Case C-224/24

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:

25 March 2024

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

21 March 2024

Appellant:

Società Eredi Raimondo Bufarini Srl – Servizi Ambientali

Respondents:

Ministero dell'Interno

Ministero della Transizione Ecologica

Comitato tecnico regionale delle Marche

Coordinamento per l'uniforme applicazione sul territorio nazionale di cui all'art. 11 del D.Lgs. 105/2015

Other parties:

Regione Marche

FP

Subject matter of the main proceedings

Appeal brought before the Consiglio di Stato (Council of State) against a judgment of the Tribunale amministrativo regionale per le Marche (Regional Administrative Court, Marche, Italy) concerning a formal notice issued by the Comitato tecnico regionale (Regional Technical Committee, 'CTR') of the

Marche Region (Italy) against the appellant pursuant to national legislation transposing Directive 2012/18/EU.

Subject matter and legal basis of the request

Reference for a preliminary ruling pursuant to Article 267 TFEU concerning the interpretation of Articles 3 and 7 of Directive 2012/18/EU. In particular, clarification is sought as to the interpretation of those provisions with reference to a practice of a waste treatment installations operator consisting in monitoring the quantity of dangerous substances and with reference to national legislation establishing a single method for notifying the authorities of information on the treatment of such substances.

Questions referred for a preliminary ruling

(a) Does the definition of 'presence of dangerous substances' in Article 3(12) of Directive 2012/18/EU preclude a practice whereby the determination of the quantities of dangerous substances present in a waste treatment installation is conducted through an operational procedure implemented by the operator (and possibly authorised by the permit provided for in Article 23 of Directive 2008/98/EC or Article 4 of Directive 2010/75/EU) which classifies waste as 'mixtures' within the meaning of Article 3(11) of Directive 2012/18/EU and provides for constant monitoring of the quantity of dangerous substances present in the installation and ensures that the lower and upper thresholds laid down in column 2 and column 3 of Annex I to Directive 2012/18/EU are not exceeded?

(b) Does Article 7 of Directive 2012/18/EU, which provides that the operator is required to send 'a notification to the competent authority' containing the information listed in Article 7(1) of that directive, interpreted in accordance with the principles of competition and freedom of establishment, preclude a provision such as Article 13(1), (2) and (5) of decreto legislativo n. 105/2015 (Legislative Decree No 105/2015), which provides that the information must be communicated exclusively by means of 'a notification drawn up in accordance with the form set out in Annex 5' (paragraph 1), 'signed in the form of self-certification in accordance with the regulations in force' (paragraph 2), 'sent by the operator to the recipients referred to in paragraph 1 in electronic form using the telematics services and tools made available via the inventory of establishments likely to cause major accidents referred to in Article 5(3)' or 'exclusively by digitally signed certified electronic mail' (paragraph 5), thus ruling out a method of communication using 'an operational procedure implemented by the operator', providing for constant monitoring of the quantity of dangerous substances present in the installation and ensuring that the lower and upper thresholds laid down in column 2 and column 3 of Annex I to Directive 2012/18/EU are not exceeded?

Provisions of European Union law relied on

Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC ('Directive 2012/18/EU'): Articles 3 and 7.

Provisions of national law relied on

Decreto legislativo del 26 giugno 2015, n. 105 – Attuazione della direttiva 2012/18/UE relativa al controllo del pericolo di incidenti rilevanti connessi con sostanze pericolose (Legislative Decree No 105 of 26 June 2015 – Implementation of Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances; 'Legislative Decree No 105/2005'), the 'Seveso legislation' (as developed over time: decreto del Presidente della Repubblica n. 175 del 1988, di recepimento della cd. prima direttiva «Seveso» 82/501/CEE (Presidential Decree No 175 of 1988, transposing Directive 82/501/EEC, the 'Seveso I Directive'); d.lgs. n. 334 del 1999, di recepimento della cd. direttiva «Seveso-bis» 96/82/CE (Legislative Decree No 334 of 1999, transposing Directive 96/82/EC, the 'Seveso II Directive'; d.lgs. 105/2015, di recepimento della cd. direttiva «Seveso-ter» 2012/18/UE (Legislative Decree No 105/2015, transposing Directive 2012/18/EU, the 'Seveso III Directive')): Articles 3 and 13.

Article 3(n) of Legislative Decree No 105/2015 defines the concept of 'presence of dangerous substances' by reproducing the text of Article 3(12) of Directive 2012/18/EU.

Article 13 of Legislative Decree No 105/2015, which transposes the provisions of Article 7(1) and (2) of Directive 2012/18/EU, requires the operator 'to send, in accordance with the rules in paragraph 5', namely 'in electronic form using the telematics services and tools made available via the inventory of establishments likely to cause major accidents referred to in Article 5(3)' or 'exclusively by digitally signed certified electronic mail', 'a notification, drawn up in accordance with the form set out in Annex 5' to that legislative decree, containing the information listed in Article 13(2). That notification must be signed in the form of self-certification, assuming criminal liability in the event of false declarations (Articles 46, 47 and 76 of decreto del Presidente della Repubblica del 28 dicembre 2000, n. 445 – Testo unico delle disposizioni legislative e regolamentari in materia di documentazione amministrativa (Presidential Decree No 445 of 28 December 2000 – Consolidated Law on administrative documentation), and equivalent means of communication that do not provide for criminal liability are not permitted.

Under Italian legislation, currently established by Legislative Decree No 105/2015 and the annexes thereto:

- the Seveso legislation does not apply to establishments where dangerous substances do not exceed the threshold set out in column 2 (lower tier);

- on the other hand, where the presence of dangerous substances is between the threshold indicated in column 2 (lower tier) and the threshold set out in column 3 (higher tier), the provisions on 'lower-tier establishments' apply;

- finally, when the threshold referred to in column 3 is exceeded, the legislation must be applied in full ('higher-tier establishments') (see Article 3 of Legislative Decree No 105/2015).

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant in the main proceedings operates an installation for the treatment of both hazardous and non-hazardous liquid waste, pursuant to an integrated environmental permit issued by the competent provincial authority. That permit allows the company to store up to 800 tonnes of hazardous waste and to treat up to 200 tonnes of such hazardous waste per day.

2 On 7 November 2019, the Director-General of the Vigili del Fuoco delle Marche (Fire Brigade of Marche, Italy), acting as chairman of the regional technical committee of that region, set up a working group to draw up a report on whether the installation operated by the appellant was subject to the legislation on the control of major-accident hazards involving dangerous substances. Having completed its investigation, the working group took the view that the treatment installation could not be excluded from the scope of that legislation.

3 By decision of 28 May 2020, the Marche regional technical committee endorsed the conclusions of the working group and gave the appellant formal notice to comply with that legislation. Having been informed that the appellant had put in place a new procedure for the control of dangerous substances present in the establishment, the committee again gave it formal notice, by decision of 24 November 2020, to comply with the above-mentioned legislation or, in the alternative, to limit the use of the tanks in the establishment so as not to exceed the prescribed limits.

4 The appellant challenged the decision of 24 November 2020 before the Regional Administrative Court, Marche, which dismissed the action by judgment of 23 June 2021.

5 The appellant brought an appeal against that judgment before the referring court, the Council of State. In particular, the appellant asked for a question to be referred to the Court of Justice for a preliminary ruling regarding whether, in order to identify the dangerous substances present in an establishment, pursuant to Article 3(12) of Directive 2012/18, the operator of that establishment may put in place a procedure for monitoring the quantities of dangerous substances present in

the waste treatment plant operated by it, in order to ensure that the thresholds laid down in columns 2 and 3 of Annex I to that directive are not exceeded.

6 By its non-final judgment No 490 of 2022, the Council of State stayed the proceedings and referred the following three questions, which are the subject of Case C-144/22, to the Court of Justice of the European Union for a preliminary ruling:

7 ‘(a) Does the correct interpretation of Article 267 TFEU require a national court against whose decisions there is no judicial remedy under national law to make a reference for a preliminary ruling on a question concerning the interpretation of [EU] law relevant to the dispute in the main proceedings, even if it is possible to rule out any interpretative doubt as to the meaning to be attributed to the relevant European provision (…) but it is not possible to establish in detail, from a subjective point of view, having regard to the conduct of other courts, that the interpretation provided by the referring court is the same as that likely to be given by the courts of the other Member States and by the Court of Justice when seised of the same question?

8 (b) In order to preserve the constitutional and European values of the independence of the courts and to ensure the reasonable duration of legal proceedings, may Article 267 TFEU be interpreted as precluding the bringing of civil or disciplinary liability proceedings against a national supreme court that has examined and rejected a request for a preliminary ruling on the interpretation of EU law, either automatically or at the discretion of the party bringing the action?

9 (c) Does the definition of ‘presence of dangerous substances’ in Article 3(12) of Directive 2012/18/EU preclude a practice whereby the determination of the quantities of dangerous substances present in a waste treatment installation is conducted through an operational procedure implemented by the operator (and possibly authorised by the permit provided for in Article 23 of Directive 2008/98/EC or Article 4 of Directive 2010/75/EU) which classifies waste as ‘mixtures’ within the meaning of Article 3(11) of Directive 2012/18/EU and provides for constant monitoring of the quantity of dangerous substances present in the installation and ensures that the lower and upper thresholds laid down in column 2 and column 3 of Annex I to Directive 2012/18/EU are not exceeded?

10 By order of 15 December 2022 in Case C-144/22, the Court of Justice ruled (in summary):

11 (a) on the first question, that the national court may refrain from referring if it is convinced that the other courts or tribunals of last instance of the Member States and the Court of Justice would share its view, having regard to the interpretative criteria mentioned in paragraphs 36 to 42 and the considerations set out in paragraphs 43 to 45 of the order of the Court of Justice;

12 (b) on the second question, that it is solely for the national court which must assume responsibility for the subsequent judicial decision to determine the need

for and relevance of the reference for a preliminary ruling and the Court is not bound to give a ruling where the interpretation sought bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical (paragraph 57 of the order in Case C-144/22);

13 (c) on the third question, formulated in the event that the Court should answer the previous questions in the negative, the Court stated that it was apparent from the order for reference that the third question had been raised only in the event of an affirmative answer to the first question and that, in view of the answer given to the first question, there was no need to answer the third question.

14 The case was referred back for a judgment by the Council of State.

15 In its statement of 19 June 2023, the appellant (also the appellant before the Council of State) again requested a reference for a preliminary ruling.

16 On the basis of the guidance provided by the Court of Justice regarding the three questions raised in Case C-144/22, the Council of State considers, as regards the first two questions, concerning the nature of the reference for a preliminary ruling and the particular features of the Italian national legislation on the civil liability of the court, that it must take note of the answers given by the Court and that it must resolve the issue with an interpretation compatible with the guidance provided by the Court.

17 With regard to the third question, concerning the rules applicable to the present case (the 'Seveso legislation'), the Council of State considers that the continuing uncertainty as to interpretation relevant to the decision, relating in particular to the concepts of 'presence of dangerous substances' in Article 3(12) of Directive 2012/18/EU and the expression 'notification to the competent authority' in Article 7 of that directive, exceptionally requires the submission of a further request for a preliminary ruling to the Court of Justice.

The essential arguments of the parties in the main proceedings

18 The appellant submits that the Seveso legislation should allow the operator of a waste treatment installation to demonstrate that the presence of dangerous substances in its establishment never exceeds the 'lower threshold' by means of a management system that provides for the continuous monitoring of the substances present in the establishment. In the appellant's view, EU law precludes legislation such as the Italian legislation that excludes methods of sending information other than those described above.

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

19 According to the referring court, it is crucial to clarify the concept of 'presence of dangerous substances' defined in Article 3(12) of Directive 2012/18/EU and reproduced in the national legislation.

20 The interpretation of Article 7(1) and (2) of Directive 2012/18/EU, according to which 'Member States shall require the operator to send a notification the competent authority containing', inter alia, 'information sufficient to identify the dangerous substances and category of substances involved or likely to be present' is also crucial.

21 In particular, the referring court is uncertain as to the compatibility with EU law of the national implementing legislation, which, by providing that the operator is required 'to send, in accordance with the rules in paragraph 5 (…) a notification, drawn up in accordance with the form contained in Annex 5', containing the information listed in Article 13(2), permits only one method for sending that information.

22 Although the wording of the directive leaves a certain margin of discretion in the choice of application, focusing solely on the system's 'effectiveness', it also does not appear to prevent a Member State from choosing 'a single method' for communicating information.

23 The wording of the directive allows the operator to make 'a notification', and the term used in the directive does not seem to require a predetermined method: that poses difficulties in interpreting the directive, which could lead to divergences in case-law within the Union, according to the criterion set out in paragraph 37 of the Court of Justice's order in Case C-144/22.

24 Neither the parties to the proceedings nor the referring court have noted any particular divergences in the different language versions of the directive, in the light of paragraph 40 of the Court of Justice's order in Case C-144/22.

25 However, according to the referring court, it is difficult to interpret the use, in the context of EU legislation, of the expression 'a notification'; on the one hand, it could be considered that that term must be understood in the sense determined by each national legislature, but on the other hand, it could be considered that 'a notification' means that the operator may use any method of communicating information (paragraph 41 of the Court of Justice's order in Case C-144/22, according to which EU law uses terminology which is peculiar to it and autonomous legal concepts).

26 In that regard, it could be argued that the EU Directive – interpreted in accordance with the principles of the Treaty on competition and freedom of establishment – does not allow the national legislature to impose a 'single method' (sending self-certification with assumption of criminal liability in the event that false declarations are made) to the exclusion of other forms of technologically more

innovative and advanced verification and monitoring, that are less restrictive of competition within the EU, and are just as effective but simpler and less onerous for undertakings.

27 The Council of State confirms that the question is relevant because, if the Court of Justice decides that Article 7 of Directive 2012/18/EU precludes (or does not preclude) national legislation that governs only one method of communicating information, the Council of State will assess whether the Italian authorities were required to allow (or not allow) the appellant to communicate the information in different ways and, consequently, will assess whether the formal notice at issue is lawful or unlawful.

28 The referring court also wishes the Court to rule, if only incidentally, on the question already referred to in the first two questions in Case C-144/22, regarding the nature of the reference for a preliminary ruling and the particular features of the Italian national legislation on civil liability of the court for failure to make a mandatory reference for a preliminary ruling (Article 2(3bis) of legge n. 117 del 1988 (Law No 117 of 1988)).

29 That court, taking note, first, of the firm orientation expressed by the Court of Justice on the first of those questions and, second, of the decision of manifest inadmissibility relating to the second of those questions, considers that it must independently identify a principle of interpretation in that regard, seeking the solution in EU sources and the considerations already set out by the Court of Justice (in particular in its judgment in *Consorzio Italian Management*, C-561/19), by the European Court of Human Rights, and in the context of the discussions with other European supreme administrative courts that took place at an official meeting of the A.C.A. (Association of the Councils of State and Supreme Administrative Jurisdictions), held in Sweden in October 2023.

30 That debate reaffirms, first, the important contribution of the Italian courts to the pan-European dialogue between the Court of Justice and European courts, including through the instrument of the reference for a preliminary ruling.

31 Second, it points out that the large number of references for a preliminary ruling made by the Italian courts, in particular the Council of State, in comparison with those of the supreme (administrative) courts of other Member States highlights the risk that the reference for a preliminary ruling may be used by courts as ‘self-defence’ and automatically, even in cases where the national legislation to be applied to the specific case does not raise doubts as to its compatibility with EU law, under the *acte clair* principles. It argues that such a situation is due to the fact that the above-mentioned Italian rules on the court’s liability might affect the national court’s attitude, leading it to formulate questions that are then held to be manifestly inadmissible, solely because certain parties to the proceedings raise the possibility of bringing an action for damages in the event of failure to make a reference (see judgment of 12 December 2023 in Case C-407/23).

32 According to the referring court, in Case C-561/19, *Consorzio Italian Management* (in particular paragraphs 50, 51 and 53 to 55), the Court of Justice states that a 'mandatory' request for a reference consists not of an 'automatic obligation to make a reference' but an 'obligation to rule on the request for a preliminary ruling and to state reasons' for the circumstances that rule it out, according to the settled EU case-law on *acte clair*, *acte éclairé* and the relevance of the question submitted by the parties as a question to be referred for a preliminary ruling.

33 Those conclusions are, the referring court submits, confirmed by the principles set out by the European Court of Human Rights (judgment of 20 September 2011, *Ullens de Shooten [Schooten] and Rezabek v. Belgium*, 3989/07 and 38353/07; judgment of 10 April 2012 in Case 4832/04 *Vergauwen and Others v. Belgium*, § 87 to 106 and, in particular,§ 89 to 91). In particular, in the latter judgment, the European Court of Human Rights held that stating reasons for deciding not to make a reference is sufficient to avoid infringement of Article 6(1) of the ECHR.

34 Consequently, where the national court expressly states the reasons for not referring the case, there cannot be any liability for damages and/or disciplinary liability on the part of the court, as to hold otherwise would undermine the independence of the judiciary.

35 In conclusion, according to that analysis, in order to determine the possible liability of the court for failure to make a reference to the Court of Justice it is only necessary to take into consideration whether or not the obligation to state reasons has been complied with in relation to the decision not to pursue a reference for a preliminary ruling.