



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 March 2013 *

(Environment — Waste — Hazardous waste — Directive 2008/98/EC — Old telecommunications poles treated with CCA (copper-chromium-arsenic) solutions — Registration, evaluation and authorisation of chemicals — Regulation (EC) No 1907/2006 (REACH Regulation) — List of uses for treated wood in Annex XVII to the REACH Regulation — Old telecommunications poles used as underlay for duckboards)

In Case C-358/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 6 July 2011, received at the Court on 8 July 2011, in the proceedings

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

v

Lapin luonnonsuojelupiiri ry,

intervening party:

Lapin elinkeino-, liikenne- ja ympäristökeskuksen ympäristö ja luonnonvarat -vastuualue,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri -vastuualue, by A. Siponen, asianajaja,
- Lapin luonnonsuojelupiiri ry, by S. Hänninen and T. Pasma, president and secretary of that association respectively,
- the Finnish Government, by M. Pere, acting as Agent,

* Language of the case: Finnish.

— the Austrian Government, by A. Posch, acting as Agent,
— the European Commission, by I. Koskinen and A. Marghelis, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 13 December 2012,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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) and of 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 and corrigendum OJ 2007 L 136, p. 3), in its version resulting from Commission Regulation (EC) No 552/2009 of 22 June 2009 (OJ 2009 L 164, p. 7) ('the REACH Regulation').
- 2 The request has been made in proceedings between Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri –vastuualue ('transport and infrastructure section' of the Lapland Centre for Economic Development, Transport and Environmental Responsibility; the 'liikenne ja infrastruktuuri – vastuualue') and the Lapin luonnonsuojelupiiri ry (Lapland Nature Protection Association) concerning repair works to a track made up of duckboards whose infrastructure consists of old wooden telecommunications poles treated with a solution known as 'CCA' (copper-chromium-arsenic) ('CCA solution').

Legal context

European Union law

Directive 2008/98

- 3 Under Article 3 of Directive 2008/98:

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

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

...

4 Article 6 of Directive 2008/98, entitled ‘End-of-waste status’, provides:

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

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

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

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

...

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 ...’

5 Paragraph 1 of Article 7 of that directive, entitled ‘List of waste’, provides:

‘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.’

6 Article 13 of Directive 2008/98 states:

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

7 Under Article 17 of Directive 2008/98, entitled ‘Control of hazardous waste’:

‘Member States shall take the necessary action to ensure that the production, collection and transportation of hazardous waste, as well as its storage and treatment, are carried out in conditions providing protection for the environment and human health in order to meet the provisions of Article 13, including action to ensure traceability from production to final destination and control of hazardous waste in order to meet the requirements of Articles 35 and 36.’

The REACH Regulation

8 Article 1(1) of the REACH Regulation provides:

‘The purpose of this Regulation is to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation.’

9 Under Article 2(2) of the REACH Regulation:

‘Waste as defined in Directive [2008/98] is not a substance, mixture or article within the meaning of Article 3 of this Regulation.’

10 Article 3(1) and (3) of the REACH Regulation contains the following definitions:

- ‘1. Substance: means a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition;
2. Mixture: means a mixture or solution composed of two or more substances;
3. Article: means an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition.’

11 In Title VIII of that regulation, entitled ‘Restrictions on the manufacturing, placing on the market and use of certain dangerous substances, mixtures and articles’, Chapter 1, entitled ‘General issues’, Article 67(1) and (3) of the REACH Regulation states:

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

...

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

12 Article 68 of the REACH Regulation is worded as follows:

‘1. When there is an unacceptable risk to human health or the environment, arising from the manufacture, use or placing on the market of substances, which needs to be addressed on a Community-wide basis, Annex XVII shall be amended in accordance with the procedure referred to in Article 133(4) by adopting new restrictions, or amending current restrictions ...

...

2. For a substance on its own, in a mixture or in an article which meets the criteria for classification in the hazard classes carcinogenicity, germ cell mutagenicity or reproductive toxicity, category 1A or 1B, and could be used by consumers and for which restrictions to consumer use are proposed by the Commission, Annex XVII shall be amended in accordance with the procedure referred to in Article 133(4). Articles 69 to 73 shall not apply.’

13 Under Article 69 of the REACH Regulation, if the Commission or a Member State considers that the manufacture, placing on the market or use of a substance on its own, in a mixture or in an article poses a risk to human health or the environment that is not adequately controlled and requires action on a Community-wide basis, beyond any measures already in place, they are to initiate the restrictions process.

14 Article 128 of the REACH Regulation provides:

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

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

15 Under Article 129(1) of that regulation:

‘Where a Member State has justifiable grounds for believing that urgent action is essential to protect human health or the environment in respect of a substance, on its own, in a mixture or in an article, even if satisfying the requirements of this Regulation, it may take appropriate provisional measures. ...’

16 Annex XVII to the REACH Regulation, entitled ‘Restrictions on the manufacture, placing on the market and use of certain dangerous substances, mixtures and articles’, contains, in Column 1, point 19 relating to ‘Arsenic compounds’. The restrictions on those compounds were taken from Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201).

17 As regards arsenic compounds, Annex XVII states, in point 19, column 2, concerning ‘Conditions of restriction’:

‘...

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

4. By way of derogation from paragraph 3:
- (a) Relating to the substances and mixtures for the preservation of wood: these may only be used in industrial installations using vacuum or pressure to impregnate wood if they are solutions of inorganic compounds of the copper, chromium, arsenic (CCA) type C and if they are authorised in accordance with Article 5(1) of Directive 98/8/EC. Wood so treated shall not be placed on the market before fixation of the preservative is completed.
 - (b) Wood treated with CCA solution in accordance with point (a) may be placed on the market for professional and industrial use provided that the structural integrity of the wood is required for human or livestock safety and skin contact by the general public during its service life is unlikely:
 - as structural timber in public and agricultural buildings, office buildings, and industrial premises,
 - in bridges and bridgework,
 - ...
 - as electric power transmission and telecommunications poles,
 - ...
 - (d) Treated wood referred to under point (a) shall not be used:
 - in residential or domestic constructions, whatever the purpose,
 - in any application where there is a risk of repeated skin contact,
 - ...
5. Wood treated with arsenic compounds that was in use in the Community before 30 September 2007, or that was placed on the market in accordance with paragraph 4 may remain in place and continue to be used until it reaches the end of its service life.
6. Wood treated with CCA type C that was in use in the Community before 30 September 2007, or that was placed on the market in accordance with paragraph 4:
- may be used or reused subject to the conditions pertaining to its use listed under points 4(b), (c) and (d),
 - may be placed on the market subject to the conditions pertaining to its use listed under points 4(b), (c) and (d).
7. Member States may allow wood treated with other types of CCA solutions that was in use in the Community before 30 September 2007:
- to be used or reused subject to the conditions pertaining to its use listed under points 4(b), (c) and (d),
 - to be placed on the market subject to the conditions pertaining to its use listed under points 4(b), (c) and (d).'

Finnish law

Law 86/2000 on environmental protection

- 18 Paragraph 7 of Law 86/2000 on environmental protection, entitled ‘Prohibition of soil contamination’, in the version applicable to the dispute in the main proceedings, states:

‘It is not permitted to leave or to permit the discharge on the ground of waste or other substances, organisms or micro-organisms which lead to the deterioration in the quality of the soil which may cause danger or harm to health or to the environment or which may considerably impair amenities or cause any other comparable harm to public or private interests. ...’.

- 19 Paragraph 28 of that law provides:

‘Any activity which involves a risk of environmental pollution requires a permit (environmental permit). Activities requiring a permit shall be listed by decree.

An environmental permit is also necessary:

- (1) for any activity which may cause pollution of a waterway and the project concerned is not subject to a permit under the Law on water;

...

- (4) for treatment of waste on a professional basis or in a waste processing plant coming within the scope of the Law on Waste.’

Government Decree 647/2009 on derogations from certain provisions of Annex XVII to the REACH Regulation

- 20 Paragraph 1 of Government Decree 647/2009 on derogations from certain provisions of Annex XVII to the REACH Regulation states:

‘In accordance with the annex to this Decree, derogations shall be provided for from the restrictions laid down in Annex XVII to the REACH Regulation applicable to the manufacturing, placing on the market and use of certain dangerous substances and preparations and certain dangerous articles referred to in Article 67 of that regulation.’

- 21 The annex to that government decree provides as follows in respect of arsenic compounds:

‘By way of derogation from the provisions in point 19 in Annex XVII to the REACH Regulation, wood treated with CCA solutions type B in use before 30 September 2007 may be placed on the market, used and reused if the conditions laid down in Point 19(4)(b), (c) and (d) of Annex XVII to the REACH Regulation are met.’

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

- 22 In 2008, the Liikenne ja infrastruktuuri -vastualue decided to repair the 35 km track between Raittijärvi village (Lapland) and the nearest road, part of which crosses a Natura 2000 zone. The repair work was to consist, inter alia, in laying down wooden duckboards to facilitate the passage of

quad vehicles in wetland areas outside the winter season. Those duckboards are supported by structures made up of old telecommunications poles which, for their previous use, were treated with CCA solution.

- 23 The Lapin luonnonsuojelupiiri, which is the applicant association in the main proceedings, took the view that those poles constitute hazardous waste and requested the Lapin ympäristökeskus, now the Lapin elinkeino-, liikenne- ja ympäristökeskuksen ympäristö ja luonnonvarat -vastuualue (the body responsible for environmental protection) to prohibit the use of those materials. Following the rejection of that request by decision of 24 February 2009, that association brought an action before the Vaasan hallinto-oikeus (Administrative Court, Vaasa), which annulled that decision by judgment of 9 October 2009.
- 24 The Liikenne ja infrastruktuuri -vastuualue lodged an appeal against that judgment before the Korkein hallinto-oikeus (Supreme Administrative Court).
- 25 The referring court asks, in particular, whether it is necessary to be the holder of an environmental permit within the meaning of Law 86/2000 in order to use old telecommunications poles treated with a CCA solution. It takes the view that, in order to resolve that issue, it needs to know whether such poles, now reused as a wood underlay, are waste, in particular hazardous waste, or if they have lost that characteristic as a result of the reuse, even though the REACH Regulation authorises the use of such treated wood.
- 26 It is in those circumstances that the Korkein hallinto-oikeus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '1 Is it possible to deduce directly from the fact that waste is classified as hazardous waste that the use of such a substance or object has overall adverse environmental or human health impacts within the meaning of Article 6(1), first subparagraph, point (d), of ... Directive 2008/98/EC? May hazardous waste also cease to be waste if it fulfils the requirements laid down in Article 6(1) of Directive 2008/98?
 2. In interpreting the concept of waste and, in particular, assessing the obligation to dispose of a substance or an object, is it relevant that the re-use of the object which is the subject of the assessment is authorised under certain conditions by Annex XVII as referred to in Article 67 of the REACH Regulation? If that is the case, what weight is to be given to that fact?
 3. Has Article 67 of the REACH Regulation harmonised the requirements concerning the manufacture, placing on the market or use within the meaning of Article 128(2) of that regulation so that the use of the preparations or objects mentioned in Annex XVII cannot be prevented by national rules on environmental protection, unless the restrictions [envisaged by those provisions] have been published in the inventory compiled by the Commission, as provided for in Article 67(3) of the REACH Regulation?
 4. Is the list in Point 19(4)(b) in Annex XVII to the REACH Regulation of the uses of CCA-treated wood to be interpreted as meaning that that inventory exhaustively lists all the possible uses?
 5. Can the use of the wood at issue as underlay and duckboards for a wooden causeway be treated in the same way as the uses listed in the inventory referred to in Question 4 above, so that the use in question may be permitted on the basis of Point 19(4)(b) of Annex XVII to the REACH Regulation if the other conditions are met?
 6. Which factors are to be taken into account in order to assess whether repeated skin contact within the meaning of Point 19(4)(d) of Annex XVII to the REACH Regulation is possible?

7. Does the word “possible” in the provision mentioned in Question 6 above mean that repeated skin contact is theoretically possible or that repeated skin contact is actually probable to some extent?’

Questions referred for a preliminary ruling

Preliminary observations

- 27 As is clear from the reasoning in the order for reference, the origin of the dispute before the referring court arises essentially from the fact that, although the telecommunications poles at issue were treated with a dangerous substance within the meaning of and for the application of the REACH Regulation, the fact none the less remains that, under that regulation, such treatment does not preclude, in certain situations and under certain conditions, the use of those wooden poles for certain purposes which may include, where appropriate, duckboards for the track concerned.
- 28 In that context, it is appropriate for the Court to rule firstly on the questions relating to the interpretation of the REACH Regulation, which is legislation independent of the legislation on waste. It should also be observed that, according to Article 2(2) of the REACH Regulation, waste, as defined in Directive 2008/98, is not a substance, mixture or article within the meaning of Article 3 of that regulation.
- 29 Furthermore, since, at the request of the Court of Justice, submitted in accordance with Article 104(5) of the Rules of Procedure, in the version applicable on the date of that request, the referring court stated that it would have to take into consideration not only the law in force at the time of the material facts, but also that which will be in force on the date on which it will give judgment, it is appropriate to answer the questions referred by applying, first, Directive 2008/98 and, second, the REACH Regulation, as regards the provisions at issue in the case in the main proceedings.

The third question

- 30 By its third question, which it is appropriate to examine first, the referring court asks whether Articles 67 and 128 of the REACH Regulation must be interpreted as meaning that that regulation harmonises the requirements relating to the manufacture, placing on the market or the use of a substance such as that concerning arsenic compounds, which is, moreover, the subject of a restriction under Annex XVII to that regulation.
- 31 In that connection, it must be recalled that, according to Article 1(1), the REACH Regulation seeks to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for the assessment of the hazards linked to substances and the free movement of substances, while enhancing competitiveness and innovation (Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 35).
- 32 As the Advocate General observed in point 55 of her Opinion, free movement in the internal market is ensured by the fact that, pursuant to Article 128(1) of the REACH Regulation, the Member States are under an obligation not to prohibit, restrict or impede the use of a substance, on its own, in a mixture or in an article which complies with the Regulation and, where appropriate, with Community acts adopted in implementation thereof. However, according to Article 128(2), there is nothing in the REACH Regulation to prevent Member States from maintaining or laying down national rules to protect workers, human health and the environment and applying in cases where that regulation does not harmonise the requirements on manufacture, placing on the market or use.
- 33 It thus follows from those provisions that the European Union legislature intended to harmonise those requirements in certain cases, including that referred to in Article 67(1) of the REACH Regulation.

- 34 According to the latter provision, a substance, on its own, in a mixture or in an article to which a restriction applies pursuant to Annex XVII must not be manufactured, placed on the market or used if it does not comply with the conditions laid down in that restriction.
- 35 It follows that the manufacture, placing on the market or use of a substance referred to in Article 67(1) of the REACH Regulation cannot be subject to conditions other than those laid down by that regulation and which, as is clear from the provisions of Articles 68(1) and 69 thereof, meet the need for 'action on a Community-wide basis'.
- 36 So far as Article 67(3) of the REACH Regulation is concerned, while it authorises a Member State to maintain existing and more stringent restrictions than those in Annex XVII, this is to be done on a transitional basis, until 1 June 2013, and subject to the condition that those restrictions have been notified to the Commission, something which the Republic of Finland, moreover, acknowledges that it has not done. The transitional and conditional nature of that measure cannot call into question the harmonisation carried out by Article 67(1) of the REACH Regulation.
- 37 Therefore, if a Member State intends to make the preparation, placing on the market or use of a substance which is the subject of a restriction under Annex XVII to the REACH Regulation subject to new conditions, it may do so only in accordance with Article 129(1) thereof, in order to respond to an urgent situation to protect human health or the environment, or in accordance with Article 114(5) TFEU on the basis of new scientific evidence relating inter alia to the protection of the environment. The adoption of other conditions by the Member States is incompatible with the objectives of that regulation (see, by analogy, Joined Cases C-281/03 and C-282/03 *Cindu Chemicals and Others* [2005] ECR I-8069, paragraph 44).
- 38 In those circumstances, the answer to the third question is that Articles 67 and 128 of the REACH Regulation must be interpreted as meaning that European Union law harmonises the requirements relating to the manufacture, placing on the market or use of a substance such as that relating to arsenic compounds which is the subject of a restriction under Annex XVII to that regulation.

The fourth and fifth questions

- 39 By its fourth and fifth questions, which it is appropriate to examine together, the referring court asks essentially whether Annex XVII, point 19(4)(b), to the REACH Regulation, which lists the applications for which wood treated with a CCA solution may be used, must be interpreted as meaning that that provision is exhaustive in character and cannot therefore be extended to uses other than those which are listed therein.
- 40 The provisions of Annex XVII, point 19(4), to the REACH Regulation set out the situations in which there may be a derogation from the provisions of point 19(3) prohibiting the use of arsenic compounds for the protection of wood.
- 41 It is clear both from the actual wording of those provisions and from their objective that the derogation provided for in point 19(4) must necessarily be subject to a strict interpretation.
- 42 It is common ground that, by including arsenic compounds in Annex XVII to the REACH Regulation, the European Union legislature took the view, as appears in particular from the title of that annex and from Articles 68 and 69 of that regulation, that that substance poses a danger or risk that is not adequately controlled, or is unacceptable, as regards human health or the environment. For that reason, the derogations from the use of such a substance cannot be given a broad interpretation.
- 43 Consequently, the list of uses to which wood treated with a CCA solution may be put, set out in Annex XVII, point 19(4)(b), to the REACH Regulation, is exhaustive in character.

- 44 As regards the use of the wood in the works which have given rise to the dispute in the main proceedings, it is unclear from the file submitted to the Court, and in particular from the photographs featuring in that file, whether the duckboards at issue in the main proceedings have, particularly with regard to their structure and function, characteristics which differ from those of any bridge or structure necessary for the construction of a track or path. It is, however, for the national court alone to determine whether the use of the telecommunications poles at issue as an underlay for those duckboards is in fact covered by the applications set out in the list mentioned in the preceding paragraph of this judgment.
- 45 In those circumstances, the answer to the fourth and fifth questions is that Annex XVII, point 19(4)(b), to the REACH Regulation, which lists the applications for which, by way of derogation, wood treated with a CCA solution may be used, must be interpreted as meaning that the list in that provision is exhaustive in character and that, therefore, that derogation cannot be applied to situations other than those referred to therein. It is for the referring court to determine whether, in circumstances such as those in the main proceedings, the use of the telecommunications poles at issue as an underlay for duckboards does in fact come within the scope of the applications listed in that provision.

The sixth and seventh questions

- 46 By its sixth and seventh questions, which it is appropriate to examine together, the referring court seeks, essentially, to ascertain the scope of the provisions of Annex XVII, point 19(4)(d), second indent, to the REACH Regulation, according to which wood treated with a CCA solution must not be used in any application in which there is a risk of repeated skin contact.
- 47 Thus, as the Advocate General observed in points 45 and 46 of her Opinion, the European Union legislature did not intend to prohibit the use of such wood on the basis of a mere risk of skin contact since, in practice, such a risk can never be totally excluded. It is thus the repeated nature of that contract which justifies the prohibition in question.
- 48 With regard to the objectives of the REACH Regulation, as set out in paragraph 31 of the present judgment, the risk thus mentioned must be that which exposes the relevant public, because of the frequency of skin contact, to a risk for human health.
- 49 In that connection, it is necessary to point out that, pursuant to Annex XVII, point 19(4)(b), to the REACH Regulation, wood treated with a CCA solution may be placed on the market for professional and industrial use only on condition, in particular, that skin contact by the general public during its service life is unlikely.
- 50 It follows that the prohibition laid down in Annex XVII, point 19(4)(d), second indent, to the REACH Regulation must apply in any situation which, in all likelihood, will involve repeated skin contact with the wood treated with a CCA solution.
- 51 Therefore, the assessment of that likelihood depends on the specific conditions of use of the applications to which wood treated with a CCA solution may be put. In particular, in circumstances such as those in the main proceedings, that likelihood may depend, inter alia, on the conditions in which the telecommunications poles in question are attached to the structure of the duckboards or the various types of use to which they are put. If those poles are merely used as an underlay for those duckboards, without being part of the surface crossed in normal conditions by users, it would, in principle, appear unlikely that the skin of such users would be in repeated contact with the treated wood. However, it is for the referring court to make that assessment.

52 In those circumstances, the answer to the sixth and seventh questions is that the provisions of Annex XVII, point 19(4)(d), second indent, to the REACH Regulation, according to which wood treated with a CCA solution must not be used in any application where there is a risk of repeated skin contact, must be interpreted as meaning that the prohibition at issue must apply in any situation which, in all likelihood, will involve repeated skin contact with the treated wood, such likelihood having to be inferred from the specific conditions of normal use of the application to which that wood has been put, this being a matter for the referring court to ascertain.

The first question

- 53 By its first question, the referring court asks, essentially, whether it follows from the requirement laid down in Article 6(1), first subparagraph, point (d), of Directive 2008/98, according to which, in order for waste to cease to be waste when it has undergone a recovery, including recycling, operation, its use must not lead to overall adverse environmental or human health impacts, that waste falling within the hazardous waste category can never cease to be waste.
- 54 In posing that question, the referring court starts from the assumption that the telecommunications poles at issue in the main proceedings, after being taken out of use for their original purpose, became waste within the meaning of Directive 2008/98 and that their new use, as an underlay for duckboards, can be compatible with the requirements of that directive only if they are no longer waste under the conditions laid down in Article 6(1), first subparagraph, of that directive, in particular if their use does not lead to overall adverse environmental or human health impacts.
- 55 However, as the Advocate General observed in point 67 of her Opinion, Article 6(1), first subparagraph, of Directive 2008/98 merely sets out the conditions to be met by the specific criteria which make it possible to determine which waste ceases to be waste, within the meaning of Article 3(1) of that directive, when it has undergone a recovery, including recycling, operation. Therefore, such conditions cannot, in themselves, make it possible directly to establish that certain waste must no longer be regarded as such. Furthermore, it is common ground that such specific criteria have not been laid down by European Union law as regards wood treated in circumstances such as those in the case in the main proceedings.
- 56 It is, however, true that, where no criteria have been set at European Union level, the Member States may, by virtue of Article 6(4) of Directive 2008/98, decide on a case-by-case basis whether certain waste has ceased to be waste, taking into account the applicable case-law. It is thus in the light of that case-law that it is appropriate, in order to provide the referring court with a useful answer, to examine whether waste which is regarded as hazardous may cease to be waste, which is not excluded by Article 6 of Directive 2008/98 or any other provision thereof.
- 57 In that regard, it should first be noted that, even where waste has undergone a complete recovery operation which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may none the less be regarded as waste if, in accordance with the definition in Article 3(1) of the directive, its holder discards it or intends or is required to discard it (see, to that effect Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 94, and Case C-9/00 *Palin Granite and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 46). It is for the referring court to carry out the assessments necessary in that regard.
- 58 The fact that a substance is the result of a recovery operation within the meaning of Directive 2008/98 is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, but does not as such permit a definitive conclusion to be drawn in that regard (*ARCO Chemie Nederland and Others*, paragraph 97).

- 59 Consequently, in order to determine whether a recovery operation may transform the object in question into a usable product, it is necessary to determine, in the light of all the facts of the case, whether that object may be used in accordance with the requirements of Directive 2008/98, as set out in particular in Articles 1 and 13 thereof, without endangering human health or harming the environment.
- 60 Therefore, the answer to the first question is that European Union law does not, as a matter of principle, exclude the possibility that waste regarded as hazardous may cease to be waste within the meaning of Directive 2008/98 if a recovery operation enables it to be made usable without endangering human health or harming the environment and, also, if it is not found that the holder of the object at issue discards it or intends or is required to discard it, within the meaning of Article 3(1) of that directive, this being a matter for the referring court to ascertain.

The second question

- 61 By its second question, the referring court asks essentially whether the REACH Regulation, in particular Annex XVII thereto, in so far as it authorises the use, under certain conditions, of wood treated with CCA solutions, is relevant for the purpose of determining whether such wood may cease to be waste because its holder would not be required, if those conditions were fulfilled, to discard it within the meaning of Article 3(1) of Directive 2008/98.
- 62 As set out in paragraph 31 of this judgment, the REACH Regulation seeks, in particular, to ensure a high level of protection of human health and the environment. In the light of that objective, it must be acknowledged that the European Union legislature, by authorising the use of wood treated with CCA solutions under certain conditions, has taken the view that, although that treatment is carried out with a dangerous substance which is subject to restrictions under that regulation, that dangerous nature is not capable of compromising that high level of protection of human health and the environment in the case where such use is limited to certain applications.
- 63 Waste management must be carried out with a comparable objective, in accordance with Article 13 of Directive 2008/98, without endangering human health and without harming the environment. In those circumstances, in order to assess that requirement, there is nothing to prevent account being taken of the fact that hazardous waste ceases to be waste because its recovery is carried out in the form of a use authorised under Annex XVII to the REACH Regulation and that its holder is therefore no longer required to discard it within the meaning of Article 3(1) of that directive.
- 64 The answer to the second question is therefore that the REACH Regulation, in particular Annex XVII thereto, in so far as it authorises the use, subject to certain conditions, of wood treated with CCA solutions, is, in circumstances such as those in the main proceedings, relevant for the purpose of determining whether such wood may cease to be waste because, if those conditions were fulfilled, its holder would not be required to discard it within the meaning of Article 3(1) of Directive 2008/98.

Costs

- 65 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 (Second Chamber) hereby rules:

1. European Union law does not, as a matter of principle, exclude the possibility that waste regarded as hazardous may cease to be waste within the meaning of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives if a recovery operation enables it to be made usable without endangering human health and without harming the environment and, also, if it is not found that the holder of the object at issue discards it or intends or is required to discard it within the meaning of Article 3(1) of that directive, this being a matter for the referring court to ascertain.
2. 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, in the version resulting from Commission Regulation (EC) No 552/2009 of 22 June 2009, in particular Annex XVII thereto, in so far as it authorises the use, subject to certain conditions, of wood treated with a 'CCA' (copper-chromium-arsenic) solution, must be interpreted as meaning that, in circumstances such as those in the main proceedings, it is relevant for the purpose of determining whether such wood may cease to be waste because, if those conditions were fulfilled, its holder would not be required to discard it within the meaning of Article 3(1) of Directive 2008/98.
3. Articles 67 and 128 of Regulation No 1907/2006, in the version resulting from Regulation No 552/2009, must be interpreted as meaning that European Union law harmonises the requirements relating to the manufacture, placing on the market or use of a substance such as that relating to arsenic compounds which is the subject of a restriction under Annex XVII to that regulation.
4. Annex XVII, point 19(4)(b), to Regulation No 1907/2006, in the version resulting from Regulation No 552/2009, which lists the applications for which, by way of derogation, wood treated with a 'CCA' (copper-chromium-arsenic) solution may be used, must be interpreted as meaning that the list in that provision is exhaustive in character and that, therefore, that derogation cannot be applied to cases other than those referred to therein. It is for the referring court to determine whether, in circumstances such as those at issue in the main proceedings, the use of the telecommunications poles concerned as an underlay for duckboards does in fact come within the scope of the applications listed in that provision.
5. The provisions of Annex XVII, point 19(4)(d), second indent, to Regulation No 1907/2006, in the version resulting from Regulation No 552/2009, according to which wood treated with a 'CCA' (copper-chromium-arsenic) solution must not be used in any application where there is a risk of repeated skin contact, must be interpreted as meaning that the prohibition at issue must apply in any situation which, in all likelihood, will involve repeated skin contact with the treated wood, such likelihood having to be inferred from the specific conditions of normal use of the application to which that wood has been put, this being a matter for the referring court to ascertain.

[Signatures]