



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 December 2023*

(Reference for a preliminary ruling – Approximation of laws – Environment – Directive 94/62/EC – Packaging and packaging waste – Directive 98/34/EC – Information procedure in the field of technical standards and regulations and of rules on Information Society services – Obligation on the Member States to notify the European Commission of any draft technical regulation – National legislation containing stricter technical rules than those laid down by EU legislation)

In Case C-86/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 7 February 2022, received at the Court on 9 February 2022, in the proceedings

Papier Mettler Italia Srl

v

Ministero della Transizione Ecologica,

Ministero dello Sviluppo Economico,

intervener:

Associazione Italiana delle Bioplastiche e dei Materiali Biodegradabili e Compostabili – Assobioplastiche,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, N. Piçarra, M. Safjan, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 22 March 2023,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

- Papier Mettler Italia Srl, by V. Cannizzaro, avvocato,
- the Associazione Italiana delle Bioplastiche e dei Materiali Biodegradabili e Compostabili – Assobioplastiche, by G. Belotti, F. De Leonardis and S. Micono, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by M. Cherubini and G. Palatiello, avvocati dello Stato,
- the European Commission, by M. Escobar Gómez, G. Gattinara and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2023,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1, 2, 9, 16 and 18 of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10), as amended by Commission Directive 2013/2/EU of 7 February 2013 (OJ 2013 L 37, p. 10) ('Directive 94/62'), Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 (OJ 2012 L 316, p. 12) ('Directive 98/34'), and Article 114(5) and (6) TFEU.
- 2 The request has been made in proceedings between Papier Mettler Italia Srl and the Ministero della Transizione Ecologica (Ministry of Ecological Transition, Italy) ('the Ministry of Environmental Affairs') and the Ministero dello Sviluppo Economico (Ministry of Economic Development, Italy) concerning, first, the lawfulness of a decree imposing compliance with certain technical specifications for the marketing of plastic shopping bags and, second, compensation for the damage allegedly caused by the adoption of that decree.

Legal context

European Union law

Directive 94/62

- 3 The first, second, fourth, seventh and thirty-third recitals of Directive 94/62 state:

'Whereas the differing national measures concerning the management of packaging and packaging waste should be harmonised in order, on the one hand, to prevent any impact thereof on the environment or to reduce such impact, thus providing a high level of environmental

protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the [European] Community;

Whereas the best means of preventing the creation of packaging waste is to reduce the overall volume of packaging;

...

Whereas the reduction of waste is essential for the sustainable growth specifically called for by the Treaty on European Union;

...

Whereas, in line with the Community strategy for waste management set out in Council resolution of 7 May 1990 on waste policy [(OJ 1990 C 122, p. 2)] and Council Directive 75/442/EEC of 15 July 1975 on waste [(OJ 1975 L 194, p. 39)], the management of packaging and packaging waste should include as a first priority, prevention of packaging waste and, as additional fundamental principles, reuse of packaging, recycling and other forms of recovering packaging waste and, hence, reduction of the final disposal of such waste;

...

Whereas Member States should, without prejudice to Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [(OJ 1983 L 109, p. 8)], notify the [European] Commission of drafts of any measures they intend to adopt before adopting them, so that it can be established whether or not they comply with the Directive’.

4 Article 1 of Directive 94/62, headed ‘Objectives’, provides:

‘1. This Directive aims to harmonise national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.

2. To that end, this Directive lays down measures aimed, as a first priority, at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, hence, at reducing the final disposal of such waste.’

5 Article 2 of the directive, entitled ‘Scope’, provides:

‘1. This Directive covers all packaging placed on the market in the Community and all packaging waste, whether it is used or released at industrial, commercial, office, shop, service, household or any other level, regardless of the material used.

...’

- 6 Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62 as regards reducing the consumption of lightweight plastic carrier bags (OJ 2015 L 115, p. 11) inserted paragraphs 1b and 1c into Article 3 of Directive 94/62, entitled ‘Definitions’. Those paragraphs provide:

‘For the purposes of this Directive:

...

- 1b. “plastic carrier bags” shall mean carrier bags, with or without handle, made of plastic, which are supplied to consumers at the point of sale of goods or products;
- 1c. “lightweight plastic carrier bags” shall mean plastic carrier bags with a wall thickness below 50 microns’.
- 7 Directive 2015/720 also inserted paragraphs 1a and 1b into Article 4 of Directive 94/62, entitled ‘Prevention’. Those paragraphs provide:

‘1a. Member States shall take measures to achieve a sustained reduction in the consumption of lightweight plastic carrier bags on their territory.

Those measures may include the use of national reduction targets, maintaining or introducing economic instruments as well as marketing restrictions in derogation from Article 18, provided that these restrictions are proportionate and non-discriminatory.

Such measures may vary depending on the environmental impact of lightweight plastic carrier bags when they are recovered or disposed of, their composting properties, durability or specific intended use.

The measures taken by Member States shall include either or both of the following:

- (a) the adoption of measures ensuring that the annual consumption level does not exceed 90 lightweight plastic carrier bags per person by 31 December 2019 and 40 lightweight plastic carrier bags per person by 31 December 2025, or equivalent targets set in weight. Very lightweight plastic carrier bags may be excluded from national consumption objectives;
- (b) the adoption of instruments ensuring that, by 31 December 2018, lightweight plastic carrier bags are not provided free of charge at the point of sale of goods or products, unless equally effective instruments are implemented. Very lightweight plastic carrier bags may be excluded from those measures.

...

1b. Without prejudice to Article 15, Member States may take measures such as economic instruments and national reduction targets, as regards any kind of plastic carrier bags, regardless of their wall thickness.’

8 Article 9 of Directive 94/62, headed ‘Essential requirements’, provides:

‘1. Member States shall ensure that three years from the date of the entry into force of this Directive, packaging may be placed on the market only if it complies with all essential requirements defined by this Directive including Annex II.

...’

9 Article 16 of the directive, entitled ‘Notification’, provides:

‘1. Without prejudice to Directive 83/189/EEC, before adopting such measures, Member States shall notify the drafts of measures which they intend to adopt within the framework of this Directive to the Commission, excluding measures of a fiscal nature, but including technical specifications linked to fiscal measures which encourage compliance with such technical specifications, in order to permit the latter to examine them in the light of existing provisions following in each case the procedure under the above Directive.

2. If the proposed measure is also a technical matter within the meaning of Directive 83/189/EEC, the Member State concerned may indicate, when following the notification procedures referred to in this Directive, that the notification is equally valid for Directive 83/189/EEC.’

10 Article 18 of Directive 94/62, entitled ‘Freedom to place on the market’, provides:

‘Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.’

11 Annex II to Directive 94/62, entitled ‘[Essential] requirements on the composition and the reusable and recoverable, including recyclable, nature of packaging’, provides:

‘1. Requirements specific to the manufacturing and composition of packaging

- Packaging shall be so manufactured that the packaging volume and weight be limited to the minimum adequate amount to maintain the necessary level of safety, hygiene and acceptance for the packed product and for the consumer.
- Packaging shall be designed, produced and commercialised in such a way as to permit its reuse or recovery, including recycling, and to minimise its impact on the environment when packaging waste or residues from packaging waste management operations are disposed of.
- Packaging shall be so manufactured that the presence of noxious and other hazardous substances and materials as constituents of the packaging material or of any of the packaging components is minimised with regard to their presence in emissions, ash or leachate when packaging or residues from management operations or packaging waste are incinerated or landfilled.

2. Requirements specific to the reusable nature of packaging

The following requirements must be simultaneously satisfied:

- the physical properties and characteristics of the packaging shall enable a number of trips or rotations in normally predictable conditions of use,
- possibility of processing the used packaging in order to meet health and safety requirements for the workforce,
- fulfil the requirements specific to recoverable packaging when the packaging is no longer reused and thus becomes waste.

3. Requirements specific to the recoverable nature of packaging

(a) *Packaging recoverable in the form of material recycling*

Packaging must be manufactured in such a way as to enable the recycling of a certain percentage by weight of the materials used into the manufacture of marketable products, in compliance with current standards in the Community. The establishment of this percentage may vary, depending on the type of material of which the packaging is composed.

(b) *Packaging recoverable in the form of energy recovery*

Packaging waste processed for the purpose of energy recovery shall have a minimum inferior calorific value to allow optimisation of energy recovery.

(c) *Packaging recoverable in the form of composting*

Packaging waste processed for the purpose of composting shall be of such a biodegradable nature that it does not hinder the separate collection and the composting process or activity into which it is introduced.

(d) *Biodegradable packaging*

Biodegradable packaging waste shall be of such a nature that it is capable of undergoing physical, chemical, thermal or biological decomposition such that most of the finished compost ultimately decomposes into carbon dioxide, biomass and water.’

Directive 98/34

- 12 Article 1(12) of Directive 98/34, which was repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), but which remains applicable *ratione temporis* to the dispute in the main proceedings, provided:

‘For the purposes of this Directive, the following meanings shall apply:

...

12. “draft technical regulation”, the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made’.

- 13 Article 8(1) of Directive 98/34 provided:

‘Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

...’

- 14 Article 9(1) of that directive provided:

‘Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 8(1).’

Italian law

- 15 Article 1(1129) and (1130) of legge n. 296 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Law No 296 on provisions for drawing up the annual and multiannual State budget) of 27 December 2006 (GURI No 299 of 27 December 2006, Ordinary Supplement No 244), laid down a prohibition on the marketing of non-biodegradable plastic shopping bags, which should have been applied as from 1 January 2010. However, the entry into force of that prohibition was postponed until the adoption of decreto-legge n. 2 – Misure straordinarie e urgenti in materia ambientale (Decree-Law No 2 on urgent special measures concerning the environment) of 25 January 2012 (GURI No 20 of 25 January 2012) (‘Decree-law No 2/2012’). Article 2(1) of that decree-law provided for an extension of the time limit laid down in Article 1(1130) of Law No 296 of 27 December 2006 for the entry into force of that prohibition until the adoption of a decree by the Ministry of the Environment and the Ministry of Economic Development.
- 16 Decree-Law No 2/2012 was converted into a law, with amendments, by legge n. 28 – Conversione in legge, con modificazioni, del decreto-legge 25 gennaio 2012, n. 2, recante misure straordinarie e urgenti in materia ambientale (Law No 28 adopting into law, with modifications, Decree-Law No 2 of 25 January 2012 on urgent special measures concerning the environment) of 24 March 2012 (GURI No 71 of 24 March 2012). Article 2 of that decree-law then provided:

‘1. The time limit laid down in Article 1(1130) of [Law No 296 of 27 December 2006] for the entry into force of the prohibition on marketing of plastic shopping bags is postponed until the adoption of the decree referred to in paragraph 2 only for single-use polymer plastic shopping bags in compliance with the harmonised standard UNI EN 13432:2002, in accordance with the certifications issued by the accredited bodies, and of the marketing of reusable shopping bags manufactured with other polymers with a handle not included within the useful size of the bag and the thickness of which exceeds 200 microns if they are intended for food use and 100 microns if they are intended for other uses, and of reusable shopping bags manufactured with other polymers with a handle included within the useful size of the bag and the thickness of which exceeds 100 microns if they are intended for food use and 60 microns if they are intended for other uses.

2. Without prejudice to paragraph 1, by non-regulatory decree issued by the [Ministers for the Environment] and for Economic Development, having heard the detailed opinions of the

competent parliamentary commissions, notified in accordance with EU law, to be adopted before 31 December 2012 in accordance with the necessary hierarchy of measures to be adopted in relation to waste management ... additional technical specifications may be identified for the purposes of the marketing thereof, inter alia, by providing for the promotion or modification of existing facilities and, in any event, detailed rules for supplying information to consumers, without imposing a new or heavier burden on the public purse.’

- 17 Article 1 of decreto ministeriale n. 73 – Individuazione delle caratteristiche tecniche dei sacchi per l’asporto delle merci (Ministerial Decree No 73 identifying the technical specifications of shopping bags) of 18 March 2013 (GURI No 73 of 27 March 2013) (‘the decree at issue in the main proceedings’), entitled ‘Definitions’, provided:

‘For the purposes of this decree, the following definitions shall apply:

- (a) Shopping bags: bags available at sales points, in return for payment or free of charge, for consumers to carry foodstuffs and non-food products.

...’

- 18 Article 2 of the decree at issue in the main proceedings, entitled ‘Marketing’, provided:

‘1. The marketing of shopping bags included within one of the following categories shall be permitted:

- (a) biodegradable and compostable single-use bags, conforming to harmonised standard UNI EN 13432:2002;
- (b) reusable bags composed of polymers other than those mentioned in (a), with external handles to fit the useful size of the bag:
- (b.1) with a thickness exceeding 200 microns and containing at least 30% recycled plastic, if they are intended for food use;
- (b.2) with a thickness exceeding 100 microns and containing at least 10% recycled plastic, if they are not intended for food use;
- (c) reusable bags composed of polymers other than those mentioned in (a), having internal handles to fit the useful size of the bag:
- (c.1) with a thickness exceeding 100 microns and containing at least 30% recycled plastic, if they are intended for food use;
- (c.2) with a thickness exceeding 60 microns and containing at least 10% recycled plastic, if they are not intended for food use.

...’

- 19 Article 6 of the decree provided:

‘This Decree is subject to a notification procedure under [Directive 98/34] and shall enter into force only after that procedure has been concluded with a successful outcome.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 20 Papier Mettler Italia is a company the activity of which is the distribution of paper and synthetic and external packaging. It focused its business activity on the development and manufacture of polyethylene packaging; more specifically, plastic carrier bags such as shopping bags.
- 21 The Ministry of Environmental Affairs and the Ministry of Economic Development adopted, on 18 March 2013, the decree at issue in the main proceedings, which prohibits the manufacture and marketing of plastic shopping bags which do not meet certain requirements laid down therein. More specifically, Article 2 of that decree limited the placing on the market of biodegradable and compostable single-use bags which comply with harmonised standard UNI EN 13432:2002, and of reusable plastic carrier bags of a given thickness varying according to their shape and to whether they are intended for food use.
- 22 Papier Mettler Italia brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the referring court, seeking annulment of that decree and an order for compensation by the administration for all the damage caused by the adoption of that decree.
- 23 In support of that action, Papier Mettler Italia claims, in essence, that the decree at issue in the main proceedings is vitiated by unlawfulness on several grounds. In the first place, the Italian authorities failed to have regard to their obligation to notify the Commission of the draft decree in three respects. First, since that decree contains technical regulations within the meaning of Directive 98/34, those authorities failed to have regard to their obligation of prior notification of draft technical regulations, laid down in Article 8(1) of that directive. Second, those authorities infringed their obligation to notify the Commission in advance of the draft measures which they intended to adopt under Article 16 of Directive 94/62. Third, the authorities also infringed Article 114(5) TFEU, because they did not notify the Commission of the measures which they intended to adopt for the purposes of environmental protection.
- 24 In the second place, Papier Mettler Italia claims that the decree at issue in the main proceedings infringes Articles 1, 9 and 18 of Directive 94/62, as supplemented in Annex II thereto, because that decree allegedly establishes a prohibition on placing packaging on the market, even if that packaging meets one of the conditions for recovery laid down in point 3 of that annex. Papier Mettler Italia further claims that, even assuming that the adoption of that decree is intended to clarify rules laid down in Decree-Law No 2/2012, which also infringes provisions of that directive, the Italian authorities failed to apply EU law directly by disapplying that decree-law.
- 25 In the third and last place, Papier Mettler Italia argues that, in so far as the decree at issue in the main proceedings requires that all plastic carrier bags for sale in Italy must carry a mandatory reference in Italian informing consumers of their features, that decree constitutes an obstacle to the free movement of those goods.
- 26 The Ministry of the Environment and the Ministry of Economic Development begin by contending that, in order to break the habit of Italian consumers of using disposable plastic carrier bags for collecting organic waste, it became apparent that it was necessary to promote the use of biodegradable and compostable plastic carrier bags and reusable bags by way of technical regulations laid down by the decree at issue in the main proceedings.

- 27 Next, they state that the draft decree was notified in accordance with the requirements of Directives 94/62 and 98/34, because that notice was given on 12 March 2013 before the draft was published in the *Gazzetta ufficiale della Repubblica italiana* on 27 March 2013. Article 6 of the decree at issue in the main proceedings made the entry into force thereof subject to the condition that the procedure initiated with the Commission under Directive 98/34 had a favourable outcome.
- 28 In addition, the Italian authorities maintain that the principle of proportionality was complied with, because the prohibition established by the legislation at issue in the main proceedings is characterised by its selectivity, in so far as it covers only single-use plastic carrier bags which are dangerous for the environment. Accordingly, far from prohibiting the marketing of all plastic carrier bags, the decree at issue in the main proceedings authorises the marketing of single-use biodegradable and compostable plastic carrier bags in compliance with the harmonised standard UNI EN 13432:2002, of traditional plastic bags which are of a certain thickness and are therefore reusable and of reusable shopping bags made of materials other than polymer such as, for example, paper, natural fibre and polyamide fibre.
- 29 Last, the Italian authorities stress that the legislation did no more than anticipate the measures to protect the environment adopted subsequently at EU level.
- 30 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Do Article 114(5) and (6) TFEU, Article 16(1) of Directive [94/62] and Article 8 of [Directive 98/34] preclude the application of a national provision such as that laid down in the [decree at issue in the main proceedings], which prohibits the marketing of single-use shopping bags made of non-biodegradable materials but otherwise complying with the requirements laid down in [Directive 94/62], where that national provision containing more restrictive technical rules than the EU legislation was not notified by the Member State to the European Commission in advance, but only after the adoption and before the publication of the measure?
- (2) Must Articles 1 [and] 2, [Article] 9(1) and [Article] 18 of Directive [94/62], as supplemented by the provisions of points 1 [to] 3 of Annex II to the directive, be interpreted as precluding the adoption of a national rule prohibiting the marketing of single-use shopping bags made of non-biodegradable materials, which otherwise comply with the requirements laid down in Directive [94/62], or may the additional technical rules laid down by national law be justified by the aim of ensuring a higher level of environmental protection, considering, if need be, the specific problems regarding waste collection in the Member State and the need for that State to implement the EU obligations laid down in that related context?
- (3) Must Articles 1 [and] 2, [Article] 9(1) and [Article] 18 of Directive [94/62], supplemented by the provisions of points 1 [to] 3 of Annex II to the directive, be interpreted as constituting a clear and precise rule aimed at prohibiting any obstacle to the marketing of bags complying with the requirements laid down in the directive and leading to the necessary disapplication of any conflicting national legislation by all organs of the State, including public authorities?

- (4) Lastly, could the adoption of national legislation prohibiting the marketing of single-use non-biodegradable shopping bags manufactured in compliance with the requirements laid down in [Directive 94/62], where that national legislation is not justified by the aim of ensuring a higher level of environmental protection, by the specific problems regarding waste collection in the Member State and by the need for that State to implement the EU obligations laid down in that related context, constitute a manifest and serious infringement of Article 18 of [Directive 94/62]?’

Admissibility of the request for a preliminary ruling

- 31 The Associazione Italiana delle Bioplastiche e dei Materiali Biodegradabili e Compostabili – Assobioplastiche (Italian Association of Bioplastics and Biodegradable and Compostable Materials – Assobioplastiche; ‘the AIB’) and the Italian Government submit, in essence, that the request for a preliminary ruling is inadmissible on the ground that, as the notification procedure did not have a successful outcome, the decree at issue in the main proceedings never entered into force or, at least, would have been subsequently repealed.
- 32 The AIB raises another ground of inadmissibility of the request for a preliminary ruling, arguing that the referring court failed to have regard to paragraph 1a introduced into Article 4 of Directive 94/62, in that that paragraph lays down specific provisions regarding plastic carrier bags.
- 33 It is not appropriate to uphold any of those grounds.
- 34 It should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 27 and the case-law cited).
- 35 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or 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 (judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 28 and the case-law cited).
- 36 That is not so in this case. As is apparent from the order for reference, the outcome of the dispute in the main proceedings is dependent on the answers which the Court has been called on to give to the four questions asked, since those answers will allow the referring court to rule on the action for damages brought by Papier Mettler Italia, which claims a loss of profit caused by the prohibition on the sale of single-use bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set by Directive 94/62 following the entry into force of the prohibition laid down in the decree at issue in the main proceedings.

- 37 In that connection, it must be borne in mind that the Court must take into account, under the division of jurisdiction between the Courts of the European Union and national courts, the factual and legal context, as set out in the order for reference, of the questions referred for a preliminary ruling, meaning that a reference for a preliminary ruling cannot be examined in the light of the interpretation of national law defended by the government of a Member State or by a party to the main proceedings (see, to that effect, judgment of 15 April 2021, *État belge (Circumstances subsequent to a transfer decision)*, C-194/19, EU:C:2021:270, paragraph 26 and the case-law cited).
- 38 In those circumstances, it cannot be maintained that the interpretation sought bears no relation to the actual facts of the main action or its purpose, or that the problem raised by the national court is hypothetical. Moreover, the Court has before it the factual or legal material necessary to provide a useful answer to the questions submitted to it.
- 39 In addition, the AIB's argument alleging failure to have regard to paragraph 1a introduced into Article 4 of Directive 94/62 must be rejected, given that that paragraph is not applicable *ratione temporis* to the facts of the main proceedings. That paragraph was inserted into that directive by Directive 2015/720 and, consequently, after those facts occurred.
- 40 It follows that the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

- 41 By its first question, the referring court asks, in essence, whether Articles 8 and 9 of Directive 98/34 and Article 16 of Directive 94/62 must be interpreted as precluding the adoption of national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set by Directive 94/62, where the Commission was notified of that legislation only a few days before it was adopted and published.
- 42 As a preliminary matter, the Court observes that it is common ground in the present case that Article 2 of the decree at issue in the main proceedings, prohibiting the manufacture and marketing of plastic shopping bags which do not meet certain requirements detailed therein, as recalled in paragraph 21 of the present judgment, is a 'technical regulation' within the meaning of Article 1 of Directive 98/34.
- 43 Following that preliminary observation, it must be borne in mind in the first place that, according to settled case-law, Directive 98/34 is designed to protect, by means of preventive monitoring, the free movement of goods, which is one of the foundations of the European Union, and that this control serves a useful purpose in that technical regulations falling within the scope of that directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest (see, to that effect, judgments of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraphs 40 and 48; of 8 September 2005, *Lidl Italia*, C-303/04, EU:C:2005:528, paragraph 22; and of 9 June 2011, *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, C-361/10, EU:C:2011:382, paragraph 10).

- 44 It is also apparent from the Court's settled case-law that a technical regulation cannot be applied if it has not been notified in accordance with Article 8(1) of Directive 98/34, or if, though notified, it has been adopted and implemented before the end of the three-month standstill period required under Article 9(1) of that directive (judgment of 16 July 2015, *UNIC and Uni.co.pel*, C-95/14, EU:C:2015:492, paragraph 29 and the case-law cited).
- 45 In that connection, regarding, first, the obligation of prior notification laid down in Article 8(1) of Directive 98/34, the Court observes that, in accordance with that provision, the Member States are to notify the Commission of any 'draft technical regulation', which is defined in Article 1(12) of the directive as a rule 'being at a stage of preparation at which substantial amendments can still be made'.
- 46 It is apparent from the order for reference that the Commission was, first of all, notified of the decree at issue in the main proceedings on 12 March 2013 pursuant to Article 8 of Directive 98/34. That decree was then adopted on 18 March 2013 and, lastly, published in the *Gazzetta ufficiale della Repubblica italiana* on 27 March 2013.
- 47 It follows that that notification cannot be regarded as concerning a 'draft technical regulation' within the meaning of Article 1(12) of the directive, because that notification concerned, as observed by the Advocate General in point 45 of his Opinion, not a 'draft technical regulation' within the meaning of that provision, but a final version thereof, which was not at a stage of preparation at which substantial amendments could still be made or account be taken of observations and detailed opinions issued by the Member States following that notification.
- 48 Second, the adoption of the decree at issue in the main proceedings within six days of its notification to the Commission under Article 8(1) of that directive also infringes the obligation laid down in Article 9(1) thereof, under which Member States are to postpone the adoption of a 'draft technical regulation' for three months from the date of receipt by the Commission of the communication referred to in Article 8(1) of the directive.
- 49 In that connection, the two grounds relied on by the Italian Government to justify the adoption of the decree at issue in the main proceedings in such circumstances are not persuasive.
- 50 In so far as that government maintains that the prohibition on marketing covered by the decree at issue in the main proceedings merely reproduced a legal framework of which the Commission had already been notified on 5 April 2011 as 'draft legislation on the prohibition on the marketing of non-biodegradable plastic shopping bags', the Court notes, as did the Advocate General in points 49 and 50 of his Opinion, that the notification of the project concerned cannot be analysed as a mere repetition of the 2011 notification. The decree at issue in the main proceedings contains stricter technical specifications than those in the document notified on 5 April 2011, so that the Commission had to be notified of that decree under Article 8(1) of Directive 98/34.
- 51 Moreover, that government maintains that the entry into force of the decree at issue in the main proceedings was made conditional, under Article 6 therefore, on the 'successful outcome' of the notification procedure initiated on 12 March 2013 on the basis of Article 8(1) of Directive 98/34. However, that procedure did not have such an outcome because the Commission did not issue an opinion regarding that decree. That argument must be rejected given that, first, the adoption and publication of that decree are capable per se of having certain effects on the free movement of the goods concerned; second, they did not make it possible to take account of the observations

and detailed opinions issued by the Kingdom of the Netherlands, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland; third, as observed by the Advocate General in point 52 of his Opinion, they constitute a legislative technique which is incompatible with the principle of legal certainty.

- 52 It follows from the foregoing considerations that the notification of the decree at issue in the main proceedings sent to the Commission only a few days before that decree was adopted and published fails to have regard to Article 8(1) and Article 9 of Directive 98/34.
- 53 In the second place, it is necessary to determine whether a Member State's failure to have regard to its obligation of prior notification of draft measures which it intends to adopt within the framework of Directive 94/62 under Article 16(1) thereof results in the legislation concerned being inapplicable and therefore unenforceable against individuals, similarly to the consequences recalled in paragraph 44 above of a Member State's failure to have regard to its obligation of prior notification of technical regulations laid down in Article 8(1) of Directive 98/34.
- 54 In that respect, Article 16(1) of Directive 94/62 is limited, in essence to imposing the obligation on Member States to notify the Commission of draft measures which they intend to adopt in the context of that directive, before those measures are adopted, so that that institution can examine them in the light of the existing provisions. Article 16(2) of that directive provides that, if the proposed measure is also a technical matter within the meaning of Directive 98/34, the Member State concerned may indicate, when following the notification procedures referred to in Directive 94/62, that the notification is equally valid for Directive 98/34.
- 55 It follows from the wording of Article 16 of Directive 94/62 that that article does not lay down an EU procedure for the review of those drafts and does not make the entry into force of those drafts conditional on the agreement of or absence of opposition by the Commission.
- 56 The objective pursued by that directive is, as is apparent from recital 1 thereof, to harmonise the differing national measures concerning the management of packaging and packaging waste in order, first, to prevent any impact thereof on the environment or to reduce such impact, thus providing a high level of environmental protection, and, second, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition. The more specific objective pursued in Article 16 of that directive is, as is apparent from recital 33 thereof, to allow the Commission to establish whether the measures which are intended to be adopted comply with the directive.
- 57 The obligation imposed on Member States in Article 16(1) of Directive 94/62 is therefore intended to allow the Commission to be informed of national measures which the Member States intend to adopt in the field of packaging and packaging waste, in order to be able to assess whether the draft measures submitted to it are compatible with EU law and, as the case may be, to draw the appropriate legal consequences therefrom.
- 58 It follows that neither the wording nor the purpose of Article 16(1) of Directive 94/62 make it possible to consider that the failure to comply with the obligation of prior notification imposed on Member States produces the same effects, recalled in paragraph 44 of the present judgment, as the failure to have regard to the obligation of prior notification laid down in Article 8 of Directive 98/34.

- 59 As argued by the Commission in its written observations, the fact that Article 16 of Directive 94/62 refers to Directive 83/189, which was replaced by Directive 98/34, cannot be interpreted as meaning that failure to have regard to that article produces the same effects as a failure to have regard to Article 8 of Directive 98/34. As observed by the Advocate General in point 64 of his Opinion, that cross-reference is merely intended to prevent the Commission from being notified of the same draft more than once under different notification obligations.
- 60 It follows that the obligation of prior notification established in Article 16 of Directive 94/62 constitutes a mere obligation imposed on the Member States to inform the Commission, failure to have regard to which cannot constitute a substantial defect leading to the measures that Member States intend to adopt being inapplicable, with the result that they are unenforceable against individuals. Accordingly, that article cannot be relied on before a national court in order to obtain the annulment of rules that have not been notified or a ruling that they are unenforceable.
- 61 Having regard to all the foregoing considerations, the answer to the first question is that Articles 8 and 9 of Directive 98/34 must be interpreted as precluding the adoption of national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set by Directive 94/62, where the Commission was notified of that legislation only a few days before it was adopted and published.

The second question

- 62 By its second question, the referring court asks, in essence, whether Article 18 of Directive 94/62, read in conjunction with Article 9 thereof and Annex II thereto, must be interpreted as precluding the adoption of national legislation prohibiting the marketing of single-use carrier bags made of non-biodegradable and non-compostable materials, which otherwise meet the requirements laid down in that directive, and, as the case may be, whether that rule may be justified by the aim of ensuring a higher level of environmental protection.
- 63 In the first place, it must be stated that Article 18 of Directive 94/62, entitled ‘Freedom to place on the market’, provides that Member States are not to impede the placing on the market of their territory of packaging which satisfies the provisions of the directive.
- 64 Article 9(1) of Directive 94/62 provides that packaging may be placed on the market only if it complies with all essential requirements defined by the directive including Annex II thereof. That annex sets out the essential requirements on the composition and the reusable and recoverable nature of packaging. More specifically, it lists, in paragraph 3, the specific requirements that must be met by packaging recoverable in the form of material recycling, energy recovery or composting, and by biodegradable packaging.
- 65 The Court has held that the requirements on the composition of packaging and its capacity to be reused or composted, governed by Articles 8 and 11 of Directive 94/62 and Annex II thereto, have been the subject of complete harmonisation (see, to that effect, judgments of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz*, C-309/02, EU:C:2004:799, paragraph 56, and of 14 December 2004, *Commission v Germany*, C-463/01, EU:C:2004:797, paragraph 44).

- 66 According to settled case-law, where a sphere has been the subject of complete harmonisation at EU level, the Member States are bound and cannot maintain national provisions to the contrary or make the movement of the products concerned subject to additional conditions (see, to that effect, judgments of 8 May 2003, *ATRAL*, C-14/02, EU:C:2003:265, paragraph 44, and of 12 April 2018, *Fédération des entreprises de la beauté*, C-13/17, EU:C:2018:246, paragraph 23).
- 67 In addition, as observed by the Advocate General in point 72 of his Opinion, when providing for exhaustive harmonisation, the EU institutions perform the necessary balancing exercise between the objective of free movement of the product concerned and the objective of protecting the public interest and specific interests, which means that national authorities may not call into question that balancing exercise.
- 68 In the present case, it is apparent from Article 2 of the decree at issue in the main proceedings that that decree authorises the marketing only of biodegradable and compostable plastic bags in compliance with the harmonised standard UNI EN 13432:2002 and of those with certain features relating to shape and thickness recalled in paragraph 18 of the present judgment, including those which fulfil the other recovery requirements laid down in point 3 of Annex II to Directive 94/62.
- 69 It follows that Article 18 of Directive 94/62, in conjunction with Article 9 thereof and Annex II thereto, precludes the adoption of national legislation such as that at issue in the main proceedings.
- 70 In the second place, it is appropriate to add that, had the Italian Government intended to adopt stricter provisions for the placing on the market of plastic bags for environmental reasons, it could have done so only in accordance with Article 114(5) and (6) TFEU.
- 71 Article 114(5) and (6) TFEU authorises a Member State, if it deems it necessary, after the adoption of a harmonisation measure, to introduce national provisions based on new scientific evidence relating to environmental protection arising after the adoption of the harmonisation measure, on condition that it notify the Commission of the measures that it intends to adopt and the grounds for their adoption.
- 72 However, there is nothing in the order for reference or the written observations submitted to the Court to suggest that the Italian Government notified the Commission, on the basis of that provision, that it intended to introduce a derogating measure.
- 73 In the third and last place, regarding the arguments of the Italian Government and the AIB relying on the introduction of paragraph 1a into Article 4 of Directive 94/62 by Directive 2015/720, it is sufficient to note, as observed in paragraph 39 of the present judgment, that that paragraph is not applicable *ratione temporis* to the main proceedings.
- 74 Having regard to all the foregoing considerations, the answer to the second question is that Article 18 of Directive 94/62, read in conjunction with Article 9 thereof and Annex II thereto, must be interpreted as precluding national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set by Directive 94/62. That legislation may nevertheless be justified by the objective of ensuring a higher level of environmental protection, where the conditions provided for in Article 114(5) and (6) TFEU are fulfilled.

The third question

- 75 By its third question, the referring court asks, in essence, whether Article 18 of Directive 94/62, read in conjunction with Article 9(1) thereof and Annex II thereto, has direct effect, so that the national court must disapply any national legislation contrary to Article 18.
- 76 In that connection, according to settled case-law, in order to be regarded as having direct effect, a provision of a directive must appear, so far as its subject matter is concerned, to be unconditional and sufficiently precise. A provision is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States. A provision is regarded as sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (see, to that effect, judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraphs 17 and 18).
- 77 Even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 19).
- 78 In the present case, Article 18 of Directive 94/62 provides that Member States are not to impede the placing on the market of their territory of packaging which satisfies the provisions of the directive.
- 79 It is therefore apparent from the wording of that article that it establishes, in unequivocal terms, an obligation not to act, so that it constitutes a ‘sufficiently precise provision’ for the purposes of the case-law cited in paragraphs 76 and 77 of the present judgment. As a result, Member States must refrain from adopting any measure restricting the marketing of packaging which complies with the provisions of that directive.
- 80 Moreover, that article is ‘unconditional’, within the meaning of that case-law, given that the prohibition which it lays down does not require the adoption of any measure of the EU institutions and does not in any way confer on Member States the right to limit the scope of that prohibition.
- 81 Admittedly, it is apparent from that article that the packaging concerned must comply with that directive, that is, that the packaging must comply with the essential requirements laid down in Article 9(1) thereof, which refers to Annex II thereto.
- 82 However, as the Advocate General observed in point 89 of his Opinion, packaging which complied with Directive 94/62 could be freely marketed without any conditions until the entry into force of paragraph 1a introduced into Article 4 of Directive 94/62 by Directive 2015/720, which permitted Member States to introduce more restrictive measures for the marketing of lightweight plastic carrier bags. As noted in paragraph 39 of the present judgment, that provision is not, however, applicable *ratione temporis* to the facts in the main proceedings.

- 83 Having regard to all the foregoing considerations, the answer to the third question is that Article 18 of Directive 94/62, read in conjunction with Article 9(1) thereof and Annex II thereto, must be interpreted as having direct effect, so that the national court must, in a dispute between an individual and national authorities, disapply any national legislation contrary to Article 18.

The fourth question

- 84 By its fourth question, the referring court asks, in essence, whether Article 18 of Directive 94/62 must be interpreted as precluding the adoption of national legislation prohibiting the marketing of single-use plastic bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set in that directive is liable to constitute a sufficiently serious infringement of Article 18.
- 85 As regards the liability of Member States in the event of infringement of EU law, it is settled case-law that the right to compensation of individuals supposes, inter alia, that the breach of the rule of EU law concerned must be sufficiently serious (see, to that effect, judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution)*, C-61/21, EU:C:2022:1015, paragraph 44).
- 86 In that regard, it is settled case-law that such a sufficiently serious breach implies a manifest and grave disregard by the Member State for the limits set on its discretion (judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 55).
- 87 The factors which may be taken into consideration in that regard include, inter alia, the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities concerned, whether any error of law was excusable or inexcusable, whether the infringement and the damage caused was intentional or involuntary, or the fact that the position taken by an EU institution may have contributed towards the omission, adoption or retention of national measures or practices contrary to EU law (judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 56, and of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 105).
- 88 Moreover, if the Member State was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach (judgment of 16 October 2008, *Synthon*, C-452/06, EU:C:2008:565, paragraph 38).
- 89 In that respect, it is sufficient to note that, as recalled in paragraph 79 of the present judgment, Article 18 of Directive 94/62 establishes, in unequivocal terms, an obligation not to act, so that it constitutes a ‘sufficiently precise provision’ for the purposes of the case-law cited in paragraphs 76 and 77 of the present judgment and that, as a result, Member States must refrain from adopting any measure restricting the marketing of packaging which complies with the rules in that directive. It follows that, as observed by the Advocate General in point 98 of his Opinion, that article, read in conjunction with Article 9(1) thereof and Annex II thereto, did not leave any discretion to the Italian authorities to prohibit, on their territory, packaging which complied with the rules of that directive.

- 90 Having regard to all of the foregoing considerations, the answer to the fourth question is that Article 18 of Directive 94/62 must be interpreted as meaning that national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and non-compostable materials but which meet the other requirements set by that directive is liable to constitute a sufficiently serious infringement of Article 18.

Costs

- 91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Articles 8 and 9 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012,**

must be interpreted as precluding the adoption of national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set by European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, as amended by Commission Directive 2013/2/EU of 7 February 2013, where the Commission was notified of that legislation only a few days before it was adopted and published.

2. **Article 18 of Directive 94/62, as amended by Directive 2013/2, read in conjunction with Article 9 of and Annex II to Directive 94/62, as amended,**

must be interpreted as precluding national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and non-compostable materials but which otherwise meet the requirements set by Directive 94/62, as amended. That legislation may nevertheless be justified by the objective of ensuring a higher level of environmental protection, where the conditions provided for in Article 114(5) and (6) TFEU are fulfilled.

3. **Article 18 of Directive 94/62, as amended by Directive 2013/2, read in conjunction with Article 9(1) of and Annex II to Directive 94/62, as amended,**

must be interpreted as having direct effect, so that the national court must, in a dispute between an individual and national authorities, disapply any national legislation contrary to Article 18.

4. **Article 18 of Directive 94/62, as amended by Directive 2013/2,**

must be interpreted as meaning that national legislation prohibiting the marketing of single-use plastic carrier bags manufactured from non-biodegradable and

non-compostable materials but which meet the other requirements set by that directive is liable to constitute a sufficiently serious infringement of Article 18.

[Signatures]