Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 January 2020[1]

Case C-15/19

A.m.a. — Azienda Municipale Ambiente SpA
v
Consorzio Laziale Rifiuti — Co.La.Ri.

(Request for a preliminary ruling
from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Request for a preliminary ruling — Environment — Waste — Directive 1999/31 — Landfill sites — Costs of the landfill of waste — Existing landfill sites — Temporal application of the directive — Adjustment of the disposal fees originally agreed by contract — Prohibition on retroactivity — Legal certainty — Legitimate expectations — Proportionality)

I. Introduction

1. Under the law on waste, the original waste holders should in principle bear the costs of waste management. Does it follow, however, that the operator of a landfill site may retroactively claim additional fees from an undertaking that has in the past delivered waste for disposal if the costs of operating the landfill site increase as a result of the adoption of the Landfill Directive?[2]

2. That question arises in the present case because the Landfill Directive adopted in 1999 lays down a period of responsibility for after-care of at least 30 years after the closure of a landfill site, whereas previously under national law a period of responsibility for after-care of only 10 years was set for the landfill site in question.

3. To answer that question, the relevant provisions of the Landfill Directive must be discussed in the light of the principles of non-retroactivity, legal certainty, legitimate expectations and proportionality.

1 Original language: German.

2 Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1), as amended by Council Directive 2011/97/EU of 5 December 2011 amending Directive 1999/31 as regards specific criteria for the storage of metallic mercury considered as waste (OJ 2011 L 328, p. 49).

II. Legal context

A. European Union law

1. Landfill Directive

4. Recitals 25 and 26 of the Landfill Directive clarify the temporal application of the Landfill Directive:

‘(25) Whereas landfill sites that have been closed prior to the date of transposition of this Directive should not be subject to its provisions on closure procedure;

(26) Whereas the future conditions of operation of existing landfills should be regulated in order to take the necessary measures, within a specified period of time, for their adaptation to this Directive on the basis of a site-conditioning plan’.

5. The costs of after-care are addressed in recital 29 of the Landfill Directive:

‘Whereas measures should be taken to ensure that the price charged for waste disposal in a landfill cover all the costs involved in the setting up and operation of the facility, including as far as possible the financial security or its equivalent which the site operator must provide, and the estimated cost of closing the site including the necessary after-care’.

6. The landfill permit is governed by Article 8(a) of the Landfill Directive:

‘the competent authority does not issue a landfill permit unless it is satisfied that:

…

(iv) adequate provisions, by way of a financial security or any other equivalent, on the basis of modalities to be decided by Member States, has been or will be made by the applicant prior to the commencement of disposal operations to ensure that the obligations (including after-care provisions) arising under the permit issued under the provisions of this Directive are discharged and that the closure procedures required by Article 13 are followed. This security or its equivalent shall be kept as long as required by maintenance and after-care operation of the site in accordance with Article 13(d). …’

7. Article 10 of the Landfill Directive concerns the costs of the landfill of waste:

‘Member States shall take measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site. …’

8. The procedure for closure and after-care is covered by Article 13 of the Landfill Directive:

‘Member States shall take measures in order that, in accordance, where appropriate, with the permit:

(a) …

(b) a landfill or part of it may only be considered as definitely closed after the competent authority has carried out a final on-site inspection, has assessed all the reports submitted by the operator and has communicated to the operator its approval for the closure. This shall not in any way reduce the responsibility of the operator under the conditions of the permit;

(c) after a landfill has been definitely closed, the operator shall be responsible for its maintenance, monitoring and control in the after-care phase for as long as may be required by the competent authority, taking into account the time during which the landfill could present hazards.

The operator shall notify the competent authority of any significant adverse environmental effects revealed by the control procedures and shall follow the decision of the competent authority on the nature and timing of the corrective measures to be taken;

(d) for as long as the competent authority considers that a landfill is likely to cause a hazard to the environment and without prejudice to any Community or national legislation as regards liability of the waste holder, the operator of the site shall be responsible for monitoring and analysing landfill gas and leachate from the site and the groundwater regime in the vicinity of the site in accordance with Annex III.'

9. The application of the Landfill Directive to existing landfill sites is the subject of Article 14 of the Landfill Directive:

'Member States shall take measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of this Directive, may not continue to operate unless the steps outlined below are accomplished as soon as possible and within eight years after the date laid down in Article 18(1) at the latest:

(a) with a period of one year after … [16 July 2001], the operator of a landfill shall prepare and present to the competent authorities, for their approval, a conditioning plan for the site including the particulars listed in Article 8 and any corrective measures which the operator considers will be needed in order to comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1;

(b) following the presentation of the conditioning plan, the competent authorities take a definite decision on whether operations may continue on the basis of the said conditioning plan and this directive. Member States shall take the necessary measures to close down as soon as possible, in accordance with Article 7(g) and 13, sites which have not been granted, in accordance with Article 8, a permit to continue to operate;

(c) on the basis of the approved site-conditioning plan, the competent authority shall authorise the necessary work and shall lay down a transitional period for the completion of the plan. Any existing landfill shall comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1 within eight years after … [16 July 2001]'.

2. Waste Directive

10. When the arbitration decision at issue was made, the fundamental provisions of EU law on waste were laid down in the 2008 Waste Directive,[3] but corresponding provisions were already set out in the earlier versions of that directive.[4]

11. Article 13 of the present Waste Directive sets out the fundamental obligation of protection in waste management previously laid down in Article 4:

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

12. Article 14(1) of the Waste Directive sets out the 'polluter-pays' principle, which was previously provided for in Article 11 and then in Article 15:

'In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders.'

B. Italian Legislative Decree 36/2003

13. Article 15(1) of the Decreto legislativo del 13 gennaio 2003, n. 36 — Attuazione della direttiva 1999/31/CE relativa alle discariche di rifiuti[5] (Legislative Decree No 36 of 13 January 2003 — Transposition of Directive 1999/31/EC on the landfill of waste) governs landfill fees:

'The amount due for landfill disposal shall cover the costs of the installation and operation of the site, the costs of the provision of the financial security and the estimated costs of the closure and after-care of the site for a period equivalent to that set out in Article 10(1)(i).'

14. Article 17(3) of the Legislative Decree lays down a time limit for adapting existing landfill sites to the new requirements:

'Within a period of six months from the date of entry into force of this decree, the holder of the permit referred to in paragraph 1 or the operator of the landfill instructed by him shall present to the competent authority a site-conditioning plan on the basis of the criteria referred to in this decree, including the financial guarantees referred to in Article 14.'

III. Facts and request for a preliminary ruling

15. A 'public services contract' dated 26 January 1996 on the disposal of waste exists between Azienda Municipale Ambiente S.p.A. ('AMA'), an undertaking from the city of Rome, and Consorzio Laziale Rifiuti ('the Consorzio'), the operator of the Malagrotta landfill site. That contract was based on a period of responsibility for after-care of 10 years from the closure of the landfill site.

16. After the Landfill Directive and Legislative Decree 36/2003 extended the period of responsibility for after-care of the Malagrotta landfill site to at least 30 years, the waste fees to be paid in the future were adjusted to the longer period of responsibility for after-care.

3 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).

4 Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), in its various versions, and Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

5 GURI No 59 of 12 March 2003, SO No 40.

17. Furthermore, AMA was ordered by arbitration decision of 8 February 2012 to pay to the Consorzio additional costs of more than EUR 76 million for the period prior to the adjustment of the fees on account of the longer period of responsibility for after-care.

18. The Corte d'Appello di Roma (Court of Appeal, Rome, Italy) upheld the arbitration decision. AMA brought an appeal in cassation against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

19. AMA complains that the appeal court has interpreted the legislation transposing the Landfill Directive as meaning that the extension of the post-closure period of responsibility for after-care and associated costs also applies to waste that has already been deposited. The application of Articles 15 and 17 of Legislative Decree 36/2003 to pre-existing situations infringes the principles of legitimate expectations, legal certainty, non-retroactivity and reasonableness, given that AMA has already paid to the Consorzio, over the years, sums greatly exceeding the additional costs it complains of, and its financial stability would be jeopardised should the decision of the appeal court be upheld.

20. The Supreme Court of Cassation therefore refers the following questions to the Court of Justice:

'(1) Do Articles 10 and 14 of the Landfill Directive preclude the interpretation upheld by the appeal court, according to which Articles 15 and 17 of Legislative Decree 36/2003 transposing those provisions of EU law into national law apply retroactively, with the result that pre-existing landfill sites which already have permission to operate are subject, unconditionally, to the obligations laid down by those provisions of national legislation, in particular in so far as they extend the period of responsibility for after-care from 10 to 30 years?

(2) In particular, do Articles 10 and 14 of the Landfill Directive, which provide that Member States must take "measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site" and "measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of [that directive], may … continue to operate" respectively, preclude the interpretation upheld by the appeal court, according to which Articles 15 and 17 of Legislative Decree 36/2003 apply to pre-existing landfill sites which already have permission to operate, where the measures implementing those obligations, in particular in relation to those landfill sites, are limited in Article 17 of that legislative decree to the provision of a transitional period and do not include any measure seeking to limit the financial impact of the extension on the "permit holder"?

(3) Moreover, do Articles 10 and 14 of [the Landfill Directive] preclude the interpretation upheld by the appeal court, according to which Articles 15 and 17 of Legislative Decree 36/2003 also apply to pre-existing landfill sites which already have permission to operate as regards the financial burden resulting from the obligations laid down by those provisions of national legislation and, in particular, from the extension of the period of responsibility for after-care from 10 to 30 years, by imposing that burden on the "permit holder" and thereby legitimising the adjustment — to the detriment of that permit holder — of the costs set out in the commercial agreements regulating [waste] disposal activities?

(4) Lastly, do Articles 10 and 14 of [the directive] preclude the interpretation upheld by the appeal court, according to which Articles 15 and 17 of Legislative Decree 36/2003 also apply to pre-existing landfill sites which already have permission to operate as regards the financial burden resulting from the obligations laid down by those provisions of national legislation and, in particular, from the extension of the period of responsibility for after-care from 10 to 30 years,

given that — in order to determine that financial burden — account must be taken not only of waste to be deposited as from the entry into force of the provisions transposing those provisions of EU law into national law but also of waste already deposited prior to that entry into force?'

21. Azienda Municipale Ambiente, Consorzio Laziale Rifiuti and the European Commission submitted written observations. However, only the AMA and the Commission participated in the oral hearing on 27 November 2019.

IV. Legal assessment

22. Before discussing the questions referred by the Supreme Court of Cassation, I will briefly touch upon their admissibility.

A. Admissibility of the request for a preliminary ruling

23. The Consorzio contends that the request for a preliminary ruling is inadmissible on the ground that the questions referred are irrelevant to the decision in the main proceedings. In particular, those questions were not the subject matter of the appeal proceedings and could not therefore be regarded as forming part of the subject matter of the proceedings before the Supreme Court of Cassation.

24. It is true that a request for a preliminary ruling is admissible only in so far as the questions referred to the Court are relevant to the decision in the main proceedings.

25. However, according to settled case-law, there is a presumption of relevance in favour of questions on the interpretation of EU law referred by a national court, and it is a matter for the national court to define, and not for the Court to determine, in which factual and legislative context they operate. The Court declines to rule on a request for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[6]

26. Accordingly, it is not for the Court to determine whether, under Italian procedural law, the questions referred are relevant to the decision in the main proceedings.

27. From the perspective of EU law, however, their relevance is obvious: the award granted to the Consorzio stems from the fact that at least the arbitral tribunal proceeded on the basis that, under the Landfill Directive, AMA's responsibility for the after-care of the Malagrotta landfill site had been extended from 10 to 30 years.

28. The request for a preliminary ruling is thus admissible.

B. The questions referred by the Supreme Court of Cassation

29. The Supreme Court of Cassation seeks to ascertain whether Articles 10 and 14 of the Landfill Directive preclude an interpretation of the corresponding Italian implementing provisions according to which landfill operators may, on account of the extension of the period of responsibility for after-care of the landfill site from 10 to 30 years, retroactively claim additional fees from waste holders who have delivered waste in the past.

6 Judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 67).

30. It harbours doubts, in particular, as to whether the application of the longer obligation to provide after-care is compatible with the prohibition on retroactivity, as well as the principles of legal certainty, legitimate expectations and proportionality and therefore refers four questions to the Court of Justice.

31. The first question seeks to clarify whether landfill sites which already have permission to operate are subject unconditionally to the obligations laid down by Articles 10 and 14 of the Landfill Directive, in particular in so far as they extend the period of responsibility for after-care from 10 to 30 years. In the same vein, the fourth question asks whether the longer period of responsibility for after-care also applies to waste delivered before the entry into force of the provisions transposing the directive. I will examine those two questions first, in so far as they relate to the landfill operator.

32. However, to the extent that the fourth question relates to the waste holder, I will discuss it together with the second and third questions in respect of whether the Landfill Directive requires the retroactive charging of additional fees for the disposal of waste. The second question relates to whether Italy was required to lay down provisions limiting retroactive additional claims for fees made against previous waste holders. The third question concerns the effect of the transposition of Article 10 and Article 14 of the Landfill Directive on existing agreements between the landfill operator and previous waste holders.

1. Application of the obligation to provide after-care to existing landfill sites and waste already delivered

33. The first and fourth questions concern the application of the obligation to provide after-care to landfill sites which were already in use when the Landfill Directive began to apply.

(a) The obligation to provide after-care for existing landfill sites

34. The application of the Landfill Directive to existing landfill sites forms the subject of Article 14. Under that article, Member States are to take measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of that directive (16 July 2001), may not continue to operate unless certain steps are accomplished within eight years (until 16 July 2009) at the latest.

35. Article 14(b) of the Landfill Directive provides Member States with two ways of meeting their obligations in relation to those existing landfill sites. They may either authorise the continued operation of those landfills in accordance with the Landfill Directive, or take the necessary measures to close down as soon as possible, in accordance with Article 7(g) and Article 13, sites which have not been granted a permit to continue to operate.[7]

36. If — as it appears to be in the present case[8] — operation was authorised beyond 16 July 2009, under Article 14(c) of the Landfill Directive an existing landfill must comply with the requirements of the directive, with the exception of the requirements in Annex I, point 1, by the end of the transitional period at the latest. The latter requirements concern the location of the landfill site and are therefore of no relevance to the present case.

7 Judgments of 16 July 2015, *Commission* v *Bulgaria* (C-145/14, not published, EU:C:2015:502, paragraph 30); of 25 February 2016, *Commission* v *Spain* (C-454/14, not published, EU:C:2016:117, paragraph 59); of 28 November 2018, *Commission* v *Slovenia* (C-506/17, not published, EU:C:2018:959), paragraph 45; and of 21 March 2019, *Commission* v *Italy* (C-498/17, EU:C:2019:243, paragraph 27).

8 See, to that effect, the finding in the judgment of 15 October 2014, *Commission* v *Italy* (C-323/13, not published, EU:C:2014:2290, paragraph 13).

37. By contrast, the after-care obligations under Article 13(c) of the Landfill Directive are fully applicable upon expiry of the transitional period at the latest. The operator must then carry out after-care for as long as may be required by the competent authority, taking into account the time during which the landfill could present hazards. In so far as costs are concerned, the operator must, in accordance with Article 8(a)(iv), pay a security until the end of the period of responsibility for after-care.

38. The operator's after-care obligations would, however, also be applicable where the landfill site ceases operation but was closed down before expiry of the transitional period. For also in such a case, Article 14(b) of the Landfill Directive refers to Article 13.

39. Thus, it is clear from the express wording of the Landfill Directive that operators of landfill sites that were in operation on expiry of the time limit for transposition on 16 July 2001 are subject to an obligation to provide after-care until the landfill no longer presents hazards. Only landfills which have already been closed down on that date are not concerned, as stated in recital 25.

(b) Extension of the obligation to provide after-care to old waste

40. The obligation to provide after-care does not make any express distinction between waste that was delivered and stored before or after expiry of the time limit for transposition. As is suggested in the fourth question, one might therefore ask whether, in the light of the prohibition on retroactivity and the principles of legal certainty, that obligation applies exclusively to waste that was subsequently delivered and stored.

41. As the Consorzio illustrates using the Malagrotta landfill site as an example, such a distinction is, however, hardly feasible in practice, since old waste and new waste are mixed in the landfill site and together give rise to the hazards that the after-care is intended to counter. After-care must therefore, as a general rule, extend to the landfill site as a whole.

42. It would only be conceivable to exclude clearly demarcated landfill site sections that were no longer in operation on expiry of the time limit for transposition and cannot interact with the sections still in operation from the after-care obligation under the Landfill Directive.

43. However, such sections would, as a general rule but at the very least, be subject to the requirements of the various versions of the Waste Directive that have applied since 1977. Member States would therefore have to ensure that neither human health is endangered nor the environment harmed,[9] and the 'polluter-pays' principle would also have to be observed.[10] However, the Member States enjoy broad discretion as to how they organise the necessary after-care and the allocation of costs.[11]

44. The request for a preliminary ruling sheds no light on whether such old sections are concerned in the main proceedings. On the contrary, the Consorzio submits that the various sections are closely interconnected. Consequently, there is no need for the Court to rule on the conditions under which certain older sections of an existing landfill site are no longer subject to the Landfill Directive, and the Court may assume, for the purposes of the further discussion, that it concerns the after-care of a landfill site that was in operation on expiry of the time limit for transposition of the Landfill Directive.

9 See point 11 above.

10 See point 12 above.

11 To that effect, judgment of 16 July 2009, *Futura Immobiliare and Others* (C-254/08, EU:C:2009:479, paragraph 47 et seq.).

(c) The prohibition on retroactivity and the principles of legal certainty, legitimate expectations and proportionality

45. AMA and the Supreme Court of Cassation doubt, however, whether the application of the obligation to provide after-care observes the prohibition on retroactivity and the principles of legal certainty, legitimate expectations and proportionality.

46. The principles of the protection of legitimate expectations and legal certainty form part of the EU legal order. They must accordingly be observed by the EU institutions, but also by the Member States when exercising the powers conferred on them by EU directives. [12]

47. In order to ensure the observance of those principles, the substantive rules of EU law must accordingly be interpreted as applying to situations which are fully established before their entry into force ('situations acquises') only in so far as it clearly follows from their terms, their objectives or their general scheme that such an effect must be given to them. [13] As a general rule, the principle of legal certainty precludes an EU measure from taking effect from a point in time before its publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. [14]

48. However, new rules apply immediately to the future effects of a situation which arose under the old rule. [15] The scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose earlier. [16]

49. The obligation to provide after-care to landfill sites that were still in operation on expiry of the time limit for transposition of the Landfill Directive is such a case in which a new rule applies to the future effects of a situation which arose under the old rule.

50. Moreover, that obligation does not infringe the principle of proportionality. Monitoring of the hazards of a closed down landfill site meets the aim of a high level of protection enshrined in Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU. The obligation to provide after-care is appropriate for the purposes of supporting that aim, and a less stringent measure is not apparent.

51. Lastly, it is also reasonable that that obligation is imposed on the operator of the landfill site. The operator generates income by operating the landfill site and generally knows the landfill site best. Moreover, the obligation to provide after-care has not been unexpectedly introduced by the Landfill Directive, but ultimately stemmed from the various versions of the Waste Directive that have been applied since 1977.

12 Judgments of 3 December 1998, *Belgocodex* (C-381/97, EU:C:1998:589, paragraph 26); of 26 April 2005, '*Goed Wonen*' (C-376/02, EU:C:2005:251, paragraph 32); of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539, paragraph 43); and of 10 December 2015, *Veloserviss* (C-427/14, EU:C:2015:803, paragraph 30).

13 Judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9); of 10 February 1982, *Bout* (21/81, EU:C:1982:47, paragraph 13); of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 49); of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 50); and of 14 March 2019, *Textilis* (C-21/18, EU:C:2019:199, paragraph 30).

14 Judgments of 25 January 1979, *Racke* (98/78, EU:C:1979:14, paragraph 20); of 13 November 1990, *Fédesa and Others* (C-331/88, EU:C:1990:391, paragraph 45); of 28 November 2006, *Parliament* v *Council* (C-413/04, EU:C:2006:741, paragraph 75); and of 30 April 2019, *Italy* v *Council (Fishing quotas for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraph 106).

15 Judgments of 5 December 1973, *SOPAD* (143/73, EU:C:1973:145, paragraph 8); of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 49); and of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 49).

16 Judgments of 16 May 1979, *Tomadini* (84/78, EU:C:1979:129, paragraph 21); of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 55); and of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 49).

(d) Interim conclusion

52. The answer to the first and the fourth question, in so far as it concerns the operator of the landfill site, must therefore be that, under Articles 10, 13 and 14 of the Landfill Directive, the operator of a landfill site that was in use on expiry of the time limit for transposition of that directive must be subject to the obligation to ensure after-care for at least 30 years after the closure of the landfill site. As a general rule, it is not possible to distinguish in that process between waste stored after expiry of the time limit for transposition of the directive and waste stored beforehand.

2. After-care costs

53. The obligation on the landfill operator to provide after-care must be separated from the responsibility for the after-care costs, which the Supreme Court of Cassation addresses in the second and the third questions and in the fourth question in so far as it concerns the situation of waste holders. In principle, those costs should be passed on, in accordance with the 'polluter-pays' principle, to the waste holders that deliver the waste for disposal on the landfill site. That allocation of costs is based on Article 10 of the Landfill Directive (see section (a)), but it is doubtful whether it also applies to waste delivered before expiry of the time limit for transposition of the Landfill Directive (see section (b)).

(a) Normative content of Article 10 of the Landfill Directive

54. As is also apparent from recital 29 of the Landfill Directive, Article 10 requires the Member States to take measures to ensure that the price charged for waste disposal in a landfill covers all the costs involved in the setting up and operation of the facility. [17]

55. That requirement is an expression of the 'polluter-pays' principle. It implies, as the Court has already held in connection with various versions of the Waste Directive, [18] that the cost of disposing of the waste must be borne by the waste holders. [19] Application of the 'polluter-pays' principle forms part of the objective of the Landfill Directive, which, according to Article 1(1) thereof, is to meet the requirements of the Waste Directive, and in particular Article 4 thereof, which inter alia requires the Member States to take appropriate measures to encourage the prevention or reduction of waste production. [20]

56. The costs referred to in Article 10 of the Landfill Directive expressly include the estimated costs of the closure and after-care for the site for a period of at least 30 years.

57. Under Article 14(c) of the Landfill Directive, that provision had to be applied to existing landfill sites still in operation at the latest on expiry of the transitional period, since, as from that date, the requirements of the directive relating to those landfills were applicable. It follows that, since then, the price charged for the disposal of waste by existing landfill sites had to include after-care.

17 Judgment of 25 February 2010, *Pontina Ambiente* (C-172/08, EU:C:2010:87, paragraph 35).

18 Judgments of 7 September 2004, *Van de Walle and Others* (C-1/03, EU:C:2004:490, paragraph 57), on 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); of 24 June 2008, *Commune de Mesquer* (C-188/07, EU:C:2008:359, paragraph 71), on Directive 75/442 as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32); of 16 July 2009, *Futura Immobiliare and Others* (C-254/08, EU:C:2009:479, paragraphs 44 and 45), on Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9); and of 30 March 2017, *VG Čistoća* (C-335/16, EU:C:2017:242, paragraph 24), on the Waste Directive.

19 Judgment of 25 February 2010, *Pontina Ambiente* (C-172/08, EU:C:2010:87, paragraph 36).

20 Judgment of 25 February 2010, *Pontina Ambiente* (C-172/08, EU:C:2010:87, paragraph 36), again on Directive 75/442 as amended by Decision 96/350.

(b) The subsequent increase of disposal fees

58. With the findings on the obligation to provide after-care and the scope of the fees from the date of application of Article 10 of the Landfill Directive to existing landfill sites, it is not, however, yet determined whether the fees for earlier periods may be increased retroactively by the costs of a longer period of responsibility for after-care.

59. Articles 10 and 14 of the Landfill Directive do not lay down any express provisions in that regard. On the contrary: Article 14(c) requires only that landfill sites still in operation must meet the requirements of the directive until expiry of the transitional period.

60. If an existing landfill site ceases operation and is closed down, Article 14(b) of the Landfill Directive refers only to Article 7(g) and Article 13, not to Article 10. However, it cannot be presumed that the necessary after-care for those landfill sites under Article 13(c) may, in principle, be brought to an end earlier than for landfill sites still in operation. The competent authorities may even come to the conclusion that the landfill site presents hazards for longer than 30 years, with the result that the period of responsibility for after-care under Article 13(c) lasts longer.

61. Thus, contrary to the Commission's view, the provisions of the Landfill Directive do *not* expressly provide that waste holders who have in the past delivered waste to a landfill site but paid a fee for it that is not sufficient to cover the estimated after-care costs for at least 30 years must subsequently pay an additional fee in order to make up for the shortfall.

62. Nevertheless, the 'polluter-pays' principle militates in favour of also imposing those additional costs on such waste holders. Although the Landfill Directive does not explicitly mention that principle in connection with Article 10, it is a fundamental principle of EU environmental law pursuant to Article 191(2) TFEU and must therefore be taken into account in its interpretation.

63. In addition, even before the Landfill Directive was adopted, the various versions of the Waste Directive provided that waste holders who hand over their waste to a waste disposal company have to bear the costs of disposing of the waste in accordance with the 'polluter-pays' principle.[21]

64. If Italy had correctly transposed those provisions while taking the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment (Article 4 of the previously applicable versions of the Waste Directive), the fees for waste disposal would already have sufficiently covered the after-care costs in the past.

65. Retroactively increased fees, on the other hand, would implement the 'polluter-pays' principle only to a much lesser extent. It is true that they would correspond to the causal responsibility of waste holders. Ultimately, without their actions, the waste would not exist at all. However, the control function of the 'polluter-pays' principle would no longer be implemented, since the waste holders are no longer able to direct their actions to the true costs of waste disposal.

66. However, the principles of legitimate expectations and legal certainty are decisive. As I have already pointed out, they require that the substantive rules of EU law accordingly be interpreted as applying to situations which are fully established before their entry into force ('situations acquises') only in so far as it *clearly* follows from their terms, their objectives or their general scheme that such effect must be given to them.[22]

21 See point 12 above.

22 See points 46 and 47 above.

67. An obligation on waste holders to pay additional waste disposal costs retroactively would be incompatible with those requirements.

68. First, the terms, objectives and general scheme of the Landfill Directive, in particular Articles 10 and 14 thereof, are not sufficiently clear that the rules on costs could have retroactive effect.

69. Secondly, at the same time, for a waste holder who delivers waste to a landfill site and pays the required fees for it, the factual situation is completed. Its situation in connection with those fees is equivalent to that of a person liable for payment of a customs debt whose customs debt was incurred before the entry into force of a new substantive rule [23] and that of a recipient of aid who has received the aid before the entry into force of a new aid code. [24]

70. That does not, of course, rule out the possibility that the agreement between the Consorzio and AMA regulates the allocation of costs differently. Thus, it is conceivable that retrospective claims by the operator in the event of additional costs are provided for. Nor would it be surprising if the Consorzio were to operate the landfill site only for AMA and thus AMA indirectly remains in possession of the waste. However, in those cases, it is not a question of the application of Article 10 of the Landfill Directive, but only of the interpretation of the contract concluded between those two parties, which does not fall within the Court's jurisdiction. Moreover, there is no indication of such a situation in the request for a preliminary ruling.

71. By contrast, in the likely factual situation in the present case, it must be admitted that, under that interpretation of Articles 10 and 14 of the Landfill Directive, the operator of an existing landfill site still in operation might not be able to cover the costs of after-care with the waste disposal fees collected. That is liable to occur in particular where the Member State concerned has inadequately transposed the Waste Directive, with the result that after-care was not sufficiently taken into account initially when calculating waste disposal costs.

72. AMA argues that the increase in fees for future waste deliveries after the transposition of the Landfill Directive is already sufficient to finance the longer period of responsibility for after-care. However, at least the national courts appear to consider that that additional income is insufficient. Nor can it be ruled out that the market for landfill sites or the remaining period of operation will preclude sufficient income to be generated from the increase in fees.

73. However, the landfill operator would, alongside the Member State, be at least jointly responsible for such a shortfall, since the operator's knowledge of the landfill site should best enable it to assess the extent of the after-care required. If the operator rightly assumed that, owing to the condition of the landfill site, a mere 10-year period of after-care would in principle suffice, further after-care should incur only minor costs. If, in contrast, the condition of the landfill site still requires a high level of after-care after 10 years, the landfill operator has failed to fulfil its due diligence obligations when determining the duration of the period of responsibility for after-care.

23 Compare judgments of 7 September 1999, *De Haan* (C-61/98, EU:C:1999:393, paragraphs 12 to 14); of 14 November 2002, *Ilumitrónica* (C-251/00, EU:C:2002:655, paragraphs 28 to 30), and of 23 February 2006, *Molenbergnatie* (C-201/04, EU:C:2006:136, paragraph 42).

24 Compare judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 117).

(c) Interim conclusion

74. The answer to the second and third questions and to the fourth question, in so far as it concerns the situation of waste holders, must therefore be that Articles 10 and 14 of the Landfill Directive do not justify, in the light of the prohibition on retroactivity and the principles of legal certainty and legitimate expectations, the imposition of additional fees on previous waste holders who have deposited waste at landfill sites and paid the required fees for it, where the duration of the period of responsibility for after-care of the landfill site is subsequently extended and that additional cost factor has not already been taken into account in the original fee.

V. Conclusion

75. I therefore propose that the Court answer the request for a preliminary ruling as follows:

(1) Under Articles 10, 13 and 14 of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, the operator of a landfill site that was in use on expiry of the time limit for transposition of that directive must be subject to the obligation to ensure after-care for at least 30 years after the closure of the landfill site. As a general rule, it is not possible to distinguish in that process between waste stored after expiry of the time limit for transposition of the directive and waste stored beforehand.

(2) Articles 10 and 14 of Directive 1999/31 do not justify, in the light of the prohibition on retroactivity and the principles of legal certainty and legitimate expectations, the imposition of additional fees on previous waste holders who have deposited waste at landfill sites and paid the required fees for it, where the duration of the period of responsibility for after-care of the landfill site is subsequently extended and that additional cost factor has not already been taken into account in the original fee.