

JUDGMENT OF THE COURT (First Chamber)

14 March 2019 (*)

(Failure of a Member State to fulfil obligations — Regulation (EC) No 1013/2006 — Shipment of waste — Refusal of the Czech Republic to ensure the take-back of the mixture TPS-NOLO (Geobal) shipped from that Member State to Poland — Existence of waste — Burden of proof — Proof)

In Case C-399/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 3 July 2017,

European Commission, represented by P. Němečková, E. Sanfrutos Cano and L. Haasbeek, acting as Agents,

applicant,

v

Czech Republic, represented by M. Smolek, J. Vlácil, T. Müller and L. Dvořáková, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, E. Regan and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 20 September 2018,

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

gives the following

Judgment

- 1 By its action, the European Commission asks the Court to declare that, by refusing to ensure the take-back to the Czech Republic of the mixture TPS-NOLO or Geobal ('TPS-NOLO (Geobal)') shipped from the Czech Republic to Katowice (Poland), the Czech Republic has failed to fulfil its obligations under Article 24(2) and Article 28(1) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

Legal context

Regulation No 1013/2006

- 2 Under Article 1 of Regulation No 1013/2006, entitled 'Scope':

‘1. This Regulation establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination.

...’

3 Article 2 of that regulation provides as follows:

‘For the purposes of this Regulation:

1. “waste” is as defined in Article 1(1)(a) of Directive 2006/12/EC [of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9), replaced, with effect from 12 December 2010, by 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), Article 3 of which reproduces, in essence, the definition of “waste” given by Directive 2006/12].

...

19. “competent authority of dispatch” means the competent authority for the area from which the shipment is planned to be initiated or is initiated;
20. “competent authority of destination” means the competent authority for the area to which the shipment is planned or takes place ...;

...

22. “country of dispatch” means any country from which a shipment of waste is planned to be initiated or is initiated;
23. “country of destination” means any country to which a shipment of waste is planned or takes place ...;

...

35. “illegal shipment” means any shipment of waste effected:

- (a) without notification to all competent authorities concerned pursuant to this Regulation; or

...

- (g) which, in relation to shipments of waste as referred to in Article 3(2) and (4), has resulted from:

...

- (iii) the shipment being effected in a way which is not specified materially in the document set out in Annex VII.

...’

4 Under Article 3(1) and (2) of that regulation, cross-border shipments within the European Union are, depending on the nature of the waste and its intended treatment and when the amount of waste exceeds 20 kg, subject to a procedure of notification to the competent authorities or of providing information to those authorities.

5 Article 24(1) and (2) of that regulation provides:

‘1. Where a competent authority discovers a shipment that it considers to be an illegal shipment, it shall immediately inform the other competent authorities concerned.

2. If an illegal shipment is the responsibility of the notifier, the competent authority of dispatch shall ensure that the waste in question is:

- (a) taken back by the notifier *de facto*; or, if no notification has been submitted;
- (b) taken back by the notifier *de jure*; or, if impracticable;
- (c) taken back by the competent authority of dispatch itself or by a natural or legal person on its behalf; or, if impracticable;
- (d) alternatively recovered or disposed of in the country of destination or dispatch by the competent authority of dispatch itself or by a natural or legal person on its behalf; or, if impracticable;
- (e) alternatively recovered or disposed of in another country by the competent authority of dispatch itself or by a natural or legal person on its behalf if all the competent authorities concerned agree.

This take-back, recovery or disposal shall take place within 30 days, or such other period as may be agreed between the competent authorities concerned after the competent authority of dispatch becomes aware of or has been advised in writing by the competent authorities of destination or transit of the illegal shipment and informed of the reason(s) therefor. Such advice may result from information submitted to the competent authorities of destination or transit, *inter alia*, by other competent authorities.

In cases of take-back as referred to in (a), (b) and (c), a new notification shall be submitted, unless the competent authorities concerned agree that a duly reasoned request by the initial competent authority of dispatch is sufficient.

The new notification shall be submitted by the person or authority listed in (a), (b) or (c) and in accordance with that order.

No competent authority shall oppose or object to the return of waste of an illegal shipment. In the case of alternative arrangements as referred to in (d) and (e) by the competent authority of dispatch, a new notification shall be submitted by the initial competent authority of dispatch or by a natural or legal person on its behalf unless the competent authorities concerned agree that a duly reasoned request by that authority is sufficient.’

6 According to Article 28 of the regulation:

‘1. If the competent authorities of dispatch and of destination cannot agree on the classification as regards the distinction between waste and non-waste, the subject matter shall be treated as if it were waste. This shall be without prejudice to the right of the country of destination to deal with the shipped material in accordance with its national legislation, following arrival of the shipped material and where such legislation is in accordance with Community or international law.

2. If the competent authorities of dispatch and of destination cannot agree on the classification of the notified waste as being listed in Annex III, IIIA, IIIB or IV, the waste shall be regarded as listed in Annex IV.

3. If the competent authorities of dispatch and destination cannot agree on the classification of the waste treatment operation notified as being recovery or disposal, the provisions regarding disposal shall apply.

4. Paragraphs 1 to 3 shall apply only for the purposes of this Regulation, and shall be without prejudice to rights of interested parties to resolve any dispute related to these questions before a court of law or tribunal.’

7 Entry A3190 of list A in part 1 of Annex V to Regulation No 1013/2006 is defined as follows:

‘Waste tarry residues (excluding asphalt cements) arising from refining, distillation and any pyrolytic treatment of organic materials’.

Directive 2006/12

8 Recital 2 of Directive 2006/12 states:

‘The essential objective of all provisions relating to waste management should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.’

9 Article 1(1)(a) of that directive defines ‘waste’ as ‘any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard’.

Directive 2008/98

10 Article 3 of Directive 2008/98 provides:

‘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;
...’

11 Article 6(1) of that directive provides:

‘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.’

The REACH Regulation

12 According to Article 2(2) 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), as amended by Commission Regulation (EU) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 (OJ 2011 L 353, p. 1) (‘the REACH Regulation’):

‘Waste as defined in Directive 2006/12/EC ... is not a substance, mixture or article within the meaning of Article 3 of this Regulation.’

13 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.’

Pre-litigation procedure and the proceedings before the Court

14 At the end of 2010 and the beginning of 2011 a Czech operator shipped from Litvínov (Czech Republic) to Katowice (Poland) approximately 20 000 tonnes of TPS-NOLO (Geobal), a mixture composed of tar acid derived from petroleum refining, carbon dust and calcium oxide.

15 The mixture was deposited, in whole or in part, on a plot of land rented by the Polish importer in ulici Karola Woźniaka (Karol Woźniak Street), Katowice.

16 On 11 September 2011, the Polish authorities informed the Czech Ministry of the Environment that they considered the shipment to be an illegal shipment of waste within the meaning of Article 2(35)(a) of Regulation No 1013/2006, since neither the sender nor the recipient of that waste had notified the shipment to the authorities responsible for the protection of the environment.

17 In January 2012 the Czech Ministry of the Environment replied to the Polish authorities, stating that, as the TPS-NOLO (Geobal) was registered under the REACH Regulation, it did not consider it to be waste and that, as a result, it refused to order the Czech sender of the mixture at issue to ensure its take-back.

18 Having received, on 4 February 2014, a complaint from an environmental association concerning that shipment, the Commission opened an investigation on 12 June 2014.

19 On 27 November 2014 the Commission sent a letter of formal notice to the Czech Republic, to which that Member State replied on 20 February 2015, claiming that the TPS-NOLO (Geobal) was not waste.

20 On 22 October 2015 the Commission sent a reasoned opinion to the Czech Republic, to which the Czech Republic replied on 18 December 2015, confirming its refusal to ensure the shipment back to the Czech Republic of the mixture at issue.

21 The Commission, having found that the Czech Republic refused to comply with its reasoned opinion, decided to bring the present action.

The request for the oral procedure to be reopened

22 Following the delivery of the Advocate General’s Opinion, the Commission requested, by letter of 23 November 2018, that the oral procedure be reopened in accordance with Article 83 of the Rules of Procedure of the Court, on the ground that the reasons on which the Advocate General relied in concluding that the action should be dismissed as inadmissible had not been debated between the parties during either the written procedure or the oral procedure.

23 It should be borne in mind that, according to Article 83 of the Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not

been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

24 The Court considers, having heard the Advocate General, that it has all the material necessary for it to rule on the matter before it and that the case does not have to be examined in the light of an argument that has not been the subject of discussion before it.

25 Accordingly, the request for the reopening of the oral procedure made by the Commission must be refused.

The action

Arguments of the parties

26 The Commission claims that the Czech Republic refused, in violation of Article 24 of Regulation No 1013/2006, to accede to the request of the Polish authorities to take back the mixture at issue, which it claims was illegally shipped to Poland.

27 According to the Commission, the TPS-NOLO (Geobal) should be classified as ‘waste’.

28 In the first place, the mixture was produced from waste from earlier refining activity on the Ostrava site (Czech Republic).

29 In the second place, the tar acid from which TPS-NOLO (Geobal) originates, like the mixture itself, constitutes hazardous waste.

30 In the third place, in the Czech Republic, as in Poland, the mixture at issue is considered to be waste. The Commission claims that the Czech Republic does not contest that statement of fact in so far as it is concerned. Indeed, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) held, in a decision of 3 December 2015, that the substance ‘Geobal’ was classified as waste. In addition, the decision concerning amendment No 20 of the integrated permit for the Litvínov landfill facility referred to the substance ‘Geobal 4’ as waste.

31 In the fourth place, that substance did not cease to be waste on account of its registration under the REACH Regulation. First, waste is excluded from the scope of that regulation under Article 2(2). Therefore, Article 128 of the REACH Regulation, which prohibits, inter alia, any restriction of the free movement of substances within the scope of that regulation, does not apply to a substance originally classified as waste as long as that substance has not ceased to be waste. Second, registration under that regulation is only one of the factors that may be relevant for the purpose of determining whether a substance has ceased to be waste, as the Court ruled in the judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142). Lastly, under Article 20(2) of the REACH Regulation, the European Chemicals Agency (ECHA) has the power to check only the completeness of registration dossiers, that check not including an assessment of the quality or the adequacy of any data submitted.

32 In the fifth place, the holder’s intention is not the only determining factor for classifying a material as waste. As the Court held in the judgment of 15 June 2000, *ARCO Chemie Nederland and Others* (C-418/97 and C-419/97, EU:C:2000:318, paragraph 88), whether a substance is waste must be determined in the light of all the circumstances of each individual case and the concept of waste cannot be interpreted restrictively. The composition of a material and the danger it presents to the environment and to human health are important factors when determining whether or not it constitutes waste.

33 In the sixth place, according to the judgments of 28 March 1990, *Vessoso and Zanetti* (C-206/88 and C-207/88, EU:C:1990:145, paragraph 11), and of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 31 and the case-law cited), the possibility of economic reutilisation does not exclude a substance from the definition of waste. Moreover, the economic interest

of the mixture at issue has not been established and cannot be deduced from the consignment agreement entered into. That agreement does not prove the existence of a demand in Poland for the material at issue as fuel for cement works since the purchaser did not sell the stored mixture in Poland in accordance with the contractual conditions. Given the reduction in the quantity of the mixture present on the site in question, which was noted by the Polish inspectors, a part of it has probably already been re-exported.

- 34 In any case, it is clear from the very wording of Article 28 of Regulation No 1013/2006 that, if the Czech and Polish authorities cannot agree, the mixture at issue must be treated as if it were waste. The Polish authorities were right to conclude, on the basis of the laboratory tests they carried out, that the mixture at issue was waste under Annex IV to that regulation and under Polish legislation.
- 35 In its defence, the Czech Republic submits that the Member States cannot make discretionary use of Article 28 of Regulation No 1013/2006. That provision can be applied only when a Member State has confirmed doubts as to whether the material in question is waste. If a Member State were able to rely on Article 28 of that regulation without any evidence, the freedom of movement would be seriously adversely affected. That interpretation is confirmed by judgment of 9 June 2016, *Nutrivet* (C-69/15, EU:C:2016:425). Yet the Commission provides no evidence that the mixture at issue is waste, within the meaning of Article 3(1) of Directive 2008/98.
- 36 It follows from the definition of ‘waste’ under Article 3(1) of Directive 2008/98 and the Court’s case-law (judgments of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 26, and of 15 June 2000, *ARCO Chemie Nederland and Others*, C-418/97 and C-419/97, EU:C:2000:318, paragraphs 57 and 97) that, for the purpose of classifying a material as waste, it is the way in which the holder intends to deal with it that matters, with the result that the same material might or might not be classified as waste. As a result, for the purpose of classifying a material as waste, the composition of the material alone is not conclusive. Therefore, the laboratory tests carried out by the Polish authorities are not relevant for the purpose of classifying the mixture at issue.
- 37 The Commission cannot rely on the fact that the Czech Republic did not submit a national decision that the mixture at issue had ceased to be waste. The Commission’s argument is based on Article 6 of Directive 2008/98 which does not apply *ratione temporis* to that mixture. The transposition deadline for that Directive expired on 12 December 2010, while the mixture was produced before that date.
- 38 Indeed, the mixture at issue was never classified as waste. The Commission’s claim that the mixture was considered waste in the Czech Republic is unsubstantiated. In fact, the integrated permit for the plants in which that mixture was produced indicates clearly that the processing provided for aims to produce a fuel product. The demand for that fuel product existed not only in the Czech Republic but also in Poland.
- 39 In particular, it is clear that, at the date of the shipment at issue, the mixture in question was not waste. In the first place, the holder did not intend to discard it, as is demonstrated by the registration of the mixture as a fuel under the REACH Regulation before it was exported to Poland. In accordance with the judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142), the registration of the mixture under the REACH Regulation should be taken into account as a factor establishing the holder’s intention to use that mixture not as waste but for economic purposes.
- 40 In the second place, the exportation of the mixture to Poland was done on the basis of a consignment agreement concluded with a Polish undertaking established in Sosnowiec (Poland) for the purpose of cement production. The Commission’s assertion that the mixture had probably been re-exported is entirely unsubstantiated. The fine imposed on the Polish purchasers and the finding by the Polish authorities of a substantial reduction in the volume of that mixture establishes, rather, that the mixture at issue found a use, in Poland, consistent with the initial intention.
- 41 The lack of possibilities at present for the use of that mixture in Poland, according to the information provided by the Polish authorities, is in no way relevant for the purpose of assessing whether, when it

was exported, the mixture constituted waste. Indeed, the use of a substance registered under the REACH Regulation is not limited to the territory of a single Member State.

42 The Commission presents no evidence that the mixture shipped had not been used in accordance with the agreement concluded and that it had been re-exported.

43 The Commission thus provides no evidence that the mixture at issue was, at the time of the facts, waste within the meaning of Article 3(1) of Directive 2008/98. Consequently, it has failed to discharge its burden of proof in the context of infringement proceedings.

Findings of the Court

44 Regulation No 1013/2006 establishes procedures and control regimes for the shipment of waste, inter alia, between the Member States of the European Union.

45 Article 3(1) of Regulation No 1013/2006 makes shipments within the EU of all waste destined for disposal operations and many types of waste destined for recovery operations, particularly those listed in Annex IV to that regulation, subject to a procedure of prior written notification and consent. Under Article 3(2) of that regulation, other shipments of waste are to be accompanied by information by means of the completion of the form in Annex VII to the regulation, unless they concern small quantities not exceeding 20 kg.

46 Article 2(35)(a) and (g) of Regulation No 1013/2006 classifies as an ‘illegal shipment’, inter alia, a shipment of waste effected without the appropriate notification or information.

47 In the event of a shipment that is illegal on the grounds set out above, Article 24(2) of Regulation No 1013/2006 provides that the authority responsible for the execution of that regulation in the Member State of origin of the waste, referred to as ‘the competent authority of dispatch’, must ensure that, normally within 30 days from the day it is notified, the waste is taken back by the ‘notifier *de jure*’, namely the person on whom the obligation to notify or inform falls, or, failing that, must have the waste taken back or take it back itself.

48 In the present case, the shipment between late 2010 and the early 2011 of 20 000 tonnes of TPS-NOLO (Geobal) from the Czech Republic to Poland was the subject of neither notification nor information. When, in September 2011, the Polish authorities reported that shipment to the Czech Ministry of the Environment, the Ministry refused to order the Czech sender to take back the mixture at issue in Poland, claiming that it was not waste. It is the persistence of this refusal which led the Commission to open proceedings for failure to fulfil obligations and subsequently to bring an action before the Court.

49 The Commission states that, under Article 28 of Regulation No 1013/2006, the subject matter of a shipment is presumed to be waste when the competent authorities of dispatch and of destination do not agree on whether or not the object of the shipment should be classified as waste, as in the present case. Thus, the shipment of the mixture at issue in the present case should be considered a shipment of waste which, since the formalities noted in paragraph 4 above were not completed, was illegal. In those circumstances, the Commission considers that the Czech Republic, having received a request to that effect from the Polish authorities, was required to ensure the take-back of the waste in accordance with the very wording of Article 24(2) of Regulation No 1013/2006. The Commission asks the Court to declare that the Czech Republic failed to fulfil its obligations by refusing to do this.

50 According to the Czech Republic, the Commission has adduced no evidence that the mixture at issue is waste.

The burden of proof

51 In the context of proceedings for failure to fulfil obligations, in accordance with the Court’s settled case-law, it is for the Commission to establish the existence of the alleged failure (judgments of 25 May 1982, *Commission v Netherlands*, 97/81, EU:C:1982:193, paragraph 6, and of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 25). It is the Commission’s

responsibility to place before the Court the information required to enable it to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (judgments of 10 June 2010, *Commission v Portugal*, C-37/09, not published, EU:C:2010:331, paragraph 28; of 22 September 2011, *Commission v Spain*, C-90/10, not published, EU:C:2011:606, paragraph 47; and of 13 February 2014, *Commission v United Kingdom*, C-530/11, EU:C:2014:67, paragraph 60).

52 In the present case, if the mixture at issue is not waste, Regulation No 1013/2006 does not apply to its shipment from the Czech Republic to Poland and the Commission cannot claim infringement of that regulation by the first of those Member States. Consequently, the mixture must be classified as waste in order for a failure to be found on the basis of Article 24(2) of that regulation, and such classification is, therefore, among the matters subject to review by the Court in the present case.

53 Since, in accordance with the case-law referred to in paragraph 51 above, the Commission may not rely on any presumption in order to provide evidence of a failure to fulfil obligations, it cannot merely rely on the presumption set out in Article 28(1) of Regulation No 1013/2006 or claim to rely on the mere acknowledgement of disagreement between the competent authorities of dispatch and destination as regards the classification of the mixture at issue as waste for the purpose of establishing that it is indeed waste.

54 It follows from the foregoing that the Commission is wrong to claim that it is not its responsibility to provide proof that the mixture at issue should be classified as ‘waste’ for the purpose of the present procedure for failure to fulfil obligations.

Proof of the failure

55 Since it is common ground that none of the formalities required for a shipment of waste were complied with in respect of the shipment of the mixture at issue, that shipment must be considered to have been effected as an illegal shipment, within the meaning of Article 2(35) of Regulation No 1013/2006, provided that the mixture may be classified as waste. In that case, the competent authority of dispatch would have to ensure its take-back, at the request of the Polish authorities, in accordance with Article 24(2) of that regulation. It is true that an exception should be made for the situation provided for in Article 24(2)(d) of that regulation in which take-back is impossible, but none of the parties claim such impossibility. In those circumstances, the classification of the mixture as waste is decisive for the purpose of establishing the existence of the alleged failure.

56 Under Article 2(1) of Regulation No 1013/2006, the definition of the term ‘waste’, for the purposes of that regulation, is that which is set out in Article 1(1)(a) of Directive 2006/12 as follows: ‘any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard’. As it is expressly non-exhaustive, the list of categories of waste in Annex I to that directive is principally illustrative (judgment of 12 December 2013, *Shell Nederland and Belgian Shell*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 35).

57 Directive 2008/98, which replaced Directive 2006/12, reproduced that definition, in essence, in Article 3(1) thereof. However, it should be noted that the applicability of that directive to the present dispute is not clear from the documents in the case file. The parties have provided no evidence as to establish that that directive had been transposed into Czech law at the date the shipment at issue took place, which the parties agree, without giving further detail, was in late 2010 or early 2011. Yet, as the Commission acknowledged at the hearing, it is the date of the shipment that should be used for the purpose of classifying the mixture at issue as waste or not, since it is at that date that the lawfulness of the shipment must be assessed.

58 As is clear from the definition set out above, classification as ‘waste’ is to be inferred primarily from the holder’s actions and the meaning of the term ‘discard’ (see, to that effect, judgments of 24 June 2008, *Commune de Mesquer*, C-188/07, EU:C:2008:359, paragraph 53, and of 18 December 2007, *Commission v Italy*, C-263/05, EU:C:2007:808, paragraph 32).

- 59 As regards the meaning of the term ‘discard’, it follows from the Court’s case-law that that term must be interpreted in the light of the aim of Directive 2006/12, which, in the words of recital 2 of the directive, consists in the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, having regard to Article 191(2) TFEU, which provides that EU policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. It follows that the term ‘discard’, and therefore the concept of ‘waste’ within the meaning of Article 1(1)(a) of Directive 2006/12, cannot be interpreted restrictively (judgment of 12 December 2013, *Shell Nederland and Belgian Shell*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 38 and the case-law cited).
- 60 Moreover, the Court has held that the existence of ‘waste’ within the meaning of Directive 2006/12 must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined (judgment of 12 December 2013, *Shell Nederland and Belgian Shell*, C-241/12 and C-242/12, EU:C:2013:821, paragraph 40 and the case-law cited).
- 61 In the present case, two preliminary observations should be made before examining the evidence submitted by the Commission. First, as regards the assessment of whether or not the mixture that was shipped was waste, the relevant circumstances in the light of which that assessment should be made are those existing at the date of the shipment, and not the circumstances before or after that date. Second, having considered that it was the responsibility of the Czech Republic to prove that the TPS-NOLO (Geobal) was not waste, the Commission undertook in its written pleadings less to provide proof itself that that substance is waste than to reply to the arguments put forward by the defendant Member State during the infringement proceedings, with a view to rebutting them.
- 62 Among the facts that the Commission presents as capable of establishing that the mixture at issue is waste is, in the first place, the fact that TPS-NOLO (Geobal) is produced from waste originating from an earlier refining activity on the Ostrava site.
- 63 That point was confirmed, at the hearing before the Court, by the Czech Republic, which also acknowledged that the tar acid — the principal component of the mixture — was derived from former oil-refining activities on the Ostrava site and corresponds to ‘waste tarry residues (excluding asphalt cements) arising from refining, distillation and any pyrolytic treatment of organic materials’ in entry A3190 in List A in Part 1 of Annex V to Regulation No 1013/2006. Nevertheless, that Member State submits that, by mixing it with carbon dust and calcium oxide to form TPS-NOLO (Geobal), that tar underwent a transformation which meant it ceased to be waste and was capable of being used as fuel in cement works.
- 64 However, the fact that a substance is the result of a waste recovery operation is only one of the factors which should be taken into consideration for the purpose of determining whether that substance is still waste and does not as such permit a definitive conclusion to be drawn in that regard (judgments of 15 June 2000, *ARCO Chemie Nederland and Others*, C-418/97 and C-419/97, EU:C:2000:318, paragraph 97, and of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri*, C-358/11, EU:C:2013:142, paragraph 58). As a result, the mere fact that TPS-NOLO (Geobal) is produced from waste does not constitute a basis for finding that it, itself, is waste.
- 65 In the second place, the Commission draws attention to the hazardous nature of the tar acid from which TPS-NOLO (Geobal) is derived and of the mixture itself.
- 66 It should be noted, at the outset, that the concept of waste does not turn on the hazardous nature of a substance (judgment of 18 April 2002, *Palin Granit and Vehmassalon kansanterveysystyön kuntayhtymän hallitus*, C-9/00, EU:C:2002:232, paragraph 48). As regards the conclusions to be drawn from the alleged hazardous nature of the tar acid in question, EU law does not, as a matter of principle, exclude the possibility that waste regarded as hazardous may cease to be waste if an 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 to discard it (judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri*, C-358/11, EU:C:2013:142, paragraph 60).

- 67 As regards the Commission's allegation that TPS-NOLO (Geobal) itself is a hazardous waste, that institution notes that a fine was imposed by a Polish court on one of the purchasers of that mixture on account of it being hazardous waste. However, an argument based on the classification as waste of a substance other than that at issue and in circumstances which are not specified is limited. As regards the mixture at issue, the Czech Republic acknowledged at the hearing that the unused quantity that has remained on the Katowice site for several years in storage conditions that have a negative impact on the environment and on public health should probably be considered waste. However, as has been stated in paragraph 61 above and as the Czech Republic maintains, the present circumstances are not relevant in the assessment of whether the mixture was waste at the date it was shipped.
- 68 In the third place, the Commission claims that TPS-NOLO (Geobal) is considered waste both in the Czech Republic and in Poland.
- 69 The Czech Republic disputes that assertion as regards itself. According to the Czech Republic, the Nejvyšší správní soud (Supreme Administrative Court), in its judgment of 3 December 2015, which is cited by the Commission as evidence that TPS-NOLO (Geobal) is classified as waste in the Czech Republic, did not take a position on that point but merely reported, in the summary of the parties' observations, that the parties had classified that mixture as waste.
- 70 In support of its argument, the Commission also refers to amendment No 20 of the integrated permit for the Litvínov plant, which is where the mixture at issue was stored before being shipped to Poland. It notes that that decision identifies 'Geobal 4' as waste. However, the similarity between the names of those substances is insufficient to establish that 'Geobal 4' and the mixture at issue are the same. In addition, as was noted in paragraph 60 above, whether or not a substance is waste must be assessed in the light of the specific circumstances of each case.
- 71 As regards the classification of TPS-NOLO (Geobal) in Polish law, it should be noted that the Polish Government participated in neither the written procedure nor the oral procedure, and that its position is known by the Court only as a result of two letters, of 21 July 2015 and 11 May 2016, sent by the Republic of Poland to the Commission and included in the file submitted to the Court by the latter. It is clear from those letters that in Poland the mixture was considered at those dates to be waste, the use of which as fuel was prohibited. However, the Czech Republic asserted at the hearing, without being contradicted, that the use of that mixture as fuel in cement works was prohibited in Poland only from May 2011, that is, after the shipment at issue. Indeed, the consignment agreement concluded appears to confirm that, at the time it was signed in December 2010, TPS-NOLO (Geobal) had, according to the Polish importer in question, an economic use and value in Poland.
- 72 In the fourth place, the Commission claims that it cannot be inferred from its registration under the REACH Regulation before its shipment that the mixture at issue had ceased to be waste.
- 73 It should be borne in mind, in that regard, that according to Article 2(2) of that regulation waste is not a substance, a mixture or article within the meaning of Article 3 of the regulation. It is true that, as the Commission submits, the mixture at issue may have been wrongly registered under the REACH Regulation in disregard of its classification as waste. However, such a hypothesis cannot be taken to demonstrate that the mixture is waste. While not permitting a definitive conclusion to the contrary, the registration of a substance under the REACH Regulation is, nevertheless, relevant for the purpose of determining whether that substance has ceased to be waste (see, to that effect, judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri*, C-358/11, EU:C:2013:142, paragraphs 63 and 64).
- 74 In the fifth place, the Commission emphasises the composition of the mixture at issue and the danger it poses to the environment and human health. In that regard it should be noted, first of all, that the analyses of the mixture that the Commission relies on, without producing them, were carried out by the Polish authorities *ex parte* and the Czech Republic is unable to obtain a second opinion given that the mixture is on Polish territory. In addition, as is clear from the definition of waste, a substance is waste not by nature, but as a result of the intention or obligation of its holder to discard it, that is to say, by

the will of the holder or of the legislature. It follows that the chemical composition of the substance at issue at most may give an indication as to whether it is waste (see, to that effect, judgment of 7 September 2004, *Van de Walle and Others*, C-1/03, EU:C:2004:490, paragraph 42). Lastly, the risks a substance poses to the environment or human health have no decisive influence on its classification as waste (see, to that effect, judgment of 15 June 2000, *ARCO Chemie Nederland and Others*, C-418/97 and C-419/97, EU:C:2000:318, paragraph 66).

- 75 In the sixth place, the Commission claims that, even if TPS-NOLO (Geobal) may be reused for economic gain, such a fact does not exclude it from being waste (see, to that effect, judgments of 28 March 1990, *Vessoso and Zanetti*, C-206/88 and C-207/88, EU:C:1990:145, paragraph 13, and of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 31). However, that argument cannot, conversely, be regarded as determinative or even indicative of the mixture at issue being waste.
- 76 In addition, the Commission contests the economic utility of the mixture at issue. It infers from the reduction of the quantity of the mixture present on the site in question, as noted by the Polish inspectors, that the buyer had not sold the mixture in Poland, as stipulated in the contract, and that part of it had been re-exported. It concludes from this that there was no demand for the mixture as fuel for cement works in that Member State.
- 77 According to the information provided by the Polish authorities, the quantity of TPS-NOLO (Geobal) at Katowice in 2016 was only about 6 000 tonnes out of the 20 000 tonnes of that mixture shipped in 2011. Nevertheless, it seems difficult to infer from that finding alone that the sale on consignment of the mixture at issue was not carried out and a part of that mixture was re-exported. As the Czech Republic suggests, the reduction of the quantity of the mixture present on the site in question could equally be explained by its having been used as fuel in Polish cement works, in accordance with its intended use, while that use was permitted. In any case, the Commission's contentions in that regard lack any supporting evidence.
- 78 It follows from all the foregoing that the Commission cannot be considered to have proven to the requisite legal standard that the mixture at issue was waste within the meaning of Directive 2006/12. As a result, it has failed to establish that the shipment of that mixture from the Czech Republic to Poland in late 2010 or early 2011 constituted, at the time it took place, a shipment of waste within the meaning of Regulation No 1013/2006 and, as a result, that the Czech Republic failed to fulfil its obligations under Article 24(2) in conjunction with Article 28(1) of that Regulation. The Commission's action must therefore be dismissed.

Costs

- 79 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Czech Republic has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]

* Language of the case: Czech.