

Case C-181/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 April 2020

Referring court:

Nejvyšší soud (Czech Republic)

Date of the decision to refer:

12 March 2020

Applicant:

VYSOČINA WIND a.s.

Defendant:

Česká republika — Ministerstvo životního prostředí (Czech Republic — Ministry of the Environment)

Subject matter of the main proceedings

Interpretation of Article 13 of Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (OJ L 197, 24.7.2012, p. 38).

Liability of a Member State for damage caused to an individual by a breach of EU law

Subject matter and legal basis of the reference for a preliminary ruling

Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 13 of Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE)

be interpreted such that it prevents a Member State from imposing the obligation to finance the costs of the collection, treatment, recovery, and environmentally sound disposal of WEEE coming from photovoltaic panels placed on the market prior to 1 January 2013 on their users, rather than their producers?

2. If the first question is answered in the affirmative, is the evaluation of the conditions for the liability of a Member State for damage caused to an individual due to a breach of EU law influenced by the fact – which was at issue in the original proceedings – that the Member State itself regulated the method of financing of waste from photovoltaic panels prior to the adoption of the directive, which newly included photovoltaic panels in the scope of EU regulation and imposed the obligation to finance the costs on producers, including in relation to panels placed on the market prior to the expiry of the directive’s implementation period (and the adoption of regulation at European Union level)?

The provisions of EU law cited

Directive 2012/19, Article 12(4) and Articles 13 and 24

Article 5 TEU

Relevant national law

Law No 185/2001, on waste and amending certain other Laws (‘the Law on Waste’), Paragraph 37p and Paragraph 37h

Brief presentation of the EU and national legal frameworks

- 1 Article 13 of Directive 2012/19 imposes on Member States the obligation to ensure that the costs for the collection, treatment, recovery and environmentally sound disposal of waste (hereinafter referred to as “waste management”) resulting from electrical and electronic equipment placed on the market after 13 August 2005 be financed by their producers. The management of ‘historical’ waste, i.e., waste resulting from products placed on the market prior to that date, is to be financed, in the case of the replacement of old products with new ones (unless Member States impose that obligation on users) by the producers of such new products, and in the case of other historical waste by users. This obligation, set already by Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) (OJ 2003 L 37, p. 24; ‘the original 2002 Directive’) newly applies also to waste from photovoltaic panels. The period allowed for transposing Directive 2012/19 ended on 14 February 2014.
- 2 The Czech Republic implemented its obligations arising from the original 2002 Directive by enacting the Law on Waste. In 2012, prior to the adoption of

Directive 2012/19, a new Paragraph 37p was inserted in the Law, introducing a mechanism for financing the management of waste from photovoltaic panels. According to that provision, the obligation to finance the management of waste from photovoltaic panels placed on the market before 1 January 2013 is borne by the operator of the solar power plant, through equal sub-payments of recycling contributions. To that end, an obligation was set to enter into, by 30 June 2013, an agreement with an entity providing a collective financing system, such that the financing is obtained by 1 January 2019. In the case of photovoltaic panels placed on the market after 1 January 2013, the obligation falls on the producer.

Brief presentation of the facts and main proceedings

- 3 The plaintiff is the operator of the 'Vranovská ves II' solar power plant. The power plant was put into operation in 2009, using photovoltaic panels placed on the market after 13 August 2005 but before 1 January 2013. Hence, the plaintiff entered into agreements with the relevant entities, in line with Paragraph 37p of the Law on Waste, on the basis of which it paid out a contribution for the recycling of electric waste from photovoltaic panels in the total amount of CZK 1,613,773.24, making three sub-payments in 2015 and 2016.
- 4 The plaintiff maintains that the Czech Republic implemented Directive 2012/19 incorrectly, as, pursuant to Article 13 of the Directive, the obligation to finance the management of waste from photovoltaic panels placed on the market after 13 August 2005 lies with the producer, rather than the user. Due to that, the plaintiff incurred damage, as, pursuant to the still-applicable Paragraph 37p of the Law on Waste, it is obliged to pay a recycling contribution even after 14 February 2014 (the expiry of the implementation period), which, according to EU law, is to be paid by the producer. The plaintiff has therefore brought an action against the Czech Republic for damages incurred by it due to a breach of EU law, corresponding to the amount of the contribution paid, of CZK 1,613,773.24.
- 5 The Czech Republic maintains that the obligation of producers to finance the management of waste from photovoltaic panels is to apply only to photovoltaic panels placed on the market after the expiry of the implementation period (14 February 2014), as a retroactive imposition of an obligation would constitute impermissible retroactivity and a related breach of general legal principles of legitimate expectations and legal certainty. Furthermore, it objects that many producers that placed photovoltaic panels on the market between 2005 and 2013 no longer exist and, hence, the obligation to finance waste management cannot be imposed on them. Finally, it states that the European Commission did not find any errors in the transposition of Article 13 of Directive 2012/19 during the EU Pilot proceedings, and no proceedings are being conducted against the Czech Republic due to a failure to comply with obligations arising from EU law.
- 6 The Obvodní soud pro Prahu 10 (District Court for Prague 10) as the court of first instance, in its judgment of 6 April 2018 upheld the action; the Městský soud v

Praze (Municipal Court in Prague) in its judgment of 14 November 2018 confirmed the judgment of the court of first instance. The Czech Republic filed an appeal on a point of law against the judgment of the Municipal Court in Prague to the referring court.

Brief presentation of the grounds of the request for a preliminary ruling

- 7 In the present case, it is necessary to answer the question whether the Czech Republic properly implemented Article 13 of Directive 2012/19 in relation to photovoltaic panels. To do so it is necessary to assess whether Article 13 of Directive 2012/19 prevents Member States from imposing the obligation to finance the management of waste from photovoltaic panels placed on the market before 1 January 2013 on the operators of a solar power plant (the users), rather than on the producers. In the event of an affirmative answer, Paragraph 37p of the Law on Waste would be incompatible with EU law and the Member State's liability for damages incurred by an individual due to a breach of EU law should be addressed. In this regard, the question would arise whether the circumstances concerned by the original proceedings may have an impact on the conditions for liability of the Member State.

The first question

- 8 It is undisputed in the proceedings that Article 13 of Directive 2012/19 obliges the Member State to impose on producers the obligation to finance the management of waste from photovoltaic panels, if those panels were placed on the market after 14 February 2014. It is likewise undisputed that, in terms of historical waste from photovoltaic panels (placed on the market before 13 August 2005), a Member State may impose that obligation on users. There is, however, a question as to this obligation in relation to panels placed on the market between 13 August 2005 and 14 February 2014.
- 9 Hence, the primary issue is whether photovoltaic panels placed on the market before 14 February 2014 fall within the substantive scope of Directive 2012/19. If so, the secondary issue is whether the imposition of an obligation in relation to photovoltaic panels placed on the market after 13 August 2005 would be retroactive and, if so, whether such retroactivity is impermissible. In the event of an affirmative answer to all these questions, it should be addressed how a Member State can transpose a directive that imposes on it an obligation to enact impermissible retroactive national legislation.
- 10 The referring court is of the opinion that the two parties operate on the basis of different assumptions as to the point at which and ground due to which the obligation to finance waste management arose. Whereas the lower courts and the plaintiff obviously operate on the assumption that the obligation is to arise as a result of the generation of a specific item of waste, the Czech Republic evidently considers the mere placement of a product on the market to constitute the ground

for the occurrence of that obligation. In this regard, the legal opinions of both parties to the proceedings seem logical. If the obligation arises at the time waste is generated, Directive 2012/19 requires Member States to adopt legislation that is not retroactive from the point of view of EU law, as it only operates into the future, despite the fact that the entity obliged to finance waste management is in fact determined according to when the product from which the said waste is generated was placed on the market (13 August 2005). If, on the other hand, the obligation arises at the time of the placement of the product on the market, such placement on the market constitutes a final situation and the imposition of the obligation to finance waste management from such products by the Directive could indeed be retroactive. It could, among other things, apply to waste generated in the past and already financed, with respect to which the obligation to finance it would be shifted to another entity retroactively.

- 11 According to the referring court, the obligation to finance waste management under Directive 2012/19 should arise only once electrical equipment (a photovoltaic panel) becomes waste. On the contrary, the assumption that the obligation to finance waste management occurs upon the placement of the product on the market seems incorrect, due to, among other things, the fact that it is not entirely clear when waste is generated. Essentially, this would involve a condition or documentation of a point in time, and this obligation would be conditional and uncertain until such time as waste is generated. In this regard, the arguments presented by the Czech Republic do not seem to be watertight, as retroactive effects would not be an issue in a situation when waste is generated after 14 February 2014. According to the referring court, retroactivity could only be inferred if waste were generated prior to 14 February 2014. No provision of Directive 2012/19, however, states that the Directive should apply also to such waste and it expresses no intention of the European Union legislature to adopt retroactive legislation.
- 12 According to the referring court, the correct interpretation of Article 13 of Directive 2012/19 should therefore be such that producers should have, as of 14 February 2014, on the basis of national legislation, the obligation to pay the costs of the disposal of waste from photovoltaic panels placed on the market after 13 August 2005, but only with respect to waste generated after 14 February 2014. This is not retroactivity for the purposes of EU law and, hence, the terms of its potential justification need not be examined. According to the referring court, priority should be given to this interpretation, including for the reason that (as has already been stated) Directive 2012/19 expresses no intention of the European Union legislature to adopt retroactive legislation.
- 13 In the light of this interpretation, the conclusion can thus be reached, according to the referring court, that a Member State cannot transpose Article 13 of Directive 2012/19 such that it imposes on users an obligation to finance the management of waste from photovoltaic panels placed on the market before 1 January 2013. Hence, the transposition of Directive 2012/19 by the Czech Republic cannot be considered correct.

- 14 The question arises, however, whether another conclusion can be reached, i.e., that a Member State may duly transpose Article 13 of Directive 2012/19 in such manner that it imposes on users the obligation to finance the management of waste from photovoltaic panels placed on the market before 1 January 2013, if the following circumstances are considered.
- 15 First, the referring court refers to the Commission's reasoning in connection with the adoption of the original 2002 Directive, which in the end led the Commission to reject the idea of imposing the financing of historical waste on producers in general. The Commission concluded that, in the case of products placed on the market before the expiry of the deadline for the transposition of the original 2002 Directive, the imposition of such an obligation would constitute an obligation with a retroactive effect that could expose producers to serious economic risks. These conclusions can be applied *mutatis mutandis* to photovoltaic panels that were newly included in the scope of EU legislation by Directive 2012/19.
- 16 Secondly, related thereto is the potential importance of the protection of legitimate expectations of producers of photovoltaic panels. They may not have expected that, in the future, a retroactive obligation to finance waste would be imposed on them, i.e., including that generated from photovoltaic panels placed on the market in the past, and thus were unable to factor such costs in their prices. This may expose them to a serious economic risk.
- 17 Thirdly, with the Czech Republic having adopted its own regulation for the financing of waste from photovoltaic panels first, which was to be subsequently amended in line with newly adopted EU regulation which also applies to panels in respect of which an obligation was previously imposed by national law, unfair treatment of users could occur: between those who did comply with the obligation set by national law before the expiry of the deadline for the transposition of Directive 2012 and those who did not. Paragraph 37p of the Law on Waste lays down the obligation to enter into an agreement and, on that basis, to finance the costs in advance, with the financing being split into several sub-payments. If an operator of a solar power plant failed to comply with its obligation, breaching national law, it could, in the event of a change in legislation due to the adoption of Directive 2012/19, gain an advantage compared to other users who have already complied with their obligation. The change in liability for financing would apply retroactively, even with respect to those entities that had already complied with the obligation.
- 18 In this regard, the Czech Republic's argument may be of relevance, that, if at the time of the enactment of the national legislation, the method of compliance involving the obligation to break the payment into several instalments had not been selected and an obligation to pay the entire amount in a lump sum had been imposed, the subsequent transfer of liability to another entity in line with newly adopted EU regulation could retroactively change the legal regime of an obligation that had already arisen and had been fulfilled in full (as opposed to in instalments).

- 19 Fourthly, the Czech Republic is not the only Member State to have transposed Article 13 of Directive 2012/19 in relation to photovoltaic panels such that it distinguished an entity obliged to finance waste management on the basis of a point at which the photovoltaic panel was placed on the market that is different from the date set by Directive 2012/19 — 13 August 2005. In this regard, the referring court refers to the German (Paragraph 7 Elektro- und Elektronikgerätegesetz) and Austrian (Paragraph 10 Elektroaltgeräteverordnung) legislation.
- 20 Fifthly, the referring court points to a practical problem which the Czech Republic also raised, namely that a producer that placed photovoltaic panels on the market in the past may no longer exist and hence the obligation to finance the management of waste generated from such panels cannot be imposed on it. In this context, the referring court refers to the Greek legislation (Article 16-B-3 of Ministerial Decision No 23615/651/E.103), according to which in such a case that obligation is borne by the user.
- 21 And finally, the sixth reason is the present approach of the Commission in monitoring the transposition of Directive 2012/19. The Commission has not initiated any proceedings against the Czech Republic due to its failure to comply with an obligation arising from EU law. On the contrary, according to the Czech Republic's statement, it has reportedly been assured that the Czech legislation is in line with EU law. This is of importance, in particular, in a situation when the transposition of Article 13 of Directive 2012/19 in relation to photovoltaic panels is different in various Member States, as was stated above.

The second question

- 22 If the first preliminary issue is answered in the affirmative, the issue arises of the liability of the Czech Republic for damage caused to the plaintiff as an operator of a solar power plant as a result of a breach of EU law (i.e., incorrect transposition of Article 13 of Directive 2012).
- 23 Case-law of the Court of Justice indicates that, in order for a Member State to be liable for such damage to an individual, the conditions for liability must be met: 1) a breach of EU law (e.g., incorrect transposition of a Directive); 2) occurrence of harm incurred by an individual; 3) a direct causal link between the breach of EU law and the occurrence of the harm; and 4) sufficient seriousness of the breach of EU law (e.g., judgments in *Francovich* (C-6/90 a C-9/90) and *Brasserie du pêcheur* (C-46/93 a C-48/93)).
- 24 According to the referring court, the question arises whether any of the circumstances described above in the original proceedings may be of relevance to the assessment of these conditions.
- 25 It may primarily be relevant in this regard that, in the present case, the Member State (the Czech Republic) itself regulated the financing of waste from

photovoltaic panels at national level prior to the adoption of Directive 2012/19, which newly included photovoltaic panels within the scope of EU regulation and imposed the obligation to finance the costs of waste management on producers with respect to photovoltaic panels placed on the market before the expiry of its implementation period (and the adoption of the legislation concerned at European Union level).

- 26 According to the applicable national legislation, operators of solar power plants were obliged to enter into an agreement on arrangements for the financing of waste from photovoltaic panels in the form of instalments by 30 June 2013, i.e., at a time when that legislation was not contrary to EU law. After the adoption of Directive 2012/19, the agreement between the operator of a solar power plant and the entity providing collective performance of the obligation continued to apply, and the operator of a solar power plant continued to be obliged to fulfil its obligations under the agreement. First, the issue arises whether it is possible, in that case, to object, after the expiry of the implementation period, about an infringement of EU law due to payment of an instalment when the obligation was set and partially fulfilled before the adoption of the EU legislation.
- 27 Furthermore, in the case at hand, given the above, there may not have been a causal link between, on the one hand, compliance with the obligation to enter into an agreement set by national law and the payment of a contribution to a collective system on the basis of the agreement and, on the other hand, the transposition of Directive 2012/19. For that reason, the question also arises whether the harm claimed, which occurred due to the incorrect transposition of Directive 2012 as a result of which the operator of a solar power plant was obliged to continue to pay a contribution for the management of waste from photovoltaic panels, even though, according to the EU legislation, the management of such waste was to be financed by the producer, has a direct causal link with the incorrect transposition of Directive 2012, as required by EU law.
- 28 Furthermore, the impact of this fact, in relation to the requirement of ‘sufficient seriousness’ of a breach of EU law, is uncertain. Due to the adoption of the EU legislation, liability is transferred with retroactive effect, even in respect of photovoltaic panels with regard to which the financing obligation had been set by national law for a specific entity, and which obligation may moreover have already been fulfilled in full. This occurs in a situation where Article 13 of Directive 2012/19 has been transposed differently in various Member States and, at least according to the claim made by the Czech Republic, the transposition has not been found incorrect by the Commission.
- 29 In the opinion of the Supreme Court, the questions referred for a preliminary ruling cannot be considered either *acte clair* or *acte éclairé*. The Supreme Court, as a court whose decision cannot be appealed, as specified in Article 267 TFEU, therefore considers it necessary to submit these issues to the Court of Justice. Given the different methods of transposition of Article 13 of Directive 2012/19 in relation to photovoltaic panels in the various Member States, the response to these

questions may be of relevance not only to the original proceedings but also at European Union level in general, as it may ensure future uniform application of EU law throughout all EU Member States.

WORKING DOCUMENT