Case C-713/22

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:

21 November 2022

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

3 November 2022

Appellant:

LivaNova plc

Respondents:

Ministero dell'Economia e delle Finanze

Ministero dell'Ambiente e della Tutela del Territorio e del Mare

Presidenza del Consiglio dei ministri

Subject matter of the main proceedings

Capital companies – Partial division – Environmental damage – Joint and several liability

Subject matter and legal basis of the request

The question concerns the concept of 'liability … not allocated by the draft terms of division' in Article 3 of the Sixth Council Directive 82/891/EEC of 17 December 1982, which is considered to be a parameter for examining the concept of 'liabilities, the allocation of which cannot be inferred from the draft terms', used in Article 2506-bis of the Codice Civile (Italian Civil Code), in order to ascertain the joint and several liability of a company that is the recipient in a partial division operation.

Question referred for a preliminary ruling

'Does Article 3 of the Sixth Council Directive [82/891/EEC], which (under Article 22 thereof) is also applicable to a division by the formation of new companies – in so far as it provides that (a) 'where a liability is not allocated by the draft terms of division and where the interpretation of these terms does not make a decision on its allocation possible, each of the recipient companies shall be jointly and severally liable for it', and that (b) 'Member States may provide that such joint and several liability be limited to the net assets allocated to each company' – preclude an interpretation of the provision of national law in Article 2506-bis, third paragraph, of the Italian Civil Code according to which the joint and several liability of the recipient refers, in relation to 'liabilities' not allocated by the draft terms, not only to liabilities of a nature already determined, but also (i) to those identifiable in the harmful consequences, arising after the division, of conduct (by act or omission) occurring before the division itself or (ii) of subsequent conduct developing from it, which has an ongoing unlawful nature and causes environmental damage, the effects of which, at the time of the division, cannot yet be fully determined'.

Provisions of European Union law relied on

Article 3 of the Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies

Provisions of national law relied on

Articles 2506-bis and 2506-quater of the Italian Civil Code

Succinct presentation of the facts and procedure in the main proceedings

1 Snia s.p.a. brought proceedings before the Tribunale di Milano (District Court, Milan, Italy) against Sorin s.p.a., now LivaNova PLC, and the respondent public authorities, seeking a declaration that Sorin was jointly and severally liable for all debts – relating to remediation costs and environmental damage – for which Snia was liable prior to the company division carried out on 13 May 2003, with effect from 2 January 2004, in which LivaNova was the recipient.

2 The application for a declaration was related to the substantial claims for compensation brought by the Ministero dell'ambiente (Ministry for the Environment, Italy) against Snia in connection with the activity of producing and marketing chemical products carried out, through its subsidiary companies Caffaro and Caffaro Chimica, at three industrial sites (Brescia, Torviscosa and Colleferro). The application for a declaration was based on Article 2504-decies of the Italian Civil Code, in the version applicable at the time, in view of the fact that

the division operation, according to Snia, had resulted in the formation of the new company Sorin after the transfer to the latter of all shareholdings held in the biomedical sector.

3 Snia argued that Sorin's liability should be deemed to be unlimited, because the remediation costs and environmental damages, if established, should have been considered liabilities whose allocation could not be inferred from the draft terms of division.

4 The respondent authorities requested that Sorin be ordered to pay compensation for damages jointly and severally with Snia. The District Court, Milan, rejected all the claims brought by the public authorities. The judgment was appealed by the Ministries and the Presidenza del Consiglio dei ministri (Presidency of the Council of Ministers, Italy).

5 The Corte d'appello di Milano (Court of Appeal, Milan, Italy), in a non-final judgment in 2019, found that Snia and Sorin were jointly liable for the failure to carry out environmental remedial measures in relation to the three sites in question. It found that Sorin was liable in so far as the debts arising from the remediation costs and environmental damages constituted liabilities of Snia, which were known, but whose allocation could not be inferred from the draft terms. It held that the relevant legal framework was not the previous version of Article 2504-octies, third paragraph, of the Italian Civil Code, but the new Article 2506-bis, third paragraph, of the Italian Civil Code resulting from the company law reform (Decreto legislativo n. 6 del 2003 (Legislative Decree No 6 of 2003)), since the division operation had taken effect, formally, on 2 January 2004, the date on which the instrument of division was registered in the register of companies. It therefore recognised the effectiveness of the causal link between the activity carried out by Snia, and the companies related to it, and the pollution of the areas and therefore the liability of Snia as owner of the areas and establishments, direct manager and parent company of the subsidiary companies and companies acquired from time to time; it also established Sorin's joint and several liability, limited to the assets transferred under the regime based on the new Article 2506-bis, third paragraph, of the Italian Civil Code.

6 The Court of Appeal, Milan, in a final judgment in 2021 (the 'judgment under appeal'), ordered LivaNova PLC, formerly Sorin s.p.a., within the limit of the assets transferred as a part of the corporate division, to reimburse the costs associated with the primary and compensatory remediation of the environmental damage caused by the activities of the companies related to the Snia Group at the three abovementioned sites, assessing them to be EUR 453 587 327.48 overall. The company LivaNova brought an appeal before the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

The essential arguments of the parties in the main proceedings

7 Before the Supreme Court of Cassation the appellant alleges infringement of Articles 2506-bis and 2506-quater of the Italian Civil Code, to the extent that Sorin was also, erroneously, found liable for those damages caused by conduct (by omission or act) occurring after the division, in breach of the time limit imposed by the legislation in relation to the '*liabilities*' or '*debts*' already existing at the time of that division. The appellant criticises the judgment under appeal on the ground that it does not note the difference in the scope of application of the different rules, since Article 2506-bis of the Italian Civil Code focuses on '*liabilities*' whereas Article 2506-quater instead focuses on unpaid '*debts*'.

8 According to the appellant, the distinction between the concepts should mean that the (accounting) notion of 'debt' includes only liabilities which are determined and which certainly exist, with a definite due date and amount, and which are not to be confused with '*provisions*' for risks, charges and '*commitments*', given that those – which constitute '*liabilities*' – are relevant only for the separate purposes of Article 2506-bis of the Italian Civil Code. The appellant argues that, pursuant to Article 2506-bis of the Italian Civil Code, it is not possible to allocate to it, the recipient of the division, the damages caused by conduct (by omission or act) occurring after the division, in breach of the time limit laid down by the legislation in relation to the 'liabilities' or 'debts' already existing at the time of that division.

Succinct presentation of the reasoning in the request for a preliminary ruling

9 According to the referring court it is necessary to determine whether the interpretation of the national provision (Article 2506-bis of the Italian Civil Code) is compatible with EU law, and in particular with the Sixth Directive 82/891/EEC. For this reason it appears necessary to make a reference to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU.

10 The question referred concerns, in particular, the concept of 'liability … not allocated by the draft terms of division' referred to in Article 3 of the abovementioned Sixth Directive 82/891/EEC, which is to be considered as a parameter for examining the concept of 'liabilities, the allocation of which cannot be inferred from the draft terms' under Article 2506-bis of the Italian Civil Code, for the purposes of determining the joint and several liability of the recipient of a partial division operation.

11 It should be pointed out at the outset that, from a factual point of view, the Court of Appeal, Milan, established that there is a causal link between the activity carried out by Snia, and the companies related to it, and the pollution of the areas in question.

12 In particular, it was established that Snia was liable, as owner of the areas and establishments, direct manager and parent company of the subsidiary companies

and companies acquired from time to time, for an intensive environmental exploitation activity that had lasted, across the three sites, for almost a century, with extremely serious consequences in terms of contamination and pollution. That liability was acknowledged by Snia itself. The judgment under appeal emphasised 'the fact that the events and circumstances giving rise to Snia's liability … certainly occurred prior to 13 May 2003', in so far as it can be inferred from documentary evidence specifically mentioned, originating from its corporate bodies. The abovementioned liability refers to the harmful consequences of ongoing unlawfulness, which were likely to worsen over time.

13 The appellant argued that it would be unlawful to find Sorin (now LivaNova) – as the recipient of the division – also liable for any worsening of the damage which occurs after the division.

14 The Supreme Court of Cassation observes that this assertion is incomplete and in any event inconsistent, given that the worsening relates to the consequences of ongoing unlawfulness for which the company being divided may still be liable on the basis of conduct prior to the division. It is relevant in that regard that the continuation of conduct (by act or even only by omission) of Snia after January 2004 was clearly described in the judgment under appeal as a mere development of the prior conduct which had been ongoing for years.

15 From that point of view, the judgment determined the damages – for primary, complementary and compensatory remediation – on the established premiss that the pollution of all the areas had a causal link attributable, either directly or indirectly, to Snia's activity, regardless of developments after January 2004. For all the areas there is a causal link between the specific industrial activity carried out by the companies related to the Snia group and the contamination present on site. It should be added that such a link was established in accordance with EU legislation on environmental damage referred to in Commission Notice 2021/C 118/01 of 7 April 2021. The latter, with reference to the judgment of the Court of Justice in Case C-378/08, recognised 'as for the causal link' that, if the legislation of a Member State so provides, 'a presumption, based on plausible evidence, is sufficient in order to establish the link', which is capable of 'justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities'. That is precisely what is inferred from the judgment under appeal.

– *The company law issue*

16 The appellant argues that, pursuant to Article 2506-bis of the Italian Civil Code, it is not possible to find it, as the recipient of the division, liable for the damages caused by conduct (by omission or act) occurring after the division, in breach of the time limit laid down by the legislation in relation to the 'liabilities' or 'debts' already existing at the time of that division (see the arguments set out above in paragraphs 7 and 8).

17 As regards the claim that it is also necessary for the purposes of joint and several liability to distinguish debts from liabilities, in the sense of understanding the provision as being intended to mean that the joint and several liability of the recipient covers only to the liabilities already determined prior to the division operation, the reply of the Supreme Court of Cassation is that, on the basis of the provision of national law, it is not necessary to do so. LivaNova's assertion that it is necessary does not take into account the reasoning with which the Court of Appeal, Milan, established that there was a causal link between the activity attributable to Snia, and to the companies related to it from time to time, and the pollution of all three areas in question.

18 With regard to the corporate division, for the purposes of potential joint and several liability, the compensatory debt arose prior to that division, since the damage clearly falls within the broader expression ('*liabilities*') used by the Italian legislator in Article 2506-bis of the Italian Civil Code. That expression does not imply any predetermined qualitative characteristic for the purposes of the potential allocation of the liabilities, since the liabilities may also take the form of debts, including debts that are separate from the assets that are being divided.

19 What is decisive, therefore, for the purposes of interpreting the national provision, is that the court adjudicating on the substance found, in relation to Snia, that the conduct causing the environmental damage, had occurred prior to the division. That conduct establishes the scope of the liability for compensation for the corresponding ongoing unlawfulness. The relevant fact may consist in the infringement of any requirement relating to human activities which may result in a significant alteration or deterioration in the environment, inferable from all the rules of the legal system, which certainly include those relating to non-contractual civil unlawfulness and those relating to liability deriving from carrying out dangerous activities. Indeed, the very notion of environmental damage in Italian law covers all the consequences of the facts established, from definitive loss (which correlates to destruction) or deterioration (or qualitative worsening) of an environmental resource, to the alteration of the environment itself, consisting in the definitive modification of the ecological, biological and sociological balance of the territory with a visible modification of the existing assets.

20 This interpretation of the provision of national law is, in the referring court's view, preferable also on the basis of the rationale of creditor protection that underlies it.

21 Moreover, the Court of Justice of the European Union itself, in its judgment of 30 January 2020, *I.G.I.*, C-394/18, EU:C:2020:56, examining, in relation to divisions of limited liability companies, the issue of the protection of the interests of creditors of the company being divided for the purposes of an action to set aside, explicitly acknowledged that the Sixth Directive 82/891/EEC requires, pursuant to recital 8 thereof, that 'creditors, including debenture holders, and persons having other claims on the companies involved in a division, must be protected so that the division does not adversely affect their interests'. Thus, any

interpretation of the relevant provisions must ensure legal certainty as regards relations between the companies involved in the division, and between those companies and third parties.

22 The interpretation of Article 2506-bis of the Italian Civil Code calls for an interpretation consistent with the corresponding wording of the version of the Sixth Directive 82/891/EEC applicable at the time of the facts in question.

23 Article 3 of the Sixth Directive 82/891/EEC, which is applicable also to division by formation of new companies (under Article 22 thereof), contains the rule that '*where a liability is not allocated by the draft terms of division and where the interpretation of these terms does not make a decision on its allocation possible, each of the recipient companies shall be jointly and severally liable for it. Member States may provide that such joint and several liability be limited to the net assets allocated to each company*'. This provision is in essence based on a similar concept to the one subsequently transposed in the national provision: '*liabilities not allocated in the draft terms of division*'. The fact that that wording is substantively equivalent means that this Court, as the court of last instance, is required to make, pursuant to Article 267 TFEU, the reference to the Court of Justice of the European Union for a preliminary ruling in order to check that there are no interpretative obstacles, in the Directive, to the abovementioned interpretation of the national provision.

24 Given the particular importance of the subject matter of the case, in particular from an economic perspective, it is requested that the matter be examined by the Court of Justice as a matter of urgency.