



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 29 November 2018<sup>1</sup>

**Case C-60/18**

**AS Tallinna Vesi**

**v**

**Keskkonnaamet,**

**Intervener:**

**Keskkonnaministeerium**

(Request for a preliminary ruling from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia))

(Directive 2008/98/EC — Waste — End-of-waste status — Recovery — Specific end-of-waste criteria for sewage sludge — No criteria at European or national level)

## I. Introduction

1. The concept of waste has been a feature of the Court's case-law, starting with the judgment in *Vessoso and Zanetti*,<sup>2</sup> for decades. A question which has arisen rather more recently has to do with the conditions under which waste is converted back into a normal commodity no longer subject to the strict rules of the waste legislation.<sup>3</sup> By recasting the Waste Directive in 2008,<sup>4</sup> the legislature took the first steps towards coming up with an answer to that question. It recently provided further clarifications,<sup>5</sup> although these amendments are not yet applicable to the case in the main proceedings.

2. Leaving aside the most recent amendments, an important criterion in this context is that the substance or object must fulfil the technical requirements for the specific purposes and meet the existing legislation and standards applicable to products. However, does this mean that waste may no longer be regarded as such only if and after it has been recovered as a product which complies with the general standards laid down as being applicable to it? Or is a waste holder permitted to request that the competent authorities decide, on a case-by-case basis and irrespective of whether any product standards are in place, whether waste is no longer to be regarded as such?

3. These are the questions raised by the present request for a preliminary ruling.

<sup>1</sup> Original language: German.

<sup>2</sup> Judgment of 28 March 1990, *Vessoso and Zanetti* (C-206/88 and C-207/88, EU:C:1990:145).

<sup>3</sup> Judgment of 15 June 2000, *ARCO Chemie Nederland and Others* (C-418/97 and C-419/97, EU:C:2000:318).

<sup>4</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3). The amendments introduced by Commission Regulation (EU) No 1357/2014 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) and Commission Directive (EU) 2015/1127 of 10 July 2015 amending Annex II to Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives (OJ 2015 L 184, p. 13) are not relevant to the present proceedings.

<sup>5</sup> Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (OJ 2018 L 150, p. 109).

## II. Legal framework

### A. *The Waste Directive*

4. Under Article 3(1) of the Waste Directive, “waste” means any substance or object which the holder discards or intends or is required to discard’.

5. The waste hierarchy is contained in Article 4(1) of the Waste Directive:

‘The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:

- (a) prevention;
- (b) preparing for re-use;
- (c) recycling;
- (d) other recovery, e.g. energy recovery; and
- (e) disposal.’

6. End-of-waste status is governed by Article 6 of the Waste Directive:

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

- (a) the substance or object is commonly used for specific purposes;
- (b) a market or demand exists for such a substance or object;
- (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
- (d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

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

2.-3. ...

4. Where criteria have not been set at Community level under the procedure set out in paragraphs 1 and 2, Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case-law. They shall notify the Commission of such decisions in accordance with 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 where so required by that Directive.’

7. The essential obligation and objective laid down by the Waste Directive is set out in Article 13:

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

8. After the request for a preliminary ruling had been submitted, the Waste Directive was amended in many respects, in particular in relation to Article 6. However, those amendments do not have to be transposed until 5 July 2020 and are not therefore applicable to the case in the main proceedings.

### ***B. The Estonian Law on waste***

9. The request for a preliminary ruling refers in particular to Paragraph 2<sup>1</sup> of the Jäätmeseadus (Estonian Law on Waste), in the version in force since 18 July 2014, which governs end-of-waste status.

‘1. Waste shall cease to be waste when it has undergone a recovery, including recycling, operation and complies with criteria developed on the basis of Article 6(2) of [the Waste Directive], in accordance with the following conditions:

- (1) the substance or object is commonly used for specific purposes;
  - (2) a market or demand exists for such a substance or object;
  - (3) the substance or object fulfils the technical requirements, legislation and standards applicable to products for the specific purposes;
  - (4) the use of the substance or object will not lead to overall adverse environmental or human health impacts.
2. Where criteria within the meaning of subparagraph 1 of this Paragraph have not been set in accordance with Article 6(2) of [the Waste Directive], the Minister responsible for this sector may, having regard to the conditions listed in subparagraph 1, points 1 to 4, of this Paragraph, issue a regulation setting end-of-waste criteria for certain types of waste.
3. The criteria must include limit values for pollutants where necessary and take into account any possible adverse environmental or human health impacts.
4. The recovery operation following which the waste ceases to be waste must be specified in the waste permit or integrated environmental permit issued under the Law on Industrial Emissions to the undertaking that performed the recovery operation.’

### **III. Facts and request for a preliminary ruling**

10. In 2014 and 2015, the Keskkonnaamet (Estonian Environmental Board) issued to AS Tallinna Vesi, an operator of sewage treatment plants, permits to recover up to 32 000 t of waste per year in a waste treatment plant in Tallinn (Estonia) and up to 7 000 t of waste per year in a treatment plant in the municipality of Harku in Harjumaa (Estonia).

11. It follows from the statement of reasons contained in the above notices that Tallinna Vesi operates a municipal sewage mains system and an activated sludge plant for the treatment of waste water.

12. The Environment Agency and Tallinna Vesi are in dispute over whether sewage sludge treated in this way is still to be regarded as waste, in which case its use would be significantly restricted, or can be freely marketed as a product.

13. Tallinna Vesi is of the view that the water purification operation constitutes biological recycling. Under Estonian law, biological recycling is a waste recovery operation in which waste materials are transformed into products and thereby cease to be waste. Tallinna Vesi wishes to obtain a permit to recover waste in this way.

14. The Environment Agency, on the other hand, takes the view that all of the criteria laid down in Paragraph 2<sup>1</sup>(1), points 1 to 4, of the Estonian Law on Waste must be met simultaneously in order for waste to cease to be such. In accordance with Paragraph 2<sup>1</sup>(1), point 3, of the Estonian Law on waste in particular, a substance or object becomes a product only if it meets the standard applicable to a product for a specific purpose.

15. However, there is no product standard for the product obtained from the stabilisation and disinfection operation performed by Tallinna Vesi, and the waste treatment operations performed by that undertaking must therefore be classified as biological treatment *prior to* waste recovery. It is for this reason that a user of sewage sludge, whether pre-treated or not, must register as a processor of non-hazardous waste or hold a waste permit or an integrated environmental permit.

16. Furthermore, the Environment Agency also takes the view that Paragraph 2<sup>1</sup> of the Estonian Law on Waste does not give it the right to decide on end-of-waste status. On the contrary, the Environment Agency may act only on the basis of a legal act of the European Union or a regulation issued by the Minister for the Environment.

17. Tallinna Vesi brought an action against the waste permits, in so far as they provide that processed sewage sludge must continue to be regarded as waste. That action having been dismissed at first instance, the appeal against that decision is now pending before the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia). The latter has therefore referred the following questions to the Court:

- (1) In the case where end-of-waste criteria have not been set at EU level for a particular type of waste, should Article 6(4) of the Waste Directive be interpreted to mean that a national legal act providing that end-of-waste status depends upon whether criteria set in a generally applicable national legal act exist for a particular type of waste is in keeping with that provision?
- (2) In the case where end-of-waste criteria have not been set at EU level for a particular type of waste, does the first sentence of Article 6(4) of the Waste Directive grant the waste holder the right to apply to the competent authority or to a court in a Member State for a decision on end-of-waste status in keeping with the applicable case-law of the Court of Justice of the European Union, irrespective of whether criteria set in a generally applicable national legal act exist for a particular type of waste?

18. Written observations were submitted by AS Tallinna Vesi, the Republic of Estonia, the Italian Republic, the Republic of Austria, the Kingdom of the Netherlands and the European Commission. No hearing was held, since the Court considered that it had sufficient information.

#### IV. Legal assessment

19. The appeal court clearly assumes that sewage sludge is waste because it does not ask whether, in the light of the exception provided for in Article 2(2)(a) of the Waste Directive in conjunction with the Waste Water Directive<sup>6</sup> and/or the Sewage Sludge Directive,<sup>7</sup> sewage sludge is to be regarded as waste at all. Neither does it ask whether the Sewage Sludge Directive may constitute a sufficient product standard. If doubts persist in relation to these questions, they must remain, for the time being at least, a matter for the national court.

20. The request for a preliminary ruling is concerned instead with a complicated provision the applicable version of which may be said to be somewhat infelicitously worded. While it is true that Article 6(1) of the Waste Directive contains particular conditions which are relevant to end-of-waste status, those conditions must first be given specific expression by the Commission in further legal acts before they can be used to determine whether certain waste is no longer to be regarded as such.<sup>8</sup> According to Article 6(4), where no criteria have been set at EU level, the Member States may instead decide on a case-by-case basis whether certain waste has ceased to be waste taking into account the applicable case-law.

21. It is the latter of those provisions to which the two questions concerning end-of-waste status which have been referred to the Court relate. One asks whether it is compatible with Article 6(4) of the Waste Directive for end-of-waste status to be made subject to the condition that product standards have been laid down for the substance or object in question at European or national level, the other whether a waste holder may ask an authority or a court to decide on a case-by-case basis whether waste is still to be regarded as waste or has ceased to be such.

22. In this regard, the answer to one question may have a significant bearing on the answer to the other question. If, after all, it were permissible to make end-of-waste status subject to the condition that criteria have been laid down, there could be no obligation to give decisions on end-of-waste status on a case-by-case basis irrespective of the existence of such criteria. On the other hand, the wording of Article 6(4) of the Waste Directive, which allows Member States to decide *case by case*, could also be understood to mean that the Member States are permitted *only* to give individual decisions and may not lay down general criteria.

23. As I shall show below, however, the answers are to be found somewhere between those extremes. To that end, I shall begin by looking at the wording of the first sentence of Article 6(4) of the Waste Directive; I shall then address the substantive legal conditions for end-of-waste status and discuss the powers of the Member States in that regard; and, finally, I shall examine the relationship between general rules and individual decisions in the context of the application of Article 6(4).

6 Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ 1991 L 135, p. 40); the relevant version is that amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part One (OJ 2008 L 311, p. 1). On the definition of the scope of the Waste Directive in relation to waste water, see the judgment of 10 May 2007, *Thames Water Utilities* (C-252/05, EU:C:2007:276).

7 Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture (OJ 1986 L 181, p. 6); the relevant version is that amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two (OJ 2009 L 87, p. 109).

8 Judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142, paragraph 55).

### **A. The wording of the first sentence of Article 6(4) of the Waste Directive**

24. The answer to the request for a preliminary ruling appears to follow relatively clearly from the first sentence of Article 6(4) of the Waste Directive. This states that Member States *may* decide case by case whether certain waste has ceased to be waste taking into account the applicable case-law, where the Commission has not set any criteria at EU level.

25. At first sight, therefore, it would seem reasonable to have regard to the wording of that provision, in particular the use of the verb ‘*may*’, and, possibly, to take into account also the power of the Member States under Article 193 TFEU to adopt more stringent protective measures. This alone would support the inference that neither the national authorities nor the courts of the Member States are *obliged* to make a determination of end-of-waste status in the absence of any specific European or national rules applicable to particular substances or objects. They would on that basis be under no obligation either to lay down criteria or to give individual decisions.

26. In reality, however, such an approach would be too superficial. The request for a preliminary ruling requires instead a more in-depth consideration of the concept of waste and, in particular, the conditions governing end-of-waste status. It would after all be inconsistent with the Waste Directive to continue to treat a substance or object as waste if it were no longer to be regarded as such under that directive. It is necessary, rather, to strike an appropriate balance between the objectives pursued by the Waste Directive, that is to say, on the one hand, to ensure a high level of protection and, on the other hand, where possible, to recover waste in the form of useable products.

### **B. End-of-waste status**

27. Article 6 of the Waste Directive identifies two routes to end-of-waste status.

28. In accordance with Article 6(1) of the Waste Directive, certain specified waste ceases to be waste when it has undergone a recovery operation and complies with specific criteria to be developed by the Commission in accordance with particular conditions. On that basis, end-of-waste status would be compulsory, but the conditions laid down in that provision are not present. The Commission, after all, has not set any such criteria for sewage sludge.

29. The second route to end-of-waste status is set out in Article 6(4) of the Waste Directive. The Decision of the Member States provided for in that article must take into account the case-law (of the Court of Justice).

30. The case-law referred to in Article 6(4) evolved independently of Article 6 and is based on the definition in Article 3(1) of the Waste Directive.<sup>9</sup> According to that definition, waste means any substance or object which the holder discards or intends or is required to discard. Whether waste has been discarded must be determined (objectively) in the light of all the circumstances, account being taken of the aim of the directive and the need to ensure that its effectiveness is not undermined.<sup>10</sup>

31. That definition could be understood as meaning that a substance or object is no longer waste if its holder does not discard it and does not intend and is not required to discard it.

32. Such a (potentially spontaneous) change in waste status would, however, be incompatible with the waste management scheme laid down in the Waste Directive, inasmuch as that scheme presupposes first of all that the waste legislation remains applicable.

<sup>9</sup> Judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142, paragraph 57 and the case-law cited).

<sup>10</sup> Judgments of 18 December 2007, *Commission v Italy* (C-263/05, EU:C:2007:808, paragraph 40), and of 12 December 2013, *Shell Nederland and Belgian Shell* (C-241/12 and C-242/12, EU:C:2013:821, paragraph 40).

33. In particular, Article 15(1) of the Waste Directive provides that the Member States are to take the necessary measures to ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector in accordance with Articles 4 and 13.

34. Article 13 of the Waste Directive contains the principal obligation applicable under waste legislation, which is that waste management should be carried out without endangering human health and without harming the environment. Article 4 lays down the waste hierarchy, which lists waste prevention in first position, followed by preparation for re-use, then recycling, then other recovery, and waste disposal only as a last resort.

35. It should be noted here, however, that those who process waste commercially will not discard it, at least not during processing. On the contrary, holding waste is a *sine qua non* of the activity in question and of the profits thereby pursued. Thus, the very business of a landfill site is to hold waste on a long-term basis. In fact, commercial waste recovery usually requires waste to be acquired. It is for this reason, moreover, that disputes arise as to who may dispose of or recover waste.<sup>11</sup>

36. The fact that, in these circumstances, waste is not discarded in the course of its management cannot in and of itself have the effect of removing waste from the scope of the waste legislation. For, as soon as the waste legislation ceases to apply, there can, by extension, no longer be any guarantee of compliance with Articles 4 and 13 of the Waste Directive.

37. Although the loss of waste status therefore rightly presupposes that the holder will not discard and does not intend and is not required to discard the substance or object in question,<sup>12</sup> that condition is not sufficient to end the waste's status as such. This is apparent, moreover, not only from the conditions laid down in Article 6(1) of the Waste Directive but also from the Court's case-law, to which Article 6(4) refers.

38. In the case of certain forms of recovery, after all, the Court has recognised that the resulting substances cease to be waste unless they are discarded. This is true of the material recycling of packaging waste into new material or a new product possessing characteristics comparable to those of the material from which the waste was derived,<sup>13</sup> and to the processing of scrap metal into iron or steel products which are so similar to other iron or steel products made from primary raw materials that they can hardly be distinguished.<sup>14</sup> The recovery of waste to produce a purified gas to be used as a fuel achieves a similar quality.<sup>15</sup>

39. The end-of-waste status of a substance or object is thus subject to two conditions. First, in accordance with Article 3(1) of the Waste Directive, the holder of the substance or object in question must not discard it or intend or be required to discard it. Secondly, a *recovery operation* must enable the substance or object to be made usable without endangering human health or harming the environment.<sup>16</sup>

40. At no point does the case-law state, however, that the European Union or the Member States must lay down rules or adopt decisions in order for waste to cease to be regarded as such.

11 By way of illustration, see judgments of 9 September 1999, *Commission v Germany* (C-102/97, EU:C:1999:394), concerning the conflict between certain practices for the recovery of waste oils, and of 23 May 2000, *Sydhavnens Sten & Grus* (C-209/98, EU:C:2000:279), concerning access to building waste.

12 Judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142, paragraph 57).

13 Judgment of 19 June 2003, *Mayer Parry Recycling* (C-444/00, EU:C:2003:356, paragraph 75).

14 Judgment of 11 November 2004, *Niselli* (C-457/02, EU:C:2004:707, paragraph 52).

15 Judgments of 4 December 2008, *Lahti Energia* (C-317/07, EU:C:2008:684, paragraphs 35 and 36), and of 25 February 2010, *Lahti Energia II* (C-209/09, EU:C:2010:98, paragraphs 20 and 21).

16 See judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142, paragraph 60).

### C. Member States' powers and the limits thereof

41. The aforementioned conditions of end-of-waste status are nonetheless relevant to the powers enjoyed by the Member States in this context. Of particular interest in this connection, in addition to Article 6(4) of the Waste Directive, is the regulation of waste recovery, which constitutes a condition of end-of-waste status under the corresponding case-law.

42. It is true that Annex II to the Waste Directive contains a non-exhaustive list of recovery operations. However, subject to specific EU rules applicable to certain waste, which could be based, for example, on Article 6(1) and (2), the regulation of recovery operations — including requirements governing full recovery — generally falls to the Member States, in accordance with Article 10. In that regard, while the Member States must comply with the waste hierarchy laid down in Article 4 and must, in accordance with Article 13, ensure that they do not endanger human health or harm the environment, they are at liberty to lay down different standards of protection.<sup>17</sup>

43. The power thus enjoyed by the Member States to make decisions in respect of recovery operations and the level of protection these are required to afford is consistent with the wording of the first sentence of Article 6(4) of the Waste Directive, according to which the Member States *may* decide case by case whether certain waste has ceased to be waste, but are not *required* to recognise that its status as such has ended. Moreover, Article 193 TFEU underpins that power in providing that the Member States may maintain or introduce more stringent protective measures.

44. The freedom enjoyed by the Member States in the application of Article 6(4) of the Waste Directive is not unlimited, however. They must not only take into account the objectives pursued by the directive, such as the waste hierarchy laid down in Article 4, in particular the promotion of waste recovery in recital 29, but also respect the fundamental rights of the persons concerned, in particular, in this case, the fundamental right to property under Article 17 of the Charter of Fundamental Rights and the freedom to conduct a business under Article 16.

45. Article 193 TFEU does not significantly alter those limits, since even more stringent protective measures must not only be consistent with the objectives of the relevant EU measure but also comply with EU law, in particular its general legal principles,<sup>18</sup> which include fundamental rights.

46. The Member States do have some discretion when it comes to achieving the objectives pursued by the Waste Directive, in particular those relating to the protection of public health and the environment, set out in Article 13.<sup>19</sup> This is because such measures require a complex assessment of the risks associated with the recovery operation in question on the basis of the most recent state of scientific and technical knowledge.<sup>20</sup> EU law allows the judicial review of such decisions to be restricted to manifest errors of assessment,<sup>21</sup> but requires the competent authorities to respect the

<sup>17</sup> See judgment of 16 December 2004, *EU-Wood-Trading* (C-277/02, EU:C:2004:810, paragraphs 45 and 46).

<sup>18</sup> Judgment of 13 July 2017, *Túrkevei Tejtermelő Kft.* (C-129/16, EU:C:2017:547, paragraph 61).

<sup>19</sup> See judgments of 9 November 1999, *Commission v Italy* (San Rocco, C-365/97, EU:C:1999:544, paragraphs 66 and 67); of 18 November 2004, *Commission v Greece* (Péra Galini, C-420/02, EU:C:2004:727, paragraph 21); of 16 December 2004, *EU-Wood-Trading* (C-277/02, EU:C:2004:810, paragraph 45); and of 11 December 2008, *MI.VER and Antonelli* (C-387/07, EU:C:2008:712, paragraph 25).

<sup>20</sup> See judgment of 28 July 2016, *Edilizia Mastrodonato* (C-147/15, EU:C:2016:606, paragraph 45).

<sup>21</sup> See judgments of 21 January 1999, *Upjohn* (C-120/97, EU:C:1999:14, paragraphs 34 and 35); of 9 June 2005, *HLH Warenvertrieb and Orthica* (C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370, paragraphs 76 and 78); and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 60). On the review of decisions adopted by EU bodies, see, for example, judgments of 21 November 1991, *Technische Universität München* (C-269/90, EU:C:1991:438, paragraph 13); of 9 September 2003, *Monsanto Agricoltura Italia and Others* (C-236/01, EU:C:2003:431, paragraph 135); of 6 November 2008, *Netherlands v Commission* (C-405/07 P, EU:C:2008:613, paragraph 54); and of 9 June 2016, *Pesce and Others* (C-78/16 and C-79/16, EU:C:2016:428, paragraph 49).



procedural requirements, which is to say, in particular, that they must carefully and impartially examine all relevant aspects of the individual case.<sup>22</sup> That discretion must also be available to them in the balancing operation necessary in the context of the application of the fundamental rights concerned.

47. The Waste Directive, in particular Article 6(4) thereof, thus affords the Member States a broad margin of discretion in deciding whether certain waste is to continue to be regarded as such. In making that decision, they must nevertheless not only take into account all relevant factors and the most recent state of scientific and technical knowledge but also respect the relevant procedural requirements.

#### ***D. General rules or individual decisions***

48. It remains to be determined, however, whether, in the light of the foregoing considerations, it is compatible with the Waste Directive, in particular Article 6(4) thereof, to make end-of-waste status subject to the condition that end-of-waste criteria must have been laid down for the substance or object in question at European or national level. If such a rule were permissible, waste holders would not be entitled to obtain an individual determination that certain waste, notwithstanding the absence of any such criteria, has ceased to be such.

49. In that regard, it must first be made clear that Article 6(4) of the Waste Directive permits the Member States to set the criteria applicable to end-of-waste status. Although that provision allows them to decide *case by case*, this does not mean that the Member States may make only individual decisions in respect of certain waste or certain waste holders. Rather, the second sentence of Article 6(4) reminds them of their duty to notify the Commission of such decisions in accordance with the Directive on Technical Standards and Regulations,<sup>23</sup> where so required by that directive. The latter directive, however, does not apply to decisions on individual cases, but to draft technical regulations. This would, in principle, include the end-of-waste criteria applicable to certain types of waste. From the point of view of the proper and consistent application of the waste legislation, moreover, such criteria are much more useful than restricting the Member States' powers to making individual decisions.

50. It should also be permissible, as a rule, to make end-of-waste status subject to the existence of such criteria. After all, waste is usually associated with risks to the protection of health and the environment which justify the application of the waste legislation.<sup>24</sup>

51. As regards the recovery of sewage sludge in particular, Austria rightly points out that sewage sludge is associated with certain risks to the environment and human health, foremost among these being the risk of contamination from harmful substances. It should therefore be possible for the Member States, given the discretion available to them, to refrain from establishing an end-of-waste status for sewage sludge or laying down product standards for processed sewage sludge if these would lead to end-of-waste status.

<sup>22</sup> For the examination of measures taken by Member States, see the judgment of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 61); for EU measures, see, for example, the judgments of 6 November 2008, *Netherlands v Commission* (C-405/07 P, EU:C:2008:613, paragraph 56); and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 69).

<sup>23</sup> The reference is to 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), although this has since been replaced by the identically titled Directive (EU) 2015/1535 (OJ 2015 L 241, p. 1).

<sup>24</sup> See judgments of 24 May 2007, *Commission v Spain* (C-361/05, EU:C:2007:298, paragraph 20), and of 10 June 2010, *Commission v Portugal* (C-37/09, EU:C:2010:331, paragraph 37).

52. There may, however, be some waste which, account being taken of all relevant factors and the most recent state of scientific and technical knowledge, has beyond any reasonable doubt undergone a recovery operation enabling it to be made usable without endangering human health or harming the environment and which the holder does not discard and does not intend and is not required to discard in accordance with Article 3(1) of the Waste Directive.

53. In such a case, the discretion enjoyed by the Member States would be more restricted and they would not be able to rely on the fact that no end-of-waste criteria had yet been set. In those circumstances, the waste holder would be entitled to obtain a determination of end-of-waste status in an individual decision adopted by the competent authorities or the courts, if it could nonetheless not be assumed that the waste holder discards or intends or is required to discard the material or object concerned.

54. The question as to whether waste may cease to be waste automatically under certain conditions, either as a direct result of the Waste Directive or because that directive permits national provisions to that effect, need not be resolved in the present proceedings. For one thing, Estonian law does not provide for such a possibility and, for another, the parties are in dispute as to the legality of administrative decisions which exclude end-of-waste status.

## V. Conclusion

55. I therefore propose that the Court's answer to the request for a preliminary ruling should be as follows:

In accordance with Article 6(4) of Directive 2008/98/EC on waste, Member States may provide that waste is, as a general rule, subject to the waste legislation until such time as it fulfils the end-of-waste criteria which have been laid down as being applicable to the particular type of waste in question by a European or national act of general application.

Where such criteria do not exist, however, the waste holder has the right to apply to the competent authority or a court of a Member State for a determination of end-of-waste status for certain waste, in the case where that waste, account being taken of all relevant factors and the most recent state of scientific and technical knowledge, has beyond any reasonable doubt undergone a recovery operation enabling it to be made usable without endangering human health or harming the environment, and the holder does not discard it and does not intend and is not required to discard it, within the meaning of Article 3(1) of Directive 2008/98.