24 According to Mr Rando, the questions referred for a preliminary ruling are irrelevant, given that they are based on the application of Law No 116/2014. That law is a 'technical rule' which the Commission should have been given notice of in advance. Since that notice was not given, that law cannot be applied to individuals.

25 Vetreco maintains that the questions referred for a preliminary ruling are not essential for the resolution of the dispute in the main proceedings, given that Italian case-law has defined the criteria according to which waste capable of coming under mirror codes should be classified. The referring court must therefore restrict itself to assessing the facts and applying its case-law, and accordingly there is no need to refer questions to the Court.

26 The Public Prosecutor at the Court of Cassation argues, first of all, that the questions referred do not identify precisely the provisions of EU law in respect of which an interpretation is sought, in that only the first of those contains a generic reference to Decision 2000/532 and Directive 2008/98. Next, those questions also fail to satisfy the self-sufficiency criteria, in that they are in themselves incomprehensible. Finally, the orders for reference do not contain any explanation with regard to the illegal classification allegedly committed in 2013 to 2015, and the referring court did not explain the logical and argumentative link between, on the one hand, the single doubt relating to interpretation set out in the grounds for those orders concerning the terms 'appropriate' and 'relevant' in point 2 of the section headed 'Assessment and classification' in the Annex to Decision 2000/532 and, on the other, the questions referred for a preliminary ruling covering matters not addressed in those grounds.

27 In that regard, it should be borne in mind that, according to settled case-law, the procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts. It follows that it is for the national courts alone which are seised of the case and which are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (see, inter alia, judgments of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369 paragraph 24, and of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, paragraph 25).

28 Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (see, inter alia, judgments of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369 paragraph 25, and of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, paragraph 26).

29 Nevertheless, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual 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 enable it to give a useful answer to the questions submitted to it (see, inter alia, judgments of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456, paragraph 33; of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, paragraph 27, and of 2 March 2017, *Pérez Retamero*, C-97/16, EU:C:2017:158, paragraph 22).

30 In the present case, it should first of all be noted that, although it is true that the description of the factual and legal context in the requests for a preliminary ruling is succinct, that description nevertheless satisfies the requirements of Article 94 of the Rules of Procedure of the Court and therefore enables the Court to understand both the facts and the legal context in which the actions in the main proceedings arose.

31 Next, it should be added that, as is apparent from paragraphs 18 to 20 above, the referring court explained the reasons which led it to seek an interpretation of the provisions of EU law covered by the questions referred for a preliminary ruling.

32 Finally, it is important to note that, under Article 10 of Directive 98/34/EC 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), as amended by Directive 98/48/CE of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18), Member States are not under an obligation to notify the Commission of a draft technical regulation or to provide information where they fulfil their obligations arising out of EU directives.

33 In the present case, it is common ground that, by adopting the provisions of Law No 116/2014, the Italian Republic fulfilled its obligations arising out of directives on the classification of waste, in particular Directive 2008/98. Accordingly, assuming that Law No 116/2014 falls within the scope of Directive 98/34, the fact that that Member State did not give notice of those provisions does not amount to a substantial procedural defect such as to prevent the technical rules at issue being applied to individuals. That fact does not affect their enforceability as against individuals and therefore does not have any impact as such on the admissibility of the questions referred for a preliminary ruling.

34 In the light of the foregoing considerations, it must be held that the requests for a preliminary ruling contain the necessary elements of fact and law to enable the Court to give a useful answer to the referring court.

35 Therefore, the requests for a preliminary ruling are admissible.

Substance

Questions 1 to 3

36 By its first to third questions which should be answered together, the referring court asks, in essence, whether Annex III to Directive 2008/98 and the Annex to Decision 2000/532 must be interpreted to the effect that the holder of waste which may be classified under mirror codes, but the composition of

which is not immediately known, must, in view of that classification, determine that composition and ascertain whether the waste in question contains one or more hazardous substances in order to establish whether that waste has hazardous properties and, if so, to what degree that composition should be determined, using which methods.

37 As a preliminary point, it should be made clear that, on the basis that the waste at issue in the main proceedings, which is the product of the mechanical treatment of municipal waste, may come under mirror codes, the referring court has clearly defined the reason for referring the questions, such that, contrary to what some parties to the main proceedings maintain, there is no need for this Court to rule on whether or not the classification carried out by the referring court is correct.

38 Under Article 3(2) of Directive 2008/98, hazardous waste is defined as 'waste which displays one or more of the hazardous properties listed in Annex III' to that directive. It should be noted, as the Advocate General stated in point 33 of his Opinion, that that directive makes hazardous waste management subject to specific requirements concerning its traceability, packaging and labelling, the ban on mixing that waste with other hazardous waste or other waste, substances or materials, and the fact that the hazardous waste may be treated only in specifically designated facilities which have obtained special authorisation.

39 As is apparent from Article 7(1) of Directive 2008/98, in order to ascertain whether waste falls within the list of waste established by Decision 2000/532, which is binding as regards the determination of waste considered to be hazardous waste, account must be taken of 'the origin and composition of the waste and, where necessary, limit values of concentration of hazardous substances', given that those substances make it possible to determine whether waste has one or more of the hazardous properties listed in Annex III to that directive.

40 Therefore, where the composition of waste to which mirror codes may be assigned is not immediately known, it falls to the holder of that waste, as the party responsible for its management, to gather information which may enable it to gain sufficient knowledge of that composition and, thus, assign the appropriate code to that waste.

41 If that information is not obtained, the holder of such waste risks being in breach of its obligations as the party responsible for managing it, where it subsequently turns out that that waste was treated as non-hazardous waste, when it had one or more of the hazardous properties listed in Annex III to Directive 2008/98.

42 It must be noted that, as the Advocate General stated in point 52 of his Opinion, there are different methods for gathering the necessary information relating to the composition of the waste which thus make it possible to identify the possible presence of hazardous substances and one or more of the hazardous properties listed in Annex III to Directive 2008/98.

43 In addition to the methods identified under the section headed 'Test methods' of that annex, the waste holder may, inter alia, refer to:

– information relating to the manufacturing process or chemical process 'from which the waste came' and to input substances and intermediates, including expert opinions;

– information from the original producer of the substance or object before it became waste, in particular the safety data sheets, product labels or product fact sheets;

– databases on waste analysis available in the Member States, and

– sampling and chemical analysis of the waste.

44 With regard to sampling and chemical analysis, it should be made clear, as the Advocate General stated in point 69 of his Opinion, that those methods must provide guarantees that they are effective and representative.

45 It is true that the chemical analysis of waste must enable the holder to gain sufficient knowledge of the composition of that waste in order to determine whether the waste has one or more of the hazardous properties listed in Annex III to Directive 2008/98. However, no provision of the EU legislation in question may be interpreted to the effect that the purpose of that analysis is to determine the absence of any hazardous substance in the waste at issue, such that the waste holder would be required to rebut a presumption that that waste is hazardous.

46 It must be recalled, first, that, as regards the obligations under Article 4 of Directive 2008/98, it is clear from paragraph 2 of that article that, when applying the waste hierarchy provided for in that directive, Member States must take appropriate measures to encourage the options that deliver the best overall environmental outcome (judgment of 15 October 2014, *Commission* v *Italy*, C-323/13, not published, EU:C:2014:2290, paragraph 36). In doing so, that article provides that Member States must take into consideration technical feasibility and economic viability, such that the provisions of that directive may not be interpreted to the effect that they impose on a waste holder unreasonable obligations, both from a technical and from an economic point of view, in respect of waste management. Secondly, in accordance with point 2, first indent, of the section entitled 'Assessment and classification' of the Annex to Decision 2000/532, the classification of waste which may come under mirror codes as 'hazardous waste' is appropriate only if that waste contains hazardous substances which confer on it one or more of the hazardous properties listed in Annex III to Directive 2008/98. It follows that the waste holder, whilst not being obliged to establish that there are no hazardous substances in the waste at issue, is nevertheless required to look for hazardous substances which may reasonably be found in that waste, and thus, in that respect, it has no discretion.

47 That interpretation, as the parties to the main proceedings submitted at the hearing, is now supported by the Commission Communication of 9 April 2018 containing technical recommendations on the classification of waste (OJ 2018 C 124, p. 1). However, since that communication postdates the facts at issue in the main proceedings, the Court, in view of the criminal nature of those cases, considers that it is not necessary to take that communication into consideration in its replies to the questions referred for a preliminary ruling.

48 Moreover, that interpretation is also compatible with the precautionary principle, which is one of the foundations of the EU's policy of protection in environmental matters, since it follows from the case-law of the Court that a protection measure such as the classification of waste as hazardous is required only where, following an assessment of the risks, which is as complete as possible having regard to the particular circumstances of the case, there is objective evidence which demonstrates that such a classification is required (see, by analogy, judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 44, and of 13 September 2017, *Fidenato and Others*, C-111/16, EU:C:2017:676, paragraph 51).

49 Where the waste holder has gathered information on the composition of that waste, in situations such as those in the main proceedings, it must carry out the assessment of the hazardous properties of that waste in accordance with point 1 of the section entitled 'Assessment and classification' of the Annex to Decision 2000/532, in order to be able to classify the waste, either on the basis of the calculation of the concentrations of hazardous substances present in that waste and in accordance with the cut-off values indicated for each substance in Annex III to Directive 2008/98, or on the basis of a test, or on the basis of both those methods. In the latter case, point 1 provides that 'the results of the test shall prevail'.

50 With regard to the calculation of the hazardous property present in waste, it is clear from point 2, second indent, of the section entitled 'Assessment and classification' of the Annex to Decision 2000/532, that the degree of concentration of hazardous substances contained in waste and capable of

attributing hazardous properties to that waste must be calculated as explained in Annex III to Directive 2008/98. In the case of hazardous properties HP 4 to HP 14, that annex contains precise instructions for determining the concentrations in question and, in tables specific to the various hazardous properties, sets the concentration limits at or above which the waste in question must be classified as hazardous.

51 With regard to the tests, it should be pointed out in the first place that the assessment of the hazardous properties HP 1 to HP 3, as is clear from Annex III to Directive 2008/98, must be carried out on the basis of that method where that is 'appropriate and proportionate'. It follows that, where the assessment of the hazardousness of waste may be made on the basis of information already obtained, such that the use of a test would be neither appropriate nor proportionate, the waste holder may classify that waste without a test.

52 In the second place, it is important to note that, although it is true that, as the Advocate General stated in point 64 of his Opinion, the EU legislature, at this stage, has not harmonised analysis and test methods, the fact remains that both Annex III to Directive 2008/98 and Decision 2000/532, in that respect, refer, first, to Regulation No 440/2008 and to the relevant CEN notes and, secondly, to the internationally recognised testing methods and guidelines.

53 However, it is clear from the heading entitled 'Test methods' in Annex III to Directive 2008/98 that that reference does not exclude test methods developed nationally from also being taken into account provided that they are internationally recognised.

54 In view of those considerations, the answer to the first to third questions is that Annex III to Directive 2008/98 and the Annex to Decision 2000/532 must be interpreted to the effect that the holder of waste which may be classified under mirror codes, but the composition of which is not immediately known, must, in view of that classification, determine that composition and ascertain the hazardous substances which may reasonably be found in that waste in order to establish whether that waste has hazardous properties and may, for that purpose, use the sampling, chemical analyses and tests provided for in Regulation No 440/2008 or any other internationally recognised sampling, chemical analysis or test.

The fourth question

55 By its fourth question, the referring court asks, in essence, whether the precautionary principle must be interpreted to the effect that, where there are doubts over the hazardous properties of waste which may be classified under mirror codes, or where it is impossible to determine with certainty that there are no hazardous substances in that waste, it must be classified as hazardous waste in accordance with that principle.

56 In order to answer that question, it must be recalled first of all that, in accordance with Article 191(2) TFEU, the precautionary principle constitutes one of the foundations of the EU's policy on the environment.

57 Next, it should be pointed out that it is clear from the case-law of the Court that a correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for the environment of the waste concerned, and, second, a comprehensive assessment of the risk to the environment based on the most reliable scientific data available and the most recent results of international research (see, to that effect, judgments of 9 September 2003, *Monsanto Agricoltura Italia and Others*, C-236/01, EU:C:2003:431, paragraph 113; 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).

58 The Court thus inferred 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 the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (see, to that effect, judgment of 19 January 2017, *Queisser Pharma*, C-282/15, EU:C:2017:26, paragraph 57 and the case-law cited).

59 Finally, it is important to note that, in accordance with the third subparagraph of Article 4(2) of Directive 2008/98, Member States must take into account, not only the general environmental protection principles of precaution and sustainability, but also technical feasibility and economic viability, protection of resources as well as the overall environmental, human health, economic and social impacts. It follows that the EU legislature, in the specific area of waste management, intended to strike a balance between, on the one hand, the precautionary principle and, on the other, technical feasibility and economic viability, such that waste holders are not required to ensure that the waste in question is devoid of any hazardous substance, but may confine themselves to ascertaining the substances which may reasonably be found in that waste and assessing its hazardous properties on the basis of calculations or through tests relating to those substances.

60 It follows that a protection measure such as the classification of waste which may be classified under mirror codes as hazardous waste is required where, following an assessment of the risks which is as complete as possible having regard to the particular circumstances of the case, it is impossible, in practical terms, for that waste holder to determine the presence of hazardous substances or to assess the hazardous property of that waste (see, by analogy, judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 44, and of 13 September 2017, *Fidenato and Others*, C-111/16, EU:C:2017:676, paragraph 51).

61 As the Commission stated in its observations, that practical impossibility cannot arise due to the conduct of the waste holder itself.

62 In view of those considerations, the answer to the fourth question is that the precautionary principle must be interpreted to the effect that where, following an assessment of the risks, which is as complete as possible having regard to the particular circumstances of the case, it is impossible, in practical terms, for a holder of waste which may be classified under mirror codes to determine the presence of hazardous substances or to assess the hazardous property of that waste, it must be classified as hazardous waste.

Costs

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

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

1. **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 Commission Regulation (EU) No 1357/2014 of 18 December 2014, and 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 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 Commission Decision 2014/955/EU of 18 December 2014, must be interpreted to the effect that a holder of waste which may be classified under either hazardous waste codes or non-hazardous waste codes, but the**

composition of which is not immediately known, must, in view of that classification, determine that composition and ascertain the hazardous substances which may reasonably be found in that waste in order to establish whether that waste has hazardous properties and may, for that purpose, use the sampling, chemical analyses and tests provided for in Commission Regulation (EC) No 440/2008 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), or any other internationally recognised sampling, chemical analysis or test.

2. **The precautionary principle must be interpreted to the effect that where, following an assessment of the risks, which is as complete as possible having regard to the particular circumstances of the case, it is impossible, in practical terms, for a holder of waste which may be classified under either hazardous waste codes or non-hazardous waste codes to determine the presence of hazardous substances or to assess the hazardous property of that waste, it must be classified as hazardous waste.**

[Signatures]