Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 November 2018 [1]

Case C-399/17

European Commission
v

Czech Republic

(Infringement — Article 258 TFEU — Regulation (EC) No 1013/2006 — Shipments of waste — Substance known as TPS-NOLO (Geobal) — Take-back of an illegal shipment of waste — Classification issues — Article 28 — Substance to be treated as waste in case of disagreement on classification issues — Admissibility)

1. In the present case the Court has been called upon to decide whether the Czech Republic has failed to fulfil its obligations under Regulation (EC) No 1013/2006 [2] ('the Waste Shipment Regulation'). More specifically, at issue is the question whether the Czech Republic has infringed provisions of that regulation by refusing to take back a substance known as TPS-NOLO (or Geobal) that had been shipped to Poland without respecting the requisite formalities of the Waste Shipment Regulation.

2. The question thus posed raises a number of issues: the broad and fluid concept of waste in EU law, the scope of the Waste Shipment Regulation and the requirements for bringing an action under Article 258 TFEU. All are issues that cannot easily be resolved.

3. Finding that there was no infringement in the present case could potentially weaken the effectiveness and enforceability of the Waste Shipment Regulation, whose main and predominant object and component is protection of the environment. However, courts are guided, first and foremost, by procedural principles that ensure a due process in each individual case. Those principles cannot be sacrificed in order to further a greater cause, as noble as it might be.

I. Legal framework

A. The Waste Shipment Regulation

4. In accordance with Article 1 ('Scope'), the Waste Shipment Regulation 'establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination'.

1 Original language: English.

2 Regulation of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

5. Article 2 ('Definitions') provides:

'1. "waste" is as defined in Article 1(1)(a) of Directive 2006/12/EC;

…

34. "shipment" means the transport of waste destined for recovery or disposal which is planned or takes place:

(a) between a country and another country; …

…

35. "illegal shipment" means any shipment of waste effected:

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

(b) without the consent of the competent authorities concerned pursuant to this Regulation; or

(c) with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or

(d) in a way which is not specified materially in the notification or movement documents; or

(e) in a way which results in recovery or disposal in contravention of Community or international rules; or

(f) contrary to Articles 34, 36, 39, 40, 41 and 43; or

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

(i) the waste being discovered not to be listed in Annexes III, IIIA or IIIB, or

(ii) non-compliance with Article 3(4),

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

…'

6. Article 3 of the Waste Shipment Regulation deals with the overall procedural framework for shipments of waste and provides as follows:

'1. Shipments of the following wastes shall be subject to the procedure of prior written notification and consent as laid down in the provisions of this Title:

(a) if destined for disposal operations:

all wastes;

(b) if destined for recovery operations:

(i) wastes listed in Annex IV, which include, *inter alia*, wastes listed in Annexes II and VIII to the Basel Convention,

(ii) wastes listed in Annex IVA,

(iii) wastes not classified under one single entry in either Annex II, IIIB, IV or IVA,

(iv) mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.

…'

7. Article 24 of the Waste Shipment Regulation provides for take-back when a shipment is illegal and states:

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

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

(a) taken back by the notifier de facto; or, if no notification has been submitted;

(b) taken back by the notifier de jure; or, if impracticable;

(c) taken back by the competent authority of dispatch itself or by a natural or legal person on its behalf; …

…

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

No competent authority shall oppose or object to the return of waste of an illegal shipment. …

…

7. Where the waste of an illegal shipment is discovered within a Member State, the competent authority with jurisdiction over the area where the waste was discovered shall be responsible for ensuring that arrangements are made for the safe storage of the waste pending its return or non-interim recovery or disposal in an alternative way.'

8. Article 28 of the Waste Shipment Regulation ('Disagreement on classification issues') further reads:

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

…

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

B. Directive 2008/98/EC ('the Waste Framework Directive')[3]

9. The Waste Framework Directive replaced Directive 2006/12/EC[4] and provides in its Article 3 a definition of 'waste' and 'hazardous waste' for the purposes of the application of the Waste Shipment Regulation.

10. Article 3 defines 'waste' as 'any substance or object which the holder discards or intends or is required to discard'. Furthermore, 'hazardous waste' is defined as 'waste which displays one or more of the hazardous properties listed in Annex III'.

11. Article 6 of the Waste Framework Directive in turn specifies the circumstances when waste ceases to be waste:

'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.

…

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

12. In accordance with Article 40, the Waste Framework Directive was to be transposed into the national laws of the Member States by 12 December 2010.

3 Directive 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 Directive of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

C. Regulation (EC) No 1907/2006 ('the REACH Regulation')[5]

13. According to its Article 1(1), the REACH Regulation seeks 'to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation'.

14. Article 2(2) of the REACH Regulation provides that 'waste as defined in [Directive 2006/12] is not a substance, mixture or article within the meaning … of this Regulation'.

15. Article 128 of the regulation further states:

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

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

II. Background to the case and the pre-litigation procedure

16. On 3 December 2010 Jiří Paškůj, a person under the jurisdiction of Czech law, and the company Biuro Rozwoju Gospodarczego Sp. z.o.o. ('BRG'), with its seat in Sosnowiec in Poland, entered into a contract for a consignment of 58 000 tonnes of TPS-NOLO (Geobal) to be used in the production of cement.

17. According to the Commission, approximately 20 000 tonnes of TPS-NOLO (Geobal) and composed of tar acid, a remnant after refining oil (code 05 01 07* of the European waste catalogue), of carbon dust and of calcium oxide were shipped by the Czech operator to a parcel of land in Karol Woźniak Street at Katowice, rented by BRG, at the end of 2010 and the beginning of 2011. At some point between the beginning of 2011 and 11 September 2011 the substance was discovered by the competent Polish authority.

18. On 11 September 2011 the competent Polish authorities notified the competent Czech authority about the substance discovered, which the Polish authorities considered as illegally shipped to Poland within the meaning of Article 2(35)(a) of the Waste Shipment Regulation, as neither the sender nor the recipient had informed the Polish authorities of a shipment of waste as foreseen in Article 3 of the same regulation. As they considered the substance to be hazardous waste classified in Annex IV to the Waste Shipment Regulation ('Waste tarry residues (excluding asphalt cements) arising from refining, distillation and any pyrolitic treatment of organic materials'), the Polish authorities maintained that shipment of that substance required prior written notification and consent.

19. In the course of the administrative procedure, the Czech citizen responsible for the shipment to Poland presented the standards adopted by the company as well as proof that the substance in question was registered under the REACH Regulation and that it was used as fuel.

5 Regulation of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

20. Following a refusal by the competent Czech authorities in the course of the administrative procedure to force the Czech citizen to take back the substance to the Czech Republic, despite reliance by the Polish authorities on Article 28 of the Waste Shipment Regulation, which provides that the substance is to be considered as waste in case of disagreement, a private complaint was lodged with the Commission on 4 February 2014.

21. On 12 June 2014 the Commission decided to pursue the complaint and opened an investigation (EU Pilot case No 6603/14/ENVI). In its reply to the EU Pilot request the Czech Republic stated that TPS-NOLO (Geobal) had been registered under the REACH Regulation and that it therefore did not constitute waste. Accordingly, the Waste Shipment Regulation did not apply.

22. Having examined the reply by the Czech Republic, the Commission concluded that the latter had infringed EU law by failing to fulfil its obligations under the Waste Shipment Regulation and the Waste Framework Directive. Consequently, on 20 February 2015, the Commission sent a letter of formal notice to the Czech Republic. The Czech Republic responded to the letter of formal notice the same day by essentially reiterating the arguments it had provided in the reply to the EU Pilot request.

23. Having been informed by the Polish inspector for the protection of the environment that the substance in question still had not been taken back to the Czech Republic and having examined the arguments presented by the Czech Republic in its reply to the letter of formal notice, the Commission, by letter of 22 October 2015, sent a reasoned opinion to the Czech Republic stating the reasons why it could not accept the Czech authorities' arguments that it had not failed to fulfil its obligations under the Waste Shipment Regulation, in particular Articles 24(2) and 28(1) thereof.

24. The Czech Republic replied by letter of 18 December 2015, stating that its legal position was that it had not failed to fulfil its obligations under those provisions as the substance in question had not been waste at the time it was shipped to Poland.

25. After examining the submissions of the Czech Republic in response to the reasoned opinion, the Commission found that the infringement still persisted. Moreover, the Commission has not been informed of any measures taken by the Czech Republic in order to comply with the obligations under Articles 24(2) and 28(1) of the Waste Shipment Regulation.

III. Procedure before the Court and forms of order sought

26. By application of 3 July 2017, the Commission claims that the Court should:

– declare that, by refusing to ensure the take-back to the Czech Republic of the substance known as TPS-NOLO (Geobal) which had been shipped from the Czech Republic to Katowice in Poland, the Czech Republic has failed to fulfil the obligations incumbent on it on the basis of Article 24(2) and Article 28(1) of the Waste Shipment Regulation;

– order the Czech Republic to pay the costs.

27. The Czech Republic contends that the Court should:

– dismiss the action as unfounded;

– order the Commission to pay the costs.

28. Both the Czech Government and the Commission presented oral argument at the hearing held on 20 September 2018.

IV. Analysis

29. By its action, the Commission requests the Court to declare that, by failing to ensure the take-back to the Czech Republic of TPS-NOLO (Geobal) shipped from the Czech Republic to Katowice, Poland, the Czech Republic has failed to fulfil its obligations under Article 24(2) and Article 28(1) of the Waste Shipment Regulation.

30. In the following, I will first present the arguments of the parties and then analyse the application lodged by the Commission.

A. Arguments of the parties

31. The Commission's application lacks any structure, which makes it difficult to clearly discern the Commission's arguments. However, in the summary of the pleas in law and main arguments submitted, the Commission's position is presented as follows.

32. The Commission maintains, first, that the TPS-NOLO (Geobal) which had been shipped from the Czech Republic to Poland and which originated from hazardous waste of a waste disposal site (the tailing ponds at Ostramo) is stored at another waste disposal site on Czech territory and is classified as waste tarry residues arising from refining, distillation and any pyrolytic treatment of organic materials. The substance is furthermore considered by the Polish authorities to be waste within the meaning of Annex IV to the Waste Shipment Regulation.

33. Second, as the Czech Republic contests the classification of that substance as waste by relying on the registration of the substance under the REACH Regulation, a classification issue within the meaning of Article 28(1) of the Waste Shipment Regulation has arisen. That provision foresees that the substance accordingly be treated as waste.

34. However, third, according to the Commission, the REACH Regulation does not in any way guarantee that use of a substance does not have any damaging effects on the environment or human health, or that a substance automatically ceases to be waste. In the absence of a national decision confirming that a substance has ceased being waste, it is not possible to consider the registration under the REACH Regulation valid, in line with Article 2(2) of that regulation.

35. Last, since the substance in question was shipped over borders without notification, that shipment must be considered illegal within the meaning of Article 2(35)(a) of the Waste Shipment Regulation. In that case, the competent authorities of the Member State of dispatch are informed of the shipment in order to ensure the take-back of the substance in question, in accordance with Article 24(2) of the Waste Shipment Regulation. The Czech Republic has refused to do so. A registration under the REACH Regulation which guarantees in Article 3 the free circulation of substances, mixtures or articles does not alter that obligation, as waste is expressly excluded from the scope of application of the REACH Regulation.

36. The Czech Government, on the other hand, argues that the substance was not, at the time relevant for the present proceedings, waste within the meaning of Article 3(1) of the Waste Framework Directive as it is registered under the REACH Regulation and is used as a fuel. Furthermore, that government submits that the Commission cannot rely on Article 28(1) of the Waste Shipment Regulation. If Article 28(1) could be applied wilfully by a Member State, without there being any objective indication that a substance is indeed waste, this would constitute a serious violation of the free movement of goods. Member States could, for example, interfere with the import of food products from other Member States.

37. The Czech Government essentially argues that the Commission has failed to prove that the shipment in question was a shipment of waste within the meaning of the Waste Shipment Regulation and that it therefore did not constitute an illegal shipment for the purposes of that regulation. The Czech Government therefore considers the Commission's action manifestly unfounded.

38. Nevertheless it is common ground between the parties that a shipment of TPS-NOLO (Geobal) from the Czech Republic to Poland has taken place.

39. Given the lack of clarity of the Commission's application, the admissibility of that application must first be assessed.

B. Admissibility

40. The Czech Republic has not raised a plea of inadmissibility. The Court may, however, on its own motion examine whether the conditions laid down in Article 258 TFEU for bringing an action for failure to fulfil obligations are satisfied, and whether the claim put forward fulfils the relevant procedural requirements. [6]

41. It is clear from Article 120 of the Rules of Procedure of the Court of Justice, and from the case-law relating to that provision, that an application must state the subject matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It follows that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself. [7] The complaints must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on one of them. [8]

42. In particular, the Commission's action must contain a coherent and detailed statement of the reasons which have led it to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaties. [9] Moreover, the explanation of the claim must be consistent with the form of order sought. [10]

43. In the present case, the Commission asks the Court to rule that by refusing to ensure the take-back to the Czech Republic of TPS-NOLO (Geobal) which had been shipped from the Czech Republic to Katowice in Poland, the Czech Republic has failed to fulfil its obligations under Article 24(2) and Article 28(1) of the Waste Shipment Regulation.

44. However, it is not clear from the submissions made in the body of the Commission's application, or from the Commission's replies to the Court's questions at the hearing, on which grounds the Commission bases its claim. [11] The obligations following from the two provisions named in the previous paragraph are not coherently defined.

6 See judgment of 15 November 2012, *Commission* v *Portugal*, C-34/11, EU:C:2012:712, paragraph 42 and the case-law cited. See also judgments of 2 June 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 33; of 26 January 2012, *Commission* v *Slovenia*, C-185/11, not published, EU:C:2012:43, paragraphs 28 to 30 and the case-law cited; and of 26 April 2007, *Commission* v *Finland*, C-195/04, EU:C:2007:248, paragraph 21 and the case-law cited.

7 Judgment of 2 June 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 32 and the case-law cited. See also C-178/00, paragraph 6, and judgment of 26 April 2007, *Commission* v *Finland*, C-195/04, EU:C:2007:248, paragraph 22 and the case-law cited.

8 Judgment of 2 June 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 34 and the case-law cited.

9 See judgment of 2 June 2016, *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 35 and the case-law cited.

10 See judgments of 14 October 2004, *Commission* v *Spain*, C-55/03, not published, EU:C:2004:628, paragraphs 28 and 29, and of 26 January 2012, *Commission* v *Slovenia*, C-185/11, not published, EU:C:2012:43, paragraphs 30 to 33.

11 Cf. judgment of 26 April 2007, *Commission* v *Finland*, C-195/04, EU:C:2007:248, paragraphs 28 to 30.

45. The Commission on the one hand seems to argue that the Waste Shipment Regulation establishes an absolute and categorical obligation on Member States to ensure the take-back of certain shipments that another Member State considers containing waste. Such an obligation, it argues, persists irrespective of the circumstances of a case, and whether or not a substance or object is, in fact, waste. The Member State subject to the obligation in that case could not put forward any defence to avoid taking back the disputed shipment.

46. At the same time, the Commission seems to imply that the obligation to take back a shipment does not exist when a substance or object is not, in fact, waste. Thus the Commission devotes large parts of its application to establishing that the substance in question is, in fact, waste, thereby seemingly introducing the notion of an obligation conditioned on the substance in question being, in fact, waste.

47. Those arguments, in my view, cannot be reconciled.

48. Somehow it seems that the Commission has conflated two alternative arguments into one single line of argument. That is possibly why the arguments presented appear confused and incoherent.

49. The unusual manner in which the application was drafted further adds to the confusion. Instead of presenting its case, the Commission rather seems to present a reply to the Czech Republic's arguments in response to the reasoned opinion. This makes it very difficult for the Court to discern the arguments of the Commission in the present case as the reader has to reconstruct the case from those counter-arguments.

50. In that connection, it is appropriate to point out that the EU judicature cannot take the place of the applicant, or his lawyer, by trying to identify those arguments of an application it might regard as supporting the party's claims. [12]

51. Moreover, I am perplexed that the Commission seems to ask the Court to declare the existence of an infringement that may in the future turn out to be no infringement at all. I am not sure if there is any scope for this sort of conditional *pro tempore* infringement in the procedure set out in Article 258 TFEU. [13] In any case, if the Commission is indeed seeking to advance the argument of such an infringement, it has failed to substantiate its argument with the reasons that led it to conclude that an infringement existed.

52. What is more, the lack of clarity in the Commission's claim has affected the Czech Republic's reply to that claim. As the Commission did not clearly define the obligations incumbent on Member States under Articles 24(2) and 28(1) of the Waste Shipment Regulation, the Czech Republic was not put in a position to respond in an extensive manner.

53. In those circumstances, I take the view that the Court does not have sufficient information to enable it to assess the infringement of EU law imputed to the Czech Republic and thus to determine whether there is a breach of obligations as alleged by the Commission. [14]

54. Having said that, I can see why the Commission probably encountered difficulties in providing the reasons underlying its claim in a coherent manner. Especially with regard to Article 28 of the Waste Shipment Regulation, it seems difficult to reconcile the wording of the different paragraphs of that provision with, for one thing, the remainder of that regulation and, indeed, the interpretative principles at play.

12 See, to that effect, the Opinion of Advocate General Léger in *Italy* v *Commission*, C-178/00, EU:C:2002:541, point 9 and the case-law cited.

13 See, by analogy, order of 13 September 2000, *Commission* v *Netherlands*, C-341/97, EU:C:2000:434, paragraphs 9 to 10 and 18 to 21, and judgment of 3 December 2009, *Commission* v *Germany*, C-424/07, EU:C:2009:749, paragraphs 25 to 31.

14 See judgment of 26 April 2007, *Commission* v *Finland*, C-195/04, EU:C:2007:248, paragraph 32 and the case-law cited.

55. Nonetheless, I conclude that the action must be dismissed as inadmissible.

V. Conclusion

56. In light of the foregoing considerations, I propose that the Court:

– dismiss the action as inadmissible;

– order the European Commission to pay the costs.