*495 Porr Bau GmbH

No Substantial Judicial Treatment

Court
European Court of Justice (First Chamber)

Judgment Date
17 November 2022

Report Citation
EU:C:2022:885
[2023] Env. L.R. 19

(C-238/21)

European Court of Justice (First Chamber)

A. Arabadjiev (Rapporteur), President of the Chamber, L. Bay Larsen , Vice-President of the Court, acting as Judge of the First Chamber, P.G. Xuereb , A. Kumin and I. Ziemele , Judges : L. Medina , AG:

17 November 2022

EU law; Excavation; National legislation; Soils; Statutory interpretation; Waste;

H1 *EU law—waste—Directive 2008/98—concepts of "waste" and "by-product"—"end of waste" status—use by farmers of uncontaminated excavated material from construction for soil adaptation or improvement—national law requiring such material to be classified as "waste" even if falling within the concept of "by-product"—such status as "waste" only lost when used directly as a substitute and holder satisfied formal criteria irrelevant for the purposes of environmental protection—whether national provisions in breach of Directive*

H2. A request for a preliminary ruling was made in proceedings where a number of farmers had approached a construction company (P) to obtain excavated materials for the purpose of soil adaptation or improvement. P supplied uncontaminated excavated materials of the highest quality class for excavated soil under Austrian law. It sought a declaration that the excavated materials supplied did not constitute "waste" and, in the alternative, that the proposed works did not constitute an activity subject to an obligation to pay a contribution in respect of contaminated sites. The Austrian authorities found that the materials in question did constitute "waste" under national law and that their "end-of-waste" status had not been achieved, primarily on the ground that formal criteria laid down in the Federal Waste Management Plan had not been complied with. The referring court noted that the materials had undergone a checking operation, with the result that they could be used directly. It stated that they were used for the purpose of improving

agricultural structures, that there was a need for materials, that the technical requirements had been complied with and that, in addition, there were no harmful effects on the environment or on health. Moreover, the aim of such an approach was to prevent waste and to substitute such materials for raw materials. Under Austrian law, only two activities enabled "end-of-waste" status to be achieved; (1) preparing for re-use by checking, cleaning or repairing; and (2) the actual use of the materials to substitute raw materials. For excavated materials, the applicable criteria were more restrictive, since preparing for re-use did not achieve their "end-of-waste" status. ***496** Thus, that court took the view that "end-of-waste" status was restricted in a manner contrary to EU law.

H3. The questions referred asked, essentially, whether arts 3 , 5(1) and 6(1) of Directive 2008/98 precluded national legislation under which uncontaminated excavated materials, in the highest quality class under national law; (1) had to be classified as "waste" even if it were determined that those materials fell within the concept of "by-product"; and (2) only lost that "waste" status when they were used directly as a substitute and their holder satisfied the formal criteria which were irrelevant for the purposes of environmental protection.

H4. **Held:**

H5. (1) Legislation classifying such materials as "waste" where their holder neither intended nor was required to discard them and those materials met the conditions laid down in art.5(1) for being classified as "by-products", was contrary to the Directive. It was for the referring court to determine whether P had in fact intended to "discard" the materials at issue, with the result that they would constitute "waste". In particular, that court should determine whether those materials constituted a burden which P sought to discard, with the result that there would be a risk that they would be discarded in a manner likely to cause harm to the environment, particularly by dumping them or disposing of them in an uncontrolled manner. In the present case, it was apparent that, even before the excavation of the materials, local farmers had made an express request for their supply. After appropriate construction projects had been found, those excavated materials were made available, alongside an agreement under which P would carry out works to adapt and improve the land and cultivation areas using those materials. Such factors, if proven, did not appear to be such as to establish the intention to discard those materials.

H6. (2) It was also for the referring court to ascertain whether the excavated materials had to be classified as a "by-product" within the meaning of art.5(1) . That included verifying whether the farmers concerned had made a binding commitment to take delivery of the excavated materials, but also that those materials and the quantities supplied did in fact serve to carry out the works

and were strictly limited for those purposes. If the materials were not supplied immediately, it was appropriate to allow temporary storage for a reasonable period, until the works for which they were intended were carried out. Although it was apparent that the excavated materials were subject to a quality control demonstrating that they were uncontaminated materials in the highest quality class and recognised as such under national law, it was for the referring court to satisfy itself that they did not require any processing or treatment before their further use. On the question whether the materials formed an integral part of P's production process, the excavated soil was the result of one of the first steps usually undertaken in a construction operation as an economic activity, the result of which was the transformation of land. The Federal Waste Management Plan, which laid down specific requirements for the reduction of waste quantities, their pollutants and their harmful effects on human health and the environment, also declared that the use of uncontaminated excavated materials in the highest quality class was suitable and authorised for land adaptation and improvement. That use was, in principle, consistent with the objectives of Directive 2008/98 . The use of such excavated soil had a significant advantage for the environment because it contributed, as required by art.11(2)(b) , to the reduction of waste, to the preservation of natural resources and to the development of a ***497** circular economy. In addition, use of such excavated materials made it possible to comply with the waste hierarchy defined in art.4 .

H7. (3) National law providing that uncontaminated excavated materials of the highest quality class only lost that "waste" status when they were used directly as a substitute and their holder had satisfied formal criteria which were irrelevant for the purposes of environmental protection, were also contrary to the Directive if those criteria had the effect of undermining the attainment of its objectives. An examination seeking to determine the status and presence of pollution or of contamination in excavated materials could be classified as a "checking operation", covered by the concept of "preparing for re-use", as defined in art.3 . Accordingly, waste which was the subject of such a "preparing for re-use" operation could be regarded as having undergone a recovery operation, within the meaning of art.6(1) , if its re-use did not require any other pre-processing. It was for the referring court to assess whether the specific criteria defined in accordance with the conditions in that article were complied with following the checking operation. It was apparent that the assessment that the "end-of-waste" status of the excavated materials had not been achieved was essentially attributable to non-compliance with the formal criteria which were irrelevant for the purposes of environmental protection. If the excavated materials at issue were the subject of a recovery operation and satisfied all the specific criteria defined in accordance with the conditions laid down in art.6(1) , it had to be held that the "end-of-waste" status of those materials had been achieved.

H8 Cases referred to:

Brady v Environmental Protection Agency (C-113/12) EU:C:2013:627; [2014] 2 C.M.L.R. 3; [2014] Env. L.R. 13
Commission v Spain (C-121/03) EU:C:2005:512
Commune de Mesquer v Total France SA (C-188/07) EU:C:2008:359; [2009] P.T.S.R. 588; [2009] Env. L.R. 9
Criminal Proceedings against Tronex BV (C-624/17) EU:C:2019:564; [2019] P.T.S.R. 2042; [2020] 1 C.M.L.R. 15
KVZ retec (C-176/05) EU:C:2007:123
Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824
Tallinna Vesi AS v Keskkonnaamet (C-60/18) EU:C:2019:264; [2019] Env. L.R. 30

H9 Legislation referred to:

TFEU art.267
Directive 75/442 (Waste)
Directive 2006/12 (Waste)
Directive 2008/98 (Waste) arts 1 , 3 , 4 , 5 , 6 , 11 , 13 and 28 and Annex II

H10 Representation

M. Walcher , Rechtsanwalt, appeared on behalf of Porr Bau GmbH.
F. Boldog , A. Kögl , A. Posch , J. Schmoll and E. Wolfslehner , acting as Agents, appeared on behalf of the Austrian Government.
S. Bourgois , C. Hermes and M. Ioan , acting as Agents, appeared on behalf of the European Commission. ***498**

OPINION

I. Introduction [1]

AG1. The present request for a preliminary ruling concerns the interpretation of the concept of 'waste' in Article 3(1) of Directive 2008/98 [2] and the conditions under which excavated materials – namely uncontaminated top-quality soil – achieve end-of-waste status pursuant to Article 6 of that directive. The case follows on from judgments such as *Tallinna Vesi* [3] and *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein'* , [4] where the Court interpreted those same provisions respectively with regard to sewage sludge and waste water.

AG2. The request has been submitted in the course of the proceedings between Porr Bau GmbH and the Bezirkshauptmannschaft Graz-Umgebung (administrative authorities of the District of Graz and surrounding area; 'the respondent authority'). Those proceedings concern an administrative decision which found that the excavated soil ordered by certain farmers from a construction undertaking in Austria, for the purposes of levelling and restoring their cultivation areas, was to be considered waste, and thus subject to the payment of a contribution, even though it had been classified as uncontaminated material of the highest quality under Austrian law.

AG3. The referring court wishes mainly to ascertain whether Article 6 of Directive 2008/98 , interpreted in the light of the objectives of that directive, precludes national legislation which grants end-of-waste status to uncontaminated top-quality excavated soil only (i) when it is used directly as a substitute for raw materials and (ii) when the holder fulfils certain formal requirements such as record-keeping and documentation obligations. As a preliminary issue, that court also wonders whether uncontaminated top-quality excavated soil, supplied by a construction undertaking for the purposes of improving the yields from cultivation land, constitutes 'waste' within the meaning of Article 3(1) of Directive 2008/98 or, alternatively, a 'by-product' within the meaning of Article 5(1) of that directive.

II. Legal framework

A. European Union law

AG4. According to Article 1 of Directive 2008/98 , in the version applicable to the main proceedings, [5] that directive lays down 'measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use'. ***499**

AG5. Article 3 of Directive 2008/98 , entitled 'Definitions', provides that, for the purpose of that directive, the following definitions in paragraphs 1, 15 and 16 of the terms 'waste', 'recovery' and 'preparing for re-use' are to apply:

> '1. "waste" means any substance or object which the holder discards or intends or is required to discard;
> …
> 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;
16. "preparing for re-use" means checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing;
…'

AG6. Article 4 of Directive 2008/98 , entitled 'Waste hierarchy', states:

'1. 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.
…'

AG7. Article 5 of Directive 2008/98 , under the heading 'By-products', reads as follows:

'1. A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in [Article 3(1)] but as being a by-product only if the following conditions are met:

(a) further use of the substance or object is certain;
(b) the substance or object can be used directly without any further processing other than normal industrial practice;
(c) the substance or object is produced as an integral part of a production process; and
(d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

…’

AG8. 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 [Article 3(1)] when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions: ***500**
>
> (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.
>
> …
>
> 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. …’

AG9. The essential obligation and objective laid down by Directive 2008/98 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 …’

AG10. Article 28 of Directive 2008/98 , under the title ‘Waste management plans’, states that Member States are to ensure that their competent authorities establish, in accordance inter alia with Articles 1 , 4 and 13 , one or more waste management plans.

B. Austrian law

1. The Law on waste management

AG11. The relevant provisions of the Abfallwirtschaftsgesetz 2002 (Austrian federal law of 2002 on waste management; ‘the Law on waste management’), which transposes Directive 2008/98 , are worded as follows:

> **‘Definitions**
>
> Paragraph 2(1) For the purposes of [the Law on waste management], waste means any movable property,
>
> 1. which the holder intends to discard or has discarded, or
> 2. whose collection, storage, transport and treatment as waste is necessary in order not to harm public interests (Paragraph 1(3)).
>
> …
> (5) For the purposes of [the Law on waste management],
>
> …
> 6. “preparing for reuse” means any checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be reused without any other pre-processing;
> … ***501**
>
> **End-of-waste status**
>
> Paragraph 5(1) Unless otherwise specified in a regulation referred to in Paragraph 5(2) or in a regulation referred to in Article 6(2) of Directive 2008/98 /EC on waste, existing substances shall be deemed to be waste until they or substances directly obtained from them are used as a substitute for raw materials or for products obtained from primary raw materials. In the case of preparing for reuse within the meaning of point 6 of Paragraph 2(5), the end-of-waste status occurs at the end of that recovery operation.

…

Federal waste management plan

Paragraph 8(1) In order to achieve the objectives and to implement the principles set out in [the Law on waste management], the Federal Minister for Agriculture, Forestry, the Environment and the Management of Water shall draw up a federal waste management plan at least every six years.

…'

2. The Federal waste management plan

AG12. The Bundesabfallwirtschaftsplan 2011 (Austrian federal waste management plan of 2011; 'the Federal waste management plan'), adopted on the basis of Article 28 of Directive 2008/98 and Paragraph 8(1) of the Law on waste management, lays down specific requirements concerning the reduction of the quantities of waste, of its pollutants and of its harmful effect on the environment and health, as well as the environmentally sound and economically useful recovery of waste.

3. The Law on the rehabilitation of disused hazardous sites

AG13. Under Paragraph 1 of the Altlastensanierungsgesetz 1989 (Austrian federal law of 1989 on the rehabilitation of disused hazardous sites, as subsequently amended), that law aims 'to finance the safeguarding and rehabilitation of disused hazardous sites within the meaning of [that law]'. In particular, Paragraph 3 provides that the long-term deposit of waste on the surface or underground for, inter alia, filling uneven ground or land development, is to be subject to the payment of a contribution known as the 'Altlastenbeitrag' (disused hazardous site contribution). However, that waste is exempt from that obligation when, in essence, it is used in accordance with the requirements of the Federal waste management plan. The Law on the rehabilitation of disused hazardous sites also sets out, in Paragraph 10, a procedure the purpose of which is to clarify, by means of an administrative decision, whether the substantive conditions for the obligation to make a contribution in respect of contaminated sites are fulfilled.

III. Facts, procedure and the questions referred

AG14. Porr Bau, the applicant in the main proceedings, is a construction undertaking established in Austria. In July 2015, certain local farmers asked it to supply them with excavated soil and to distribute it over their properties. The purpose of the farmers' request was to level their agricultural land and improve their cultivation areas, thereby increasing yields.

AG15. On the date the farmers approached Porr Bau, it was not certain that that undertaking would be in a position to respond to their request. It was only after **502* the selection of an appropriate construction project and the extraction of soil samples that Porr Bau supplied the requested material. For that purpose, the soil had been qualified as being of class quality A1, that is to say, the highest quality of uncontaminated excavated soil established in the Federal waste management plan. The use of that class of soil is, under Austrian law, suitable and authorised for land adaptation and land development. Porr Bau was also paid to carry out the works to improve the land and the cultivation areas concerned.

AG16. On 4 May 2018, pursuant to the Law on the rehabilitation of disused hazardous sites, Porr Bau asked the respondent authority to declare that the excavated soil supplied to the farmers did not constitute waste. In the alternative, it asked for that soil to be exempted from the obligation to pay the contribution on the use of waste.

AG17. On 14 September 2020, the respondent authority found that the excavated soil at issue constituted waste within the meaning of Paragraph 2(1) of the Law on waste management. That authority also considered that the soil had not achieved end-of-waste status, essentially due to the failure to comply with certain formal requirements laid down in the Federal waste management plan. It concluded therefore that the contribution on the use of waste could not be exempted.

AG18. The Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), which is hearing the appeal against that decision, has doubts as to the view taken by the respondent authority.

AG19. In particular, the referring court questions the interpretation of the concept of 'waste' adopted by that authority and its application to uncontaminated excavated soil of the highest quality class, such as the soil at issue in the present case. In addition, the referring court

observes that, under Austrian law, excavated materials can only achieve end-of-waste status when they have been used directly as a substitute for raw materials or for products made from primary raw materials. That raises the question whether the national legislation regulates the achievement of end-of-waste status more strictly than Article 6 of Directive 2008/98 in respect of uncontaminated soil of the highest quality. Moreover, the referring court points out that Austrian law requires, for the purposes of achieving end-of-waste status, the fulfillment of certain formal requirements, specifically record-keeping and documentation obligations. The referring court asks whether, where uncontaminated top-quality excavated soil is concerned, the obligation to comply with those requirements, which that court considers to have no environmental relevance, infringes Article 6 of Directive 2008/98 .

AG20. In those circumstances the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> ‘(1) Does Article 6(1) of [Directive 2008/98] preclude national legislation under which end-of-waste status is achieved only once waste or existing substances or the substances obtained from them are used directly as a substitute for raw materials or for products made from primary raw materials or once they have been prepared for reuse?
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> If Question 1 is answered in the negative:
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> (2) Does Article 6(1) of [Directive 2008/98] preclude national legislation under which end-of-waste status in respect of excavated materials can be achieved at the earliest when they serve as a substitute for raw materials or for products made from primary raw materials? ***503**
>
> If Question 1 and/or Question 2 is/are answered in the negative:
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> (3) Does Article 6(1) of [Directive 2008/98] preclude national legislation under which end-of-waste status in respect of excavated materials cannot be achieved if formal criteria (in particular record-keeping and documentation obligations) which have no environmentally relevant influence on the measure carried out are not complied with or are not complied with in full, even though the excavated materials

demonstrably fall below the limit values (premium) to be complied with for the specific intended use?'

IV. Analysis

AG21. By its request, the referring court asks, in essence, whether Article 6(1) of Directive 2008/98 must be interpreted as precluding national legislation under which end-of-waste status is achieved, as a general rule, only when waste is used directly as a substitute for raw materials or is prepared for reuse and, in the particular case of excavated materials, only when the excavated materials have been used directly as a substitute for raw materials, and their holder has satisfied formal requirements such as record-keeping and documentation obligations.

AG22. As a preliminary point, I must observe that, in the order for reference, the referring court expresses doubts as to whether uncontaminated excavated soil, classified as top-quality under national law, constitutes waste within the meaning of Article 3(1) of Directive 2008/98 . After all, the application of Article 6 of that directive is based on the premiss that a substance or object is qualified as waste beforehand. Although this particular issue is not expressly raised in the questions referred, I shall first examine whether the provision by a construction company of uncontaminated top-quality excavated soil, under the specific circumstances of a case such as that in the main proceedings, should be considered waste. In my analysis, I shall also address the issue, discussed by the parties during the hearing before the Court, of whether the soil supplied should be regarded instead as a by-product within the meaning of Article 5(1) of Directive 2008/98 .

AG23. On the assumption that the material at issue in the main proceedings is considered waste, I shall examine the three questions referred together. Those questions must be read as inviting the Court to determine whether the national legislation in question is compatible with Article 6(1) of Directive 2008/98 when the sole possibility of recovery for uncontaminated top-quality excavated soil, in order to reach end-of-waste status, is its use as a substitute for raw materials and the fulfilment of certain formal requirements such as record-keeping and documentation obligations.

A. Uncontaminated top-quality excavated soil as waste or as a by-product

1. Scope of Directive 2008/98

AG24. Before examining whether uncontaminated top-quality excavated soil could be considered as waste or, alternatively, as a by-product, within the respective meanings of Article 3(1) and Article 5(1) of Directive 2008/98 , I should briefly point out that Article 2(1)(c) of that same directive excludes, from its scope, uncontaminated soil and other naturally occurring material excavated in the course ***504*** of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated.

AG25. Given that, in the light of the information set out in the order for reference, the excavated soil at issue in the main proceedings was deposited elsewhere than in its excavation location, it is not covered by Article 2(1)(c) of Directive 2008/98 and, consequently, it must be considered in accordance with the definition of waste and the provisions for by-products of that directive. [6]

2. The concepts of ‘waste’ and ‘by-product’

AG26. Article 3(1) of Directive 2008/98 defines the concept of ‘waste’ as any substance or object which the holder discards or intends to discard (*subjective* waste) or which the holder is required to discard (*objective* waste). The concept of waste has been widely interpreted by the Court, which has defined relevant criteria for the purposes of determining whether a substance or object, including materials, is to be considered waste within the meaning of that provision. [7]

AG27. In particular, according to settled case-law, the classification of a substance or object as waste, in its subjective sense, is to be inferred primarily from the holder’s actions and the meaning of the term ‘discard’. [8] That term and the term ‘waste’ encompass concepts of EU law which, in view of the aim of Directive 2008/98 to minimise the negative effects of the generation and management of waste on human health and the environment, cannot be interpreted restrictively. [9]

AG28. The Court has also emphasised that, in order to assess whether a substance or an object is waste, account must be taken of all the circumstances of the specific case, regard being had to the aim of Directive 2008/98 and the need to ensure that its effectiveness is not undermined. [10]

AG29. Among the circumstances that may reveal the existence of waste is the fact, first, that a substance or an object is a production or consumption residue, that is to say a product which was not itself sought. [11] In addition, particular attention must be paid, according to the Court, to the fact that the substance or object in question is not or is no longer of any use to its holder, such that that substance or object constitutes a burden which that holder will seek to discard. [12] Moreover, neither the method of treatment reserved for a substance nor the use to which it is put determines conclusively whether or not the substance is to be classified as ‘waste’.

Finally, the concept of 'waste' does not exclude either substances or objects which are capable of economic reuse. [13]

AG30. In parallel with the previous case-law, the Court has also developed the concept of 'by-product', mostly on the basis of the interpretation of Directive 75/442 . [14] That case-law is currently codified in Article 5(1) of Directive 2008/98 , which, in essence, refers to a substance or object which the holder is not willing to discard, by reason of the financial advantage that might be obtained from its reuse, and **505* which cannot therefore be regarded as a burden and thus as a waste. In the Court's view, it would not be justified to make a substance or object which the holder intends to exploit or market on economically advantageous terms, within a subsequent recovery process, subject to the strict requirements of Directive 2008/98 on environment and human health protection. [15]

3. Uncontaminated top-quality excavated soil requested for the levelling and improvement of cultivation land

AG31. It is of course for the referring court, which alone has jurisdiction to assess the facts of the case before it, to verify, in the light of the case-law previously cited, whether a holder of excavated materials, namely uncontaminated top-quality soil, intends to discard them, giving rise to waste, or to exploit them in economically advantageous terms, giving rise to a by-product. [16] That being so, I would invite the Court to provide the referring court with the following guidance in order to resolve the dispute before it. This guidance is based on the specific circumstances that must not be disregarded in a case such as the one in the main proceedings.

(a) Top-quality excavated soil as waste

AG32. To begin with, I would like to point out that, according to the Austrian Government, the decision adopted by the respondent authority, which concludes that the excavated soil at issue has the status of waste, is based on the case-law developed by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) on the concept of 'waste' as laid down in Paragraph 2(1) of the Law on waste management. [17] According to that court, where materials are excavated or demolished during a construction project, the main purpose of the construction developer is usually to complete that project without being hampered by those materials. They are therefore removed from the site with the intention of discarding them.

AG33. I agree that the standard established by the Verwaltungsgerichtshof (Supreme Administrative Court), subsequently followed in the decision under appeal, can be employed, as a general rule, for the purposes of determining whether excavated materials resulting from construction activities are to be regarded as waste. However, as indicated in point 28 above, the assessment of the existence of waste, within the meaning of Article 3(1) of Directive 2008/98 , requires, according to the Court's case-law, account to be taken of all the circumstances of a

specific case. [18] That means that, for that general rule to be applied, the elements characterising the concrete intention of a holder of waste must not be disregarded.

AG34. In my opinion, contrary to the position taken by the Austrian Government and the Commission, there are factual elements in the present case that deserve to be taken into account in the assessment of the specific intention of a construction undertaking regarding the further use of the material which it previously excavated. Those elements may include, for instance, the prior demand for the material to be excavated by local operators when that material may be marketed after careful selection and sampling of its quality. In essence, it cannot be excluded that a construction company, instead of perceiving excavated material as a residue or a burden to be discarded, might instead seek ways to obtain a profit from its own **506* activity, especially when that material is classified as belonging to the highest quality class of uncontaminated soil.

AG35. Indeed, the present case illustrates how a construction undertaking may be inclined, not to discard material previously excavated, but to exploit it in economically advantageous terms. This is suggested by the fact that it was a group of local farmers who initially contacted Porr Bau in order to distribute excavated soil over their properties for the purposes of levelling and improving their agricultural land. While it was not certain, at the time when the farmers approached Porr Bau, that that undertaking would be in a position to satisfy their demand, the initiative of those farmers encouraged it to select an appropriate construction project and to extract soil samples. The order for reference further indicates that that soil was subject to a quality control and that it was subsequently classified as uncontaminated top-quality material, which, according to Austrian law, is suitable and authorised for land adaptation and land development. At the request of the farmers, Porr Bau was also paid to carry out the works to improve the land and the cultivation areas concerned.

AG36. It is then difficult to conclude that, under circumstances such as those of the present case, the intention of a construction undertaking is to discard excavated soil that has been carefully selected, subjected to a quality control and supplied as uncontaminated top-quality material in order to attend to a specific request from local operators in need of that material. I also think it should not be assumed that all excavated soil by a construction undertaking is by default to be discarded. After all, it cannot be excluded that that material might be used within the construction project concerned, which, as indicated in point 24 above, would take it outside the scope of Directive 2008/98 .

AG37. In the light of the foregoing considerations, I think the Court should tend towards the view that, subject to the verifications to be made by the referring court, uncontaminated top-quality excavated soil should not be regarded, in a case like the present one, as waste within the meaning of Article 3(1) of Directive 2008/98 .

(b) Excavated soil as a by-product

AG38. By contrast, a close analysis of the case makes it apparent, in line with Porr Bau's written observations, that the soil at issue in the main proceedings might satisfy the requirements laid down in Article 5(1) of Directive 2008/98 for a by-product.

AG39. I should point out, in that regard, that, according to Article 5(1) of Directive 2008/98 , a substance or object resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste, but as being a by-product. For that to be so, that provision also requires the fulfilment of four conditions, namely (i) the further use of the substance or object is certain; (ii) the substance or object can be used directly without any further processing other than normal industrial practice; (iii) the substance or object is produced as an integral part of a production process, and (iv) the further use is lawful. I shall briefly examine all those elements in the light of the information arising from the Court file.

(1) Definition of by-product

AG40. As regards, first of all, whether excavated soil can be considered 'a substance or object resulting from a production process, the primary aim of which is not the production of that item', within the meaning of the first subparagraph of **507* Article 5(1) of Directive 2008/98 , it is important to bear in mind that the Court has traditionally held, in its settled case-law, that 'materials or raw materials resulting from an extraction or manufacturing process' may be not regarded as a residue, but as a by-product. [19] As already noted, that case-law is at the heart of the concept of 'by-product', which was subsequently codified in Article 5(1) of Directive 2008/98 using for that purpose, instead of the terms 'extraction or manufacturing process', the terms 'production process'.

AG41. In my view, contrary to the thesis defended, in essence, by the Austrian Government in its observations, no argument supports the view that the EU legislature, when codifying the case-law of the Court by using the terms 'production process', intended to restrain the consideration of by-products to secondary items resulting from an industrial production. On the contrary, a production process is commonly defined by economic scholars as the process in which the factors of production, namely capital, labour, technology and land (inputs), are turned into goods and services (output). [20] Land can therefore be the object of a production process, which means that a secondary product resulting from its transformation, including excavated soil, should be regarded as falling under the concept of 'by-product', provided it fulfils the additional conditions laid down in Article 5(1) of Directive 2008/98 .

AG42. In that regard, I would like to draw the Court's attention to the judgment in *Brady* . [21] In it, the Court considered, when interpreting Directive 75/442 , that slurry generated in farms as a secondary product and sold to other farmers for reuse as fertiliser could be regarded as a by-product. That demonstrates that, even before the adoption of Article 5(1) of Directive 2008/98 , the Court has admitted, as by-products, outputs resulting from economic transformation activities that do not exclusively take place within an industrial context. On those bases, I would invite the Court to adopt an interpretation of the terms 'production process' which

not only pairs the common definition of those terms, but also follows the understanding of the concept of 'by-product' in the Court's case-law before the adoption of Article 5(1) of Directive 2008/98 .

(2) Further use is sufficiently certain

AG43. With regard to the condition that further use of the substance or object at issue must be certain, without prejudice to the specific checks which the national court will carry out, it is sufficiently conclusive in that regard that, prior to the excavation of the soil at issue in the main proceedings, there was an express request for the supply of that material from local operators. That request later resulted in an engagement to provide the requested soil, along with an agreement by which the construction undertaking would carry out, using that same material, the necessary works for the levelling and improvement of the agricultural land concerned. Even though, on the date the farmers initially approached Porr Bau, it was not certain that that undertaking could accommodate their request, that does not in itself mean, in the light of the Court's case-law, that further use of the excavated soil concerned ***508** was not certain. [22] Indeed, the requirement of certainty appears to be fulfilled at a sufficiently early stage in the present case.

AG44. Nonetheless, the Court has laid down useful criteria to assess more specifically whether the further use of material intended to be distributed over agricultural land, such as the excavated soil at issue, is sufficiently certain. The requirements established, for instance, in the judgment in *Brady* , already cited, are as follows:

– first, the farmers' plots of land where the material is to be supplied must be clearly identified from the outset; [23]

– second, the material – and the quantities to be delivered – must actually be intended and strictly limited to the needs of the specific use established; [24]

– third, the supply of the material concerned must actually be used or marketed on terms that are economically advantageous to its holder;

– fourth, in event that the material at issue is not supplied immediately, there is an obligation to use appropriate and sufficient storage to keep the soil during the period of storage; moreover, that period of storage must not exceed what is required in order for the undertaking to be able to meet its contractual commitments. [25]

AG45. To my mind, the Court should consider making applicable the requirements elaborated in *Brady* , concerning the further use of material to be distributed over agricultural land, to a case regarding excavated soil such as that at issue in the main proceedings. That would help to assess more specifically whether the further use of that material is sufficiently certain within the meaning of Article 5(1)(a) of Directive 2008/98 . As a matter of fact, I would point out that the information shared by the referring court in the order for reference appears to reveal that the first three requirements are satisfied in the main action. By contrast, the order for reference does not contain any information concerning whether the excavated soil at issue in the main proceedings was – or was not – supplied immediately, which raises the question whether the

requirement related to the storage of that material was at all applicable. In any event, I must stress, once again, that it is for the referring court to carry out that assessment and to determine ultimately whether the condition laid down in Article 5(1)(a) of Directive 2008/98 should be regarded as being satisfied.

(3) No further processing and part of an integral production process

AG46. With regard to the conditions laid down by Article 5(1)(b) and (c) of Directive 2008/98 , according to which the substance or object must be used directly without any further processing other than normal industrial practice and the substance or object must be produced as an integral part of a production process, I think that it is clear that excavated soil supplied for the levelling of land does not require any processing or treatment before its further use. That is all the more so when, as repeatedly mentioned, that excavated soil has undergone a control declaring that it is uncontaminated top-quality material, recognised as such under national law. ***509** [26]

AG47. Furthermore, I have already argued, in points 41 and 42 above, that the term 'production process', in the first subparagraph of Article 5(1) of Directive 2008/98 , should be interpreted as encompassing economic transformation activities that go beyond those that take place exclusively within an industrial context. As to the present case, it is important to understand that excavated soil is the inevitable result of one of the first steps usually undertaken in a construction operation as an economic activity, the result of which is the transformation of land. For that reason, excavated soil should be regarded as an integral part of a production process within the meaning of Article 5(1)(c) of Directive 2008/98 .

AG48. Finally, I consider it important that the Court also adopts a dynamic understanding of how regular a certain by-product is supplied as such by an undertaking, which is not, by the way, a condition expressly established by Article 5(1) of Directive 2008/98 . Even if a material were not provided on a regular basis as a by-product – as could be the case with Porr Bau and the excavated soil at issue in the main proceedings – that should not lead to the conclusion that the supply of that material cannot evolve and be transformed into an activity capable of being performed on a more regular basis if that results into an economic benefit for an undertaking.

(4) Further lawful use

AG49. Lastly, with regard to the condition that the further use of the substance or object at issue must be lawful, Article 5(1)(d) of Directive 2008/98 requires, in particular, that the substance or object satisfies all relevant product, environmental and health protection requirements for its specific use and will not lead to overall adverse environmental or human health impacts.

AG50. In that respect, I have already mentioned that, according to the information provided by the referring court, the soil concerned by the main proceedings had been classified, following a quality analysis undertaken before its reuse, as belonging to the highest quality of uncontaminated excavated materials as defined by Austrian law, in particular under the Federal waste management plan. As indicated in point 12 above, that waste management plan lays down specific requirements concerning the reduction of the quantities of waste, of its pollutants and of

its harmful effect on the environment and health. It also declares that the use of uncontaminated top-quality soil is suitable and authorised for land adaptation and land development.

AG51. It appears then that, inasmuch as a classification of the excavated soil at issue in the main proceedings highlights both its uncontaminated status and its suitability for the specific purpose of land adaptation, the fourth condition should also be regarded as having been satisfied in the circumstances of a case such as the one in the main proceedings.

(c) Final remark

AG52. It follows from the foregoing considerations that, subject to the checks to be carried out by the referring court, a construction undertaking which carefully selects soil, subjects it to a quality control and supplies it as uncontaminated top-quality material in order to attend to a specific request from local operators in need of that material does not intend to discard it, but rather seeks to exploit it under advantageous conditions for that undertaking. That excavated soil should not therefore, in the specific circumstances of the present case, be regarded as waste within the meaning of Article 3(1) of Directive 2008/98 . ***510**

AG53. By contrast, I consider that Article 5(1) of Directive 2008/98 should be interpreted as meaning that uncontaminated top-quality excavated soil, supplied for the purposes of attending the specific request from local operators, after that soil has been selected and undergone a quality control, constitutes a by-product provided that the conditions laid down in that article are fulfilled in accordance with the guidance set out in the preceding points of this Opinion.

B. Achieving end-of-waste status

AG54. My previous analysis excludes the need to examine the three questions referred by the national court concerning the interpretation of Article 6 of Directive 2008/98 . However, should the Court decide not to follow the conclusion that the excavated soil at issue in the main proceedings should be regarded as a by-product, but instead as waste, I present my analysis on those three questions below.

1. Article 6 of Directive 2008/98 and the case-law of the Court

AG55. Under Article 6(1) of Directive 2008/98 , in the version applicable to the present proceedings, [27] certain specified waste ceases to be waste within the meaning of Article 3(1) when it has undergone a recovery, including recycling, operation.

AG56. Pursuant to that provision, end-of-waste status must also comply with specific criteria developed in accordance with the following conditions: first, the substance or object in question must be commonly used for specific purposes; second, a market or demand must exist for such a substance or object; third, the substance or object must fulfil the technical requirements for the specific purposes and meet the existing legislation and standards applicable to products, and, fourth, the use of the substance or object must not lead to overall adverse environmental or human health impacts.

AG57. According to Article 6(2) of Directive 2008/98 , the definition of the specific criteria that allow end-of-waste status to be achieved are to be adopted primarily by the European Commission. However, in the absence of implementing legislation adopted at EU level, Article 6(4) of Directive 2008/98 allows Member States to decide case by case whether certain waste has ceased to be waste.

AG58. It also follows from the case-law of the Court, in particular from its judgment in *Tallinna Vesi* , that the exact nature of the measures relating to the end-of-waste status of a substance or object has not been specified by the EU legislature. [28] Member States may thus adopt generally applicable national legislation providing for the cessation of waste status concerning certain types of waste. [29] Alternatively, Member States may also adopt individual decisions, in particular on the basis of applications submitted by holders of the substance or object classified as waste. [30] Member States are even entitled, according to the case-law of the Court, to take the view that some waste cannot cease to be waste and to refrain from adopting legislation concerning the end-of-waste status of that waste. [31]

AG59. In those three contexts, Member States must, however, ensure that their national legislation – or the fact that such legislation has not been adopted – does not amount ***511** to an obstacle to the attainment of the objectives set by Directive 2008/98 . Those objectives have been defined by the Court as encouraging the application of the waste hierarchy laid down in Article 4 of that directive, and, as is stated in recitals 8 and 29, encouraging the recovery of waste and the use of recovered material in order to preserve natural resources and to enable the development of a circular economy. [32] In addition, the measures adopted on the basis of Article 6(4) of Directive 2008/98 must comply with the requirements laid down in Article 6(1)(a) to (d) thereof, and, in particular, take account of any possible adverse impact which the substance or object concerned may have on the environment and on human health. [33]

2. The end-of-waste status of uncontaminated top-quality excavated soil

AG60. In the present case, it is common ground for the parties that, in accordance with Article 5(1) of the Law on waste management, the referring court must determine when the uncontaminated top-quality excavated soil provided by Porr Bau to local farmers in the main action ceased to be waste. The answer to that issue is highly relevant given that the payment of a contribution for the deposit of waste, pursuant to the Law on the rehabilitation of disused hazardous sites, depends on the determination of the moment in which that material might have achieved end-of-waste status. [34]

(a) National provision and case-law applicable

AG61. Article 5(1) of the Law on waste management stipulates, in essence, that the substances or objects derived from waste do not achieve end-of-waste status until they are used as a direct

substitute for raw materials or products obtained from primary raw materials, or until their preparation for reuse is completed.

AG62. That rule of the Law on waste management does not apply, however, in its entirety to excavated materials. Indeed, according to the order for reference, as corroborated by the Austrian Government, [35] excavated materials are considered to have achieved end-of-waste status only once they have been used as a direct substitute for raw materials or products obtained from primary raw materials. Recovery through preparation for reuse is therefore not available to them as a result of a decision adopted by Austria on the basis of the margin of discretion which Article 6(4) of Directive 2008/98 allows Member States. On top of that, for excavated materials to achieve end-of-waste status, formal requirements such as record-keeping or documentation obligations are to be fulfilled according to the Federal waste management plan.

AG63. The source of the present dispute mainly relates to the parties' disagreement as to when the excavated soil at issue in the main proceedings should be regarded as having undergone a recovery operation, as required by Article 6(1) of Directive 2008/98 . Indeed, Porr Bau considers that the quality control carried out on that material, for the purposes of determining its uncontaminated top-quality class, ***512*** amounts to a 'preparing for reuse' operation and thus a recovery. In its view, which mirrors the view expressed by the referring court in the order for reference, a national provision limiting that possibility would be contrary to Article 6(1) of Directive 2008/98 . By contrast, the Austrian Government submits that a quality control of excavated soil cannot be qualified as a 'preparing for reuse' operation. Consequently, that material cannot be considered to have gone through a recovery until it is used for the adaptation of agricultural land and the improvement of cultivation areas.

AG64. In that regard, I must point out, in the first place, that, according to recital 22 of Directive 2008/98 , for the purposes of reaching end-of-waste status, a recovery operation may be 'as simple as the checking of waste to verify that it fulfils the end-of-waste criteria'.

AG65. That recital is given concrete expression in Article 3(16) of Directive 2008/98 , which formally defines 'preparing for re-use' as an operation consisting in the 'checking, cleaning or repairing' of products or components of products that have become waste in order to prepare them so that they can be reused without any other pre-processing. [36] That same provision expressly qualifies 'preparing for re-use' operations as a recovery. Therefore, waste that undergoes such a 'preparing for re-use' operation must be regarded as having satisfied the first requirement laid down in Article 6(1) of Directive 2008/98 for the achievement of end-of-waste status.

AG66. It is also worth noting that Article 4 of Directive 2008/98 , which defines the hierarchy to be applied in waste legislation and policy, places 'preparing for re-use' in second position in the order of priorities for waste management, right after prevention.

AG67. In the second place, for waste to achieve end-of-waste status, it must not only undergo a recovery process, such as checking, as mentioned above. After all, for a change of status of

certain waste to take place, it is necessary to ensure that the product in question is not harmful. [37] That is all the more so given that, as the Court has recently indicated, end-of-waste status results in the end of the protection that the law governing waste guarantees as regards the environment and human health. [38] That is the reason why, during the recovery of waste, a high level of protection of the environment and human health must be guaranteed, [39] and why a specific recovery operation must ensure that the conditions in Article 6(1) of Directive 2008/98 are fully respected.

AG68. It is in the light of the above considerations that it must be ascertained whether national legislation which grants end-of-waste status to uncontaminated top-quality soil only when it has been used as a substitute for raw materials and after certain formal requirements have been satisfied, and not when its uncontaminated status and top-quality class have been defined, is compatible with Article 6(1) of Directive 2008/98 , as interpreted by the Court.

(b) Quality control as recovery

AG69. On the one hand, I believe it is sufficiently clear that an examination capable of determining the quality and uncontaminated status of excavated soil is suitable, ***513*** from a formal perspective, to be considered as a 'checking operation', thus falling under the concept of 'preparing for re-use' as defined in Article 3(16) of Directive 2008/98 . The Austrian Government argues that that type of operation is reserved, according to that provision, to 'products or components of products' and that the excavated soil concerned by the present case cannot be qualified as such. However, that argument should not be upheld on grounds similar to those set out in points 41 and 42 above, which invite the Court to consider land transformation activities, such as construction works, as a production process and, therefore, excavated soil as a product of that activity. Excavated soil can thus be subject to a preparing for reuse operation.

AG70. On the other hand, it is certainly for a national court to assess, when necessary on the basis of a scientific and technical analysis, [40] whether a quality and contamination control performed on excavated soil is appropriate for the purposes of excluding any harm to the environment and human health, and also appropriate to determining whether the conditions laid down in Article 6(1) of Directive 2008/98 , as described in point 56 above, have been respected. The aim should be to ensure that excavated soil does not present a potentially greater risk than that of comparable raw materials for a specific use.

AG71. As regards those conditions, that appears to be the situation in the main proceedings in view of the facts established in the order for reference. That order indicates, first, that, before being excavated, it was established that uncontaminated top-quality soil would be used for a specific purpose, namely the levelling and restoration of agricultural lands. Second, there was a specific demand for excavated soil, in particular from the farmers, which addressed the holder of uncontaminated top-quality soil for that purpose. Third, the order for reference states that the excavated soil fulfilled the technical requirements and standards for the levelling and restoration of agricultural land and complied with the relevant legislation and standards. Forth, given the

top quality of the excavated soil according to the Federal waste management plan, the use of the substance or object would not appear to lead to overall adverse environment or human health impacts. Let me recall, in that regard, that, in the order for reference, the referring court expressly indicates that the excavated soil at issue in the main proceedings was demonstrably below the limit values of contamination defined in the Federal waste management plan for the specific use of land adaptation and land development.

AG72. I would like to emphasise that the above interpretation of Article 3(16) and Article 6 of Directive 2008/98 , granting end-of-waste status to excavated soil which has been subject to a control and classified as being in the top-quality class of material under national law, ensures that the effectiveness of Directive 2008/98 is not undermined, as prescribed by the case-law cited in point 59 above, which essentially requires Member States to grant end-of-waste status to substances or objects where that contributes to the achievement of the objectives of Directive 2008/98 .

AG73. As to the present case, it must be considered that the use of top-quality excavated soil, for the purposes of levelling and restoring agricultural land, makes it possible to respect the waste hierarchy defined in Article 4 of Directive 2008/98 and, in particular, to respond to the encouragement to recover waste in order to conserve natural resources and promote the development of a circular economy. ***514**

AG74. After all, as Porr Bau argues, if excavated uncontaminated material classified as top quality was not regarded as having achieved end-of-waste status following a quality control, that soil, whose properties can be used to improve agricultural structures, could have been disposed of in a landfill, in accordance with the obligations laid down in Directive 2008/98 and the Austrian national legislation. That would lead not only to the potential impairment of landfill capacity, but also to the contamination of that soil, which could no longer be used for useful purposes. Besides, instead of implementing the waste hierarchy and responding to the encouragement to recover waste in order to conserve natural resources, as already indicated, the holder of such waste would be required, under Austrian law, to pay a contribution in respect of contaminated sites, which would impair the polluter-pays principle that, according to recitals 1 and 26 of Directive 2008/98 , is a guiding principle for European environmental law and policy.

AG75. Consequently, I am of the view that the grant of end-of-waste status to excavated soil once it has been subject to a control and defined as uncontaminated top-quality material can meet the objectives of Directive 2008/98 . National legislation which provides that end-of-waste status may occur solely when that type of soil is used to replace raw materials directly, and which excludes preparation for reuse for it, exceeds the margin of discretion recognised to Members States and is therefore precluded by Article 6(1) of Directive 2008/98 .

(c) Formal requirements

AG76. As regards the formal requirements, such as record-keeping and documentation obligations, which, according to the referring court, must be additionally satisfied by excavated materials in order to achieve the end-of-waste status, a similar understanding should apply. In

particular, it is necessary to ensure that formal requirements do not compromise the effectiveness of Directive 2008/98 . In other words, national legislation which provides that end-of-waste status of excavated materials cannot end in the event of non-compliance with formal obligations, even though the conditions laid down in Article 6(1) of Directive 2008/98 are fulfilled, prevents the objectives of Directive 2008/98 from being achieved and for that reason should be set aside.

AG77. Certainly, as the Austrian Government points out, the setting of formal requirements for end-of-waste status is not foreign to EU law. In that regard, Member States enjoy a margin of discretion when it comes to laying out the criteria of the end-of-waste status. Nevertheless, those formal requirements must be defined in a way that achieves their goals without compromising the objectives of Directive 2008/98 .

AG78. That does not appears to be the case in the main action in the light of the description made by the referring court in the order for reference. Indeed, as the Austrian Government recognises in its observations, the decision under appeal before the referring court concluded that the excavated soil at stake had not achieved end-of-waste status essentially due to the failure to comply with certain formal requirements laid down in the Federal waste management plan. Yet, as repeatedly mentioned, the referring court indicates that the excavated soil at issue in the main proceedings had been classified as top-quality soil and was demonstrably below the limit values of contamination defined in the Federal waste management plan for the specific use of land adaptation and land development. ***515**

AG79. The formal requirements therefore led the respondent authority to consider uncontaminated top-quality soil as waste, encouraging disposal and the acquisition of new raw materials, instead of encouraging the reuse of pre-existing materials. Inasmuch as the reuse of uncontaminated top-quality materials could be discouraged, formal requirements which prove to have no environmental relevance must be regarded as undermining the promotion of the waste hierarchy defined in Article 4 of Directive 2008/98 and, as such, the effectiveness of that directive.

(d) Final remark

AG80. In the light of the foregoing considerations, Article 6(1) of Directive 2008/98 must be interpreted as precluding national legislation which grants end-of-waste status to uncontaminated excavated soil, classified as top-quality material for the specific purpose of land development under national law, only when it is used directly as a substitute for raw materials and inasmuch as it denies the end-of-waste status until the holder fulfils certain formal requirements with no environmental relevance such as record-keeping and documentation obligations.

V. Conclusion

AG81. On the basis of the analysis set out above, I propose that the Court answer the request for a preliminary ruling from the Landesverwaltungsgericht Steiermark (Regional Administrative Court of Styria, Austria) as follows:

Article 6(1) of Directive 2008/98 /EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives must be interpreted as precluding national legislation which grants end-of-waste status to uncontaminated excavated soil, classified as top-quality material for the specific purpose of land development under national law, only when it is used directly as a substitute for raw materials and inasmuch as it denies the end-of-waste status until the holder fulfils certain formal requirements with no environmental relevance such as record-keeping and documentation obligations.
However, Article 6(1) of Directive 2008/98 should not be applied in a case such as the one in the main proceedings, inasmuch as Article 3(1) and Article 5(1) of Directive 2008/98 must be interpreted as meaning that uncontaminated top-quality excavated soil, supplied for the purposes of attending to a request from local farmers relating to land adaptation and land development, after that soil has been selected and undergone a quality control, constitutes not waste, but a by-product, provided that the conditions laid down in Article 5(1)(a) to (d) of Directive 2008/98 are fulfilled. It is for the referring court to carry out that assessment.

JUDGMENT [41]

1. This request for a preliminary ruling concerns the interpretation of Article 6(1) 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). ***516**

2. The request has been made in proceedings between Porr Bau GmbH (‘Porr Bau’) and the Bezirkshauptmannschaft Graz-Umgebung (administrative authorities of the District of Graz and surrounding area) concerning the latter’s finding that excavated materials discharged on cultivation areas constituted waste.

Legal context

European Union law

3. The essential objective of Council Directive 75/442 /EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156 /EEC of 18 March 1991 (OJ 1991 L 78, p. 32) (‘ Directive 75/442 ’), was, according to the third recital thereof, the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. Directive 75/442 was repealed and replaced by Directive 2006/12 /EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9), which was itself repealed and replaced by Directive 2008/98 .

4. Recitals 6, 8,11, 22 and 29 of Directive 2008/98 state:

> '(6) The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.
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> …
>
> (8) … Furthermore, the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources.
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> …
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> …
>
> (11) The waste status of uncontaminated excavated soils and other naturally occurring material which are used on sites other than the one from which they were excavated should be considered in accordance with the definition of waste and the provisions on by-products or on the end of waste status under this Directive.
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> …
>
> (22) … In order to specify certain aspects of the definition of waste, this Directive should clarify:
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> …
>
> – when certain waste ceases to be waste, laying down end-of-waste criteria that provide a high level of environmental protection and an environmental and economic benefit; possible categories of waste for which "end-of-waste" specifications and criteria should be developed are, among others, construction and demolition waste … For the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.
>
> … ***517**
>
> (29) Member States should support the use of recyclates, such as recovered paper, in line with the waste hierarchy and with the aim of a recycling society, and should not support the landfilling or incineration of such recyclates whenever possible.'

5. Chapter I of that directive, entitled 'Subject matter, scope and definitions', includes Articles 1 to 7 thereof.

6. Article 1 of that directive is worded as follows:

> ‘This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use.’

7. Article 3 of that directive, entitled ‘Definitions’, 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;
>
> …
>
> 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;
>
> 16. “preparing for re-use” means checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing;
>
> …
>
> 19. “disposal” means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations;
>
> …’

8. Article 4 of Directive 2008/98 , entitled ‘Waste hierarchy’, is worded as follows:

> ‘1. 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.

2. When applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. …
…'

9. Article 5 of that directive, entitled 'By-products', states, in paragraph 1 thereof: ***518**

'A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in point 1 of Article 3 but as being a by-product only if the following conditions are met:

(a) further use of the substance or object is certain;
(b) the substance or object can be used directly without any further processing other than normal industrial practice;
(c) the substance or object is produced as an integral part of a production process; and
(d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.'

10. Under Article 6 of Directive 2008/98 , headed 'End-of-waste status':

'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.
>
> …
> 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. …'

11. Article 11 of that directive, entitled 'Re-use and recycling', provides, in paragraph 2 thereof:

> 'In order to comply with the objectives of this Directive, and move towards a European recycling society with a high level of resource efficiency, Member States shall take the necessary measures designed to achieve the following targets:
>
> …
> (b) by 2020, the preparing for re-use, recycling and other material recovery, including backfilling operations using waste to substitute other materials, of non-hazardous construction and demolition waste excluding naturally occurring material defined in category 17 05 04 in the list of waste shall be increased to a minimum of 70% by weight.'
> ***519**

12. The recovery operations listed in Annex II to Directive 2008/98 include, inter alia, 'land treatment resulting in benefit to agriculture or ecological improvement'.

Austrian law

13. Paragraph 2(1) of the Abfallwirtschaftsgesetz 2002 (2002 Federal Law on Waste Management) provides:

> ‘For the purposes of this Federal Law, waste means any movable property
>
> 1. which the holder intends to discard or has discarded, or
> 2. whose collection, storage, transport and treatment as waste is necessary in order not to harm public interests (Paragraph 1(3)).’

14. Under Paragraph 5(1) of that law:

> ‘Unless otherwise specified in a regulation referred to in Paragraph 5(2) or in a regulation referred to in Article 6(2) of Directive 2008/98 on waste, existing substances shall be deemed to be waste until they or substances obtained from them are used directly as a substitute for raw materials or for products obtained from primary raw materials. In the case of preparing for re-use within the meaning of point 6 of Paragraph 2(5), the end-of-waste status occurs at the end of that recovery operation.’

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

15. Several farmers approached Porr Bau to obtain excavated materials from it for the purpose of soil adaptation or an improvement in cultivation areas. At that time, it was not certain that that undertaking would be in a position to meet their request. That request led Porr Bau subsequently to select an appropriate construction project and to extract those materials from it. Porr Bau thus supplied the requested materials, namely uncontaminated excavated materials of quality class A1, which, under Austrian law, is the highest quality class for excavated soil. In accordance with that law, the use of those materials is appropriate for such terrain adjustments and is lawful.

16. On 4 May 2018, Porr Bau requested the administrative authorities of the District of Graz and surrounding area to declare that the excavated materials which it had supplied did not constitute waste and, in the alternative, that the proposed works did not constitute an activity subject to an obligation to pay a contribution in respect of contaminated sites.

17. By decision of 14 September 2020, those authorities found that the materials in question constituted waste, within the meaning of Paragraph 2(1) of the 2002 Federal Law on Waste

Management and that their end-of-waste status had not been achieved, primarily on the ground that formal criteria laid down in the Federal Waste Management Plan had not been complied with.

18. Porr Bau brought an action against that decision before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), which is uncertain whether the excavated materials at issue must be classified as 'waste' within the meaning of Directive 2008/98 . Furthermore, that court notes that, if those materials are to be classified as waste, it will have to examine whether end-of-waste status has been achieved. ***520**

19. The referring court points out that those materials have undergone a checking operation, with the result that they can be used directly. It states that, in the present case, they were used for the purpose of improving agricultural structures, that there was a need for materials, that the technical requirements have been complied with and that, in addition, there were no harmful effects on the environment or on health. Moreover, the aim of such an approach is to prevent waste and to substitute such materials for raw materials.

20. That court states that, under Austrian law, only two activities enable end-of-waste status to be achieved, namely, first, preparing for re-use by checking, cleaning or repairing and, second, the actual use of the materials concerned to substitute raw materials. As regards excavated materials, the applicable criteria are more restrictive, since preparing for re-use does not achieve their end-of-waste status. Thus, that court takes the view that, according to the state of the law currently in force in Austria and according to generally adopted interpretation, end-of-waste status is restricted in a manner contrary to EU law.

21. Although the excavated materials at issue are in the highest quality class and are appropriate, at a technical and legal level, for the improvement of the cultivation areas in question, the formal criteria laid down in the Federal Waste Management Plan, interpreted strictly, could prevent those materials from ceasing to be waste.

22. Accordingly, in the referring court's view, an activity such as an improvement of cultivation areas with the aid of excavated materials, which is used to substitute raw materials and is necessary under the waste hierarchy laid down in Directive 2008/98 , is prevented. That would create an incentive, contrary to the objectives pursued by that directive, to use primary raw

materials and to dispose of secondary raw materials, such as excavated materials, which are perfectly suitable for recovery.

23. In those circumstances the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '(1) Does Article 6(1) of Directive [2008/98] preclude national legislation under which end-of-waste status is achieved only once waste or existing substances or the substances obtained from them are used directly as a substitute for raw materials or for products made from primary raw materials or they have been prepared for re-use?
>
> If Question 1 is answered in the negative:
>
> (2) Does Article 6(1) of Directive 2008/98 preclude national legislation under which end-of-waste status in respect of excavated materials can be achieved at the earliest when they serve as a substitute for raw materials or for products made from primary raw materials?
>
> If Question 1 and/or Question 2 is/are answered in the negative:
>
> (3) Does Article 6(1) of Directive 2008/98 preclude national legislation under which end-of-waste status in respect of excavated materials cannot be achieved if formal criteria (in particular record-keeping and documentation obligations) which have no environmentally relevant influence on the measure carried out are not complied with or are not complied with in full, even though the excavated materials demonstrably fall below the limit values (premium) to be complied with for the specific intended use?' ***521**

Consideration of the questions referred

24. From the outset, it should be noted that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where

necessary, reformulate the question referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its question (judgment of 1 August 2022, *Uniqa Asigurari (C-267/21) EU:C:2022:614* at paragraph 21 and the case-law cited).

25. It is also for the Court to answer the questions asked on the basis of the national legislation and the factual context defined by the referring court, which alone has jurisdiction in that regard, and to provide it with all the criteria for the interpretation of EU law which may enable it to assess whether that legislation is compatible with the provisions of the directive concerned (see, to that effect, judgment of 10 February 2022, *Philips Orastie (C-487/20) EU:C:2022:92* at paragraph 21 and the case-law cited).

26. In the present case, the referring court is uncertain as to whether the excavated materials at issue in the main proceedings constitute 'waste' within the meaning of point 1 of Article 3 of Directive 2008/98 . That court observes that one of the issues of the dispute before it is to ascertain whether uncontaminated excavated materials which, under national legislation, are in the highest quality class must be classified as 'waste'.

27. The Austrian Government contends that, under Austrian law, where materials are excavated or demolished in the course of a construction project, the main purpose of the construction developer is usually to carry out that project without being hindered by those materials, with the result that they are removed from the site in question with the intention of discarding them.

28. Porr Bau takes the view that that is not the case here and submits that the excavated materials at issue in the main proceedings could fulfil the conditions laid down in Article 5(1) of Directive 2008/98 and thus be classified as 'by-products'.

29. In the event that those materials were nevertheless to be classified as 'waste', the referring court states that it will be necessary to make them subject to a contribution in respect of contaminated sites and to examine whether and, if so when, the end-of-waste status of those materials has been achieved.

30. In that regard, it should be noted that, according to recital 11 of Directive 2008/98 , the waste status of uncontaminated excavated soils and other naturally occurring material which are used on sites other than the one from which they were excavated should be considered in accordance with the definition of waste and the provisions on by-products or on the end-of-waste status under that directive.

31. Therefore, in order to provide a useful answer to the referring court, it must be held that, by its questions, which it is appropriate to consider together, that court asks, in essence, whether point 1 of Article 3 , Article 5(1) and Article 6(1) of Directive 2008/98 must be interpreted as precluding national legislation under which uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class, first, must be classified as 'waste' even if it were determined that those materials fall within the concept of 'by-product' and, second, ***522** only lose that waste status when they are used directly as a substitute and their holder satisfies the formal criteria which are irrelevant for the purposes of environmental protection.

Classification of excavated materials as 'waste' or as a 'by-product'

32. Article 3 of Directive 2008/98 defines the concept of 'waste' as being any substance or object which the holder discards or intends or is required to discard.

33. In that regard, the Court has repeatedly held that the classification of a substance or object as 'waste' is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 42 and the case-law cited).

34. As regards the meaning of the term 'discard', it follows from the Court's settled case-law that that term must be interpreted in the light of the aim of Directive 2008/98 , which, in the words of recital 6 thereof, is to minimise the negative effects of the generation and management of waste on human health and the environment, 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 point 1 of Article 3 of Directive 2008/98 , cannot be interpreted restrictively (judgment of 4 July 2019, *Tronex (C-624/17) EU:C:2019:564* at paragraph 18 and the case-law cited).

35. More specifically, the existence of 'waste', within the meaning of Directive 2008/98 , must be determined in the light of all the circumstances certain of which may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard it within the meaning of point 1 of Article 3 of Directive 2008/98 (see, to that effect, judgment of 14 October

2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 45 and the case-law cited).

36. Among the circumstances that may constitute such evidence is the fact that a substance is a production or consumption residue, that is to say, a product which was not itself sought and for which special precautions must be taken if it is used owing to the environmentally hazardous nature of its composition (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraphs 46 and 47 and the case-law cited).

37. It is also clear from the Court's case-law that neither the method of treatment reserved for a substance nor the use to which that substance is put determines conclusively whether or not the substance is to be classified as 'waste' and that the concept of 'waste' does not exclude substances or objects which are capable of economic re-use. The system of supervision and control established by Directive 2008/98 is intended to cover all substances and objects discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 48 and the case-law cited). ***523**

38. In addition, particular attention must be paid to the fact that the substance or object in question is not or is no longer of any use to its holder, such that that substance or object constitutes a burden which that holder will seek to discard. If that is indeed the case, there is a risk that that holder will dispose of the substance or object in his or her possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner. That substance or object, because it falls within the concept of 'waste' within the meaning of Directive 2008/98 , is subject to the provisions of that directive, which means that the recovery or disposal of that substance or object must be carried out in such a way that human health is not endangered and without using processes or methods likely to harm the environment (judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 49 and the case-law cited).

39. In that regard, the degree of probability that a substance or an object will be re-used without a prior processing operation constitutes a criterion relevant to assessing whether or not they constitute waste within the meaning of Directive 2008/98 . If, beyond the mere possibility of re-using the substance or object in question, there is also a financial advantage for the holder in so doing, the likelihood of such re-use is high. In such circumstances, the substance or object in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 50 and the case-law cited).

40. In certain situations, a substance or an object resulting from an extraction or manufacturing process the primary aim of which is not their production may be regarded not as a residue, but

as by-products, which their holder does not seek to 'discard', within the meaning of point 1 of Article 3 of Directive 2008/98 , but which he or she intends to exploit or market on terms advantageous to him or herself in a subsequent process – including, as the case may be, in order to meet the needs of economic operators other than the producer of those substances – provided that such re-use is not a mere possibility but a certainty, without any further processing prior to re-use and as part of the continuing process of production (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 51 and the case-law cited).

41. As the Court has already held, it would indeed not be justified at all to make substances or objects which the holder intends to exploit or market on economically advantageous terms, whether or not there is to be a subsequent recovery process, subject to the requirements of Directive 2008/98 , which seek to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. However, having regard to the requirement to interpret the concept of 'waste' widely, it is only situations in which the re-use of the substance or object in question is not a mere possibility but a certainty that are envisaged, which it is for the referring court to ascertain, without the necessity of using any of the waste recovery processes referred to in Annex II to Directive 2008/98 prior to re-use (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 52 and the case-law cited). ***524**

42. It is apparent from Article 5(1) of Directive 2008/98 that a 'by-product' is a substance or object resulting from a production process the primary aim of which is not to produce that substance or object and which meets a number of conditions listed in Article 5(1)(a) to (d) .

43. As follows from that provision, a substance or object, resulting from a production process, the primary aim of which is not the production of that substance or product, may be regarded as being not 'waste' as referred to in point 1 of Article 3 of that directive but as a 'by-product' only if the following cumulative conditions are met: first, further use of the substance or object must be certain; second, it must be possible to use the substance or object directly without any further processing other than normal industrial practice; third, the substance or object must be produced as an integral part of a production process; and fourth, further use must be lawful, that is to say the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

44. A substance or object which constitutes a 'by-product', within the meaning of Article 5(1) of Directive 2008/98 , is not regarded as being waste falling within the scope of that directive. Thus, according to that provision, the classification of 'by-product' and the status of 'waste' are mutually exclusive (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 71).

45. In that regard, the Court has ruled that petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of that directive. Livestock effluent may, on the same terms, fall outside classification as 'waste', if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations (see, to that effect, judgment of 8 September 2005, *Commission v Spain (C-121/03) EU:C:2005:512* at paragraphs 59 and 60 and the case-law cited).

46. It is for the referring court, which alone has jurisdiction to assess the facts of the case before it, to determine whether, in the light of the considerations set out in paragraphs 32 to 39 above, Porr Bau had in fact intended to 'discard' the excavated materials at issue in the main proceedings, with the result that they would constitute waste, within the meaning of point 1 of Article 3 of Directive 2008/98 .

47. It is, in particular, for that court to determine whether those excavated materials constituted a burden which that construction undertaking sought to discard, with the result that there would be a risk that that undertaking would discard them in a manner likely to cause harm to the environment, particularly by dumping them or disposing of them in an uncontrolled manner.

48. That being so, it is for the Court to provide that referring court with any helpful guidance to resolve the dispute before it (see, to that effect, judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* at paragraph 53 and the case-law cited).

49. In the present case, it is apparent from the information before the Court that, even before the excavation of the materials at issue in the main proceedings, local farmers had made an express request for the supply of such materials. After appropriate construction projects had been found, making the requested excavated materials available, that request, it is stated, led to a commitment by Porr Bau to ***525*** make those excavated materials available, alongside an agreement under which that undertaking would carry out, by means of those materials, the works to adapt and improve the land and cultivation areas duly identified. Such factors, if proven which it is for the referring court to determine, do not appear to be such as to establish the intention of the construction undertaking concerned to discard those materials.

50. It is, therefore, necessary to examine whether the excavated materials at issue in the main proceedings must be classified as a 'by-product' within the meaning of Article 5(1) of Directive 2008/98 .

51. It is for the referring court to ascertain whether all the conditions laid down in that provision, referred to in paragraph 43 above, are fulfilled.

52. As regards, in the first place, the condition laid down in Article 5(1)(a) of that directive, according to which further use of the substance or object is certain, it will be for the referring

court to verify in the present case that the farmers concerned have made a binding commitment to Porr Bau to take delivery of the excavated materials at issue in the main proceedings in order to use them for carrying out works to adapt and improve land and cultivation areas, but also that those materials and the quantities supplied did in fact serve to carry out those works and were strictly limited for those purposes.

53. If the materials were not supplied immediately, it is appropriate to allow temporary storage for a reasonable period, until the works for which they are intended are carried out. As is clear from the case-law referred to in paragraph 45 above, that period of storage must, however, not exceed what is required in order for the undertaking concerned to be able to meet its contractual obligations (see, to that effect, judgment of 3 October 2013, *Brady (C-113/12) EU:C:2013:627* at paragraph 45 and the case-law cited).

54. As regards, in the second place, the condition laid down in Article 5(1)(b) of Directive 2008/98 that it must be possible to use the substance or object directly without further processing other than normal industrial practice, it is apparent from the order for reference that the excavated materials at issue in the main proceedings were subject to a quality control demonstrating that they are uncontaminated materials in the highest quality class and are recognised as such under national law. It is nevertheless for the referring court to satisfy itself that those materials did not require any processing or treatment before their further use.

55. In the third place, regarding the condition laid down in Article 5(1)(c) of Directive 2008/98 and the question whether those materials form an integral part of Porr Bau's production process, it should be noted, as the Advocate General observed in points 41 and 47 of her Opinion, that the excavated soil is the result of one of the first steps usually undertaken in a construction operation as an economic activity, the result of which is the transformation of land.

56. As regards, in the fourth place, the condition that the further use of the substance or object at issue must be lawful, Article 5(1)(d) of Directive 2008/98 requires, in particular, that the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

57. It should be borne in mind in that regard that, according to the information in the order for reference, the excavated materials at issue in the main proceedings had been classified, following a quality analysis carried out before their re-use, as uncontaminated excavated materials in the highest quality class, as defined by ***526** Austrian law, in particular in the context of the Federal Waste Management Plan, which lays down specific requirements for the reduction of waste quantities, their pollutants and their harmful effects on human health and the environment. That plan, it is contended, also declares that the use of uncontaminated excavated materials in the highest quality class is suitable and authorised for land adaptation and improvement.

58. That use is, in principle, consistent with the objectives of Directive 2008/98 . It should be noted that the use of excavated soil, in the form of building materials, in so far as such soil meets strict quality requirements, has a significant advantage for the environment because it contributes, as required by Article 11(2)(b) of that directive, to the reduction of waste, to the preservation of natural resources and to the development of a circular economy.

59. In addition, as the Advocate General observed in point 73 of her Opinion, it must be held that the use of excavated materials in the highest quality class, for the purpose of adapting and improving cultivation areas, makes it possible to comply with the waste hierarchy defined in Article 4 of that directive.

60. If, conversely, the referring court were to conclude that the excavated materials at issue in the main proceedings constitute 'waste', within the meaning of point 1 of Article 3 of Directive 2008/98 , it asks whether Article 6(1) of that directive must be interpreted as precluding national legislation under which the end-of-waste status of such materials is achieved only when they are used directly as a substitute and their holder satisfies the formal criteria which are irrelevant for the purposes of environmental protection.

The end-of-waste status of excavated materials

61. Under Article 6(1) of Directive 2008/98 , certain specified waste ceases to be waste when it has undergone a recovery or recycling operation. End-of-waste status is also subject to specific criteria which must be defined in accordance with a number of conditions. First, the substance or object at issue must commonly be used for specific purposes. Second, a market or demand must exist for such a substance or object. Third, the substance or object must fulfil the technical requirements for the specific purposes and meet the existing legislation and standards applicable to products. Fourth, the use of the substance or object must not lead to overall adverse environmental or human health impacts.

62. The referring court observes that Paragraph 5(1) of the 2002 Federal Law on Waste Management provides that existing substances or substances obtained from them are to cease to be waste when those substances are directly used as substitutes for raw materials or products obtained from primary raw materials or at the end of their preparation for re-use.

63. However, as regards excavated materials, that court states that that end-of-waste status is achieved only when those materials have been used as substitutes for raw materials or for products obtained from primary raw materials.

64. In addition, that referring court notes, first, that recovery through preparation for re-use does not achieve end-of-waste status. Second, in order for that status to be achieved, formal requirements, such as record-keeping and documentation obligations which are irrelevant for the purposes of environmental protection, must be fulfilled, in accordance with the Federal Waste Management Plan. ***527**

65. It is, therefore, necessary to ascertain whether Article 6(1) of Directive 2008/98 precludes national legislation under which the end-of-waste status of uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class, is achieved only when they have been used as a substitute for raw materials and after such formal requirements have been satisfied.

66. In the first place, it should be noted that, although the recovery operations listed in Annex II to Directive 2008/98 include 'land treatment resulting in benefit to agriculture or ecological improvement', it is apparent from recital 22 of that directive that, for the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.

67. As the Advocate General observed in point 65 of her Opinion, that recital finds expression in point 16 of Article 3 of Directive 2008/98 , which defines 'preparing for re-use' as any operation consisting in the 'checking, cleaning or repairing' of products or components of products that have become waste in order to prepare them so that they can be re-used without any other pre-processing. That same provision expressly classifies 'preparing for re-use' operations as a recovery.

68. Therefore, it must be held that an examination seeking to determine the status and presence of pollution or of contamination in excavated materials may be classified as a 'checking operation', covered by the concept of 'preparing for re-use', as defined in point 16 of Article 3 of Directive 2008/98 . Accordingly, waste which is the subject of such a 'preparing for re-use' operation may be regarded as having undergone a recovery operation, within the meaning of Article 6(1) of that directive, if its re-use does not require any other pre-processing.

69. In the second place, it is for the referring court to assess whether, in the case in the main proceedings, the specific criteria defined in accordance with the conditions laid down in that Article 6(1) are complied with following the checking operation.

70. As regards the formal criteria laid down in the Federal Waste Management Plan to which the excavated materials at issue in the main proceedings were made subject, it should be noted that, in accordance with the second subparagraph of Article 6(1) of Directive 2008/98 , the end-of-waste status criteria are to include limit values for pollutants where necessary and are to take into account any possible adverse environmental effects of the substance or object. Furthermore, Member States enjoy, within the framework laid down in Article 6(4) of that directive, discretion as regards the setting of those criteria.

71. Therefore, although formal criteria such as those mentioned by the referring court may prove necessary, in particular, in order to ensure the quality and safety of the substance at issue, they must be set in such a way as to attain their objectives without undermining the achievement of the objectives of Directive 2008/98 .

72. In the present case, it is apparent from the file before the Court that, according to the decision referred to in paragraph 17 above, the assessment that the end-of-waste status of the excavated materials at issue in the main proceedings had not been achieved was essentially attributable to non-compliance with the formal criteria which are irrelevant for the purposes of environmental protection.

73. The objectives pursued by Directive 2008/98 would be likely to be disregarded if, notwithstanding the fact that the uncontaminated excavated materials in the highest quality class comply with the specific criteria defined in accordance with the conditions laid down in Article 6(1) of that directive, those materials – the properties of which serve to improve agricultural structures – were not regarded ***528** as having lost their waste status following a quality control making it possible to ensure that their use was safe for the environment or human health.

74. If, as the referring court points out, the re-use of such excavated materials were hindered by formal criteria which are irrelevant for the purposes of environmental protection, those criteria would have to be regarded as running counter to the objectives pursued by Directive 2008/98 , which, as is apparent from recitals 6, 8 and 29 of that directive, consist in encouraging the application of the waste hierarchy provided for in Article 4 of that directive as well as the recovery of waste and the use of recovered materials in order to conserve natural resources and to enable the development of a circular economy. Such measures would, as the case may be, undermine the effectiveness of that directive.

75. It cannot be accepted that such formal criteria have the effect of undermining the attainment of the objectives of Directive 2008/98 . It is for the referring court, which alone has jurisdiction to interpret the provisions of its national law, to examine whether that is so in the present case.

76. It follows from those considerations that, if the excavated materials at issue in the main proceedings were the subject of a recovery operation and satisfy all the specific criteria defined in accordance with the conditions laid down in Article 6(1)(a) to (d) of Directive 2008/98 , which it is for the referring court to ascertain, it must be held that the end-of-waste status of those materials has been achieved.

77. In the light of all the foregoing considerations, the answer to the questions referred is that point 1 of Article 3 and Article 6(1) of Directive 2008/98 must be interpreted as precluding national legislation under which uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class:

– must be classified as ‘waste’ where their holder neither intends nor is required to discard them and those materials meet the conditions laid down in Article 5(1) of that directive for being classified as ‘by-products’, and
– only lose that waste status when they are used directly as a substitute and their holder has satisfied the formal criteria which are irrelevant for the purposes of environmental protection,

if those criteria have the effect of undermining the attainment of the objectives of that directive.

Costs

78. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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.

Order

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

Point 1 of Article 3 and Article 6(1) of Directive 2008/98 /EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, must be interpreted as precluding national legislation under which uncontaminated excavated materials, which, pursuant to national law, are in the highest quality class,

– must be classified as 'waste' where their holder neither intends nor is required to discard them and those materials meet the conditions laid ***529*** down in Article 5(1) of that directive for being classified as 'by-products', and

– only lose that waste status when they are used directly as a substitute and their holder has satisfied the formal criteria which are irrelevant for the purposes of environmental protection, if those criteria have the effect of undermining the attainment of the objectives of that directive. ***530***

Footnotes

1 Original language: English.

2 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).

3 Judgment of 28 March 2019, *Tallinna Vesi (C-60/18) EU:C:2019:264* ; 'the judgment in *Tallinna Vesi* '.

4 Judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein' (C-629/19) EU:C:2020:824* ; 'the judgment in *Sappi* '.

5 Directive 2008/98 was last amended by 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). Its transposition period ended on 5 July 2020. In the order for reference, however, the referring court indicates that the applicable version of Directive 2008/98 in the main action is the one preceding the amendments introduced by Directive 2018/851 . Since, according to settled case-law of the Court, the national court has sole jurisdiction to determine the legal framework applicable to those proceedings, I shall not question its assessment concerning the version of Directive 2008/98 to be applied in the present case.

6 See, in that regard, recital 11 of Directive 2008/98 , *in fine* .

7 For a recent outline of those criteria, see the judgment in *Sappi* at paragraphs 43 to 53 and the case-law cited.

8 Judgment of 4 July 2019, *Tronex (C-624/17) EU:C:2019:564* at paragraph 17 and the case-law cited.

9 The judgment in *Sappi* , paragraph 43 and the case-law cited.

10 Judgment of 4 July 2019, *Tronex (C-624/17) EU:C:2019:564* at paragraph 20 and the case-law cited.

11 Judgment of 24 June 2008, *Commune de Mesquer (C-188/07) EU:C:2008:359* at paragraph 41.

12 Judgment of 4 July 2019, *Tronex (C-624/17) EU:C:2019:564* at paragraph 22 and the case-law cited.

13 Judgment of 3 October 2013, *Brady (C-113/12) EU:C:2013:627* at paragraph 42 and the case-law cited.

14 Council Directive 75/442 /EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), subsequently amended by Council Directive 91/156 /EEC of 18 March 1991 (OJ 1991 L 78, p. 32) and consolidated in Directive 2006/12 /EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

15 Judgment of 4 July 2019, *Tronex (C-624/17) EU:C:2019:564* at paragraph 24 and the case-law cited.

16 The judgment in *Sappi* at paragraph 53 and the case-law cited.

17 Article 2(1) of the Law on waste management transposes Article 3(1) of Directive 2008/98 into Austrian law.

18 See, as a further example, judgment of 1 March 2007, *KVZ retec (C-176/05) EU:C:2007:123* at AG64).

19 See, inter alia, the judgment in *Sappi* at paragraph 51 and the case-law cited.

20 Under classical economics, excavated materials are categorised as by-products of land. See, inter alia, Pearce, D. W., Macmillan dictionary of Modern Economics, London: Macmillan Education UK, pp. 311 320. See also, as a concrete illustration, Environmental Protection Agency of Ireland, *Guidance on Soil and Stone By-products* , June 2019, available at https://www.epa.ie/publications/licensing--permitting/waste/Guidance_on_Soil_and_Stone_By_Product.pdf

21 See judgment of 3 October 2013, *Brady (C-113/12) EU:C:2013:627* at paragraph 60.
22 See judgment of 3 October 2013, *Brady (C-113/12) EU:C:2013:627* at paragraph 48.
23 *Ibid* ., paragraph 53.
24 *Ibid* ., paragraphs 52, 53 and 56.
25 *Ibid* ., paragraphs 55 and 56.
26 As Porr Bau explains in its observations, without being rebutted by the other parties before the Court, the soil supplied was ‘virgin soil’, taken from one agricultural site and directly delivered to another identical agricultural site.
27 See footnote 5 above.
28 The judgment in *Tallinna Vesi* at paragraph 22.
29 Ibid., paragraphs 23 and 25.
30 Ibid., paragraph 24.
31 Ibid., paragraph 26.
32 *Ibid* ., paragraphs 23 and 27.
33 *Ibid* ., paragraph 23. See also, in that regard, Article 13 of Directive 2008/98 .
34 In that respect, the Austrian Government explains that, according to the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court), excavated materials considered as waste retain that status even at the moment when they are used for land development. That means that, even if those materials achieve end-of-waste status as a result of that specific use, that has no bearing on the obligation to pay a contribution under the Law on the rehabilitation of disused hazardous sites.
35 See, in that regard, recitals of the Law on the waste management.
36 This provision has been transposed into Austrian law in those exact terms, in particular in Paragraph 2(5)(6) of the Law on waste management.
37 The judgment in *Tallinna Vesi* at paragraph 23.
38 The judgment in *Tallinna Vesi* at paragraph 23.
39 The judgment in *Sappi* at paragraph 66.
40 The judgment in *Sappi* at paragraph 67.
41 Language of the case: German.

