Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 July 2021 [1]

Case C-181/20

VYSOČINA WIND a.s.
v
Czech Republic

(Request for a preliminary ruling
from the Nejvyšší soud (Supreme Court, Czech Republic))

(Request for a preliminary ruling – Directive 2012/19/EU – Waste – Waste electrical and electronic equipment (WEEE) – Costs for the collection, treatment, recovery and environmentally sound disposal of photovoltaic panels – Producer responsibility – Incorrect transposition of a directive – Liability of a Member State – Polluter-pays principle – Principle of non-retroactivity)

I. Introduction

1. In the main proceedings, Vysočina Wind seeks compensation from the Czech State on the ground that the latter incorrectly implemented the polluter-pays principle as given concrete expression by Directive 2012/19/EU [2] with regard to photovoltaic panels.

2. The liability claim under EU law is based on the judgment in *Francovich and Others* [3] and requires, inter alia, a sufficiently serious infringement of EU law. [4] Such an infringement could reside in an incorrect transposition of Directive 2012/19, but would be ruled out if the relevant rules of the directive infringe higher-ranking EU law, in particular the principle of non-retroactivity.

3. The Czech Republic has doubts as to the compatibility of Directive 2012/19, published in 2012, with EU law in so far as it provides that producers of photovoltaic panels are to bear the costs of disposing of all panels that they have already placed on the market since 13 August 2005. Therefore, that Member State adopted legislation imposing those costs on the users of the panels

1 Original language: German.

2 Directive of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (OJ 2012 L 197, p. 38).

3 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

4 See judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51); of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 30); and of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249, paragraph 113).

if they were placed on the market by 1 January 2013. Vysočina Wind operates a solar power plant and was required to bear costs on the basis of that legislation, and it is now seeking to recover them.

4. It is therefore necessary to clarify the extent to which the establishment of producer responsibility for photovoltaic panels is compatible with the principle of non-retroactivity.

II. Legal framework

A. EU legislation on the disposal of WEEE

1. Directive 2012/19

5. The subject matter of Directive 2012/19 is defined in Article 1:

'This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste from electrical and electronic equipment (WEEE) and by reducing overall impacts of resource use and improving the efficiency of such use in accordance with Articles 1 and 4 of [the Waste Directive[5]], thereby contributing to sustainable development.'

6. The scope of Directive 2012/19 follows, in particular, from Article 2(1):

'This Directive shall apply to electrical and electronic equipment (EEE) as follows:

(a) from 13 August 2012 to 14 August 2018 (transitional period), subject to paragraph 3, to EEE falling within the categories set out in Annex I. Annex II contains an indicative list of EEE which falls within the categories set out in Annex I;

(b) from 15 August 2018, subject to paragraphs 3 and 4, to all EEE. All EEE shall be classified within the categories set out in Annex III. Annex IV contains a non-exhaustive list of EEE which falls within the categories set out in Annex III (open scope).'

7. Article 3(1) of Directive 2012/19 defines various terms:

'For the purposes of this Directive, the following definitions shall apply:

(a) "electrical and electronic equipment" or "EEE" means equipment which is dependent on electric currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such currents and fields and designed for use with a voltage rating not exceeding 1 000 volts for alternating current and 1 500 volts for direct current;

…

[5] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

(e) "waste electrical and electronic equipment" or "WEEE" means electrical or electronic equipment which is waste within the meaning of Article 3(1) of [the Waste Directive], including all components, sub-assemblies and consumables which are part of the product at the time of discarding;

8. Annex I to Directive 2012/19 sets out the categories of EEE covered by the directive during the transitional period as provided for in Article 2(1)(a). Point 4 refers to consumer equipment and photovoltaic panels.

9. Moreover, photovoltaic panels are referred to in point 4 of the indicative list of EEE of Annex II to Directive 2012/19 which falls within the categories of Annex I.

10. Article 13(1) of Directive 2012/19 governs the producer responsibility for the costs of disposing of equipment intended for professional use:

'Member States shall ensure that the financing of the costs for the collection, treatment, recovery and environmentally sound disposal of WEEE from users other than private households resulting from products placed on the market after 13 August 2005 is to be provided for by producers.

For historical waste being replaced by new equivalent products or by new products fulfilling the same function, the financing of the costs shall be provided for by producers of those products when supplying them. Member States may, as an alternative, provide that users other than private households also be made, partly or totally, responsible for this financing.

For other historical waste, the financing of the costs shall be provided for by the users other than private households.'

11. Moreover, it follows from Article 12(4) of Directive 2012/19 that 'WEEE from products placed on the market on or before 13 August 2005' is to be regarded as 'historical waste'.

12. The same provisions were already laid down in Article 9(1) and Article 8(3) of Directive 2002/96/EC on waste electrical and electronic equipment (WEEE).[6] However, the earlier directive did not apply to photovoltaic panels. It was not until Directive 2012/19 that they were covered.

13. Producer responsibility is addressed in recital 23 of Directive 2012/19:

'… In order to give maximum effect to the concept of producer responsibility, each producer should be responsible for financing the management of the waste from his own products. The producer should be able to choose to fulfil this obligation either individually or by joining a collective scheme. Each producer should, when placing a product on the market, provide a financial guarantee to prevent costs for the management of WEEE from orphan products from falling on society or the remaining producers. The responsibility for the financing of the management of historical waste should be shared by all existing producers through collective financing schemes to which all producers that exist on the market when the costs occur contribute proportionately. Collective financing schemes should not have the effect of excluding niche and low-volume producers, importers and new entrants. Collective schemes could provide for differentiated fees based on how easily products and the valuable secondary raw materials that

[6] Directive of the European Parliament and of the Council of 27 January 2003 (OJ 2003 L 37, p. 24), as amended by Directive 2003/108/EC of the European Parliament and of the Council of 8 December 2003 (OJ 2003 L 345, p. 106).

they contain could be recycled. In the case of products which have a long life cycle and which are now covered by this Directive, such as photovoltaic panels, the best possible use should be made of existing collection and recovery systems, provided that they meet the requirements laid down in this Directive.'

14. Directive 2012/19 was published on 24 July 2012 and, according to Article 24(1) thereof, was to be transposed by 14 February 2014.

2. The Waste Directive

15. In addition, reference must be made to the provisions regarding responsibility for waste laid down in the waste directives respectively applicable.

16. Article 15 of Waste Directive 75/442[7] (initially Article 11) and Article 15 of Waste Directive 2006/12[8] each provided as follows:

'In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by:

… the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9; and/or

… the previous holders or the producer of the product from which the waste came.'

17. Article 14 of Waste Directive 2008/98, which is now applicable, contains a similar rule:

'1. In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders.

2. Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs.'

B. Czech law

18. The Czech Republic implemented its obligations arising from the original Directive 2002/96 by enacting the Law on waste. On 30 May 2012, prior to the adoption of Directive 2012/19, a new Paragraph 37p was inserted into that law, introducing a mechanism for financing the management of waste from photovoltaic panels. According to that provision, the obligation to finance the management of waste from photovoltaic panels placed on the market before 1 January 2013 is borne by the operator of the solar power plant, through equal sub-payments of recycling contributions. To that end, an obligation was set to enter into, by 30 June 2013, an agreement with an entity providing a collective financing system, such that the financing is obtained by 1 January 2019. In the case of photovoltaic panels placed on the market after 1 January 2013, the obligation falls on the producer.

[7] Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 47), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

[8] Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

III. Facts and request for a preliminary ruling

19. Vysočina Wind is the operator of the 'Vranovská ves II' solar power plant. The power plant was put into operation in 2009, using photovoltaic panels placed on the market after 13 August 2005. After the introduction of the new Paragraph 37p of the Czech Law on waste, Vysočina Wind therefore entered into agreements with the relevant entities, on the basis of which it paid out a contribution for the future recycling of electric waste from photovoltaic panels in the total amount of 1 613 773.24 Czech koruny (CZK) (approximately EUR 65 000), making three sub-payments in 2015 and 2016.

20. Vysočina Wind brought an action against the Czech Republic seeking to recover that amount. Before the national courts, it took the view that the Czech Republic had incorrectly transposed Directive 2012/19. In accordance with Article 13, the obligation to finance the management of waste from photovoltaic panels placed on the market after 13 August 2005 falls on the producer, rather than the user. Vysočina Wind incurred damage as a result of that, since, pursuant to the still-applicable Paragraph 37p of the Law on waste, it is obliged to pay a recycling contribution even after 14 February 2014 (the expiry of the implementation period), which, under EU law, is to be paid by the producer.

21. Against that, the Czech Republic contends that the obligation of producers to finance the management of waste can, contrary to the wording of Directive 2012/19, apply only to photovoltaic panels placed on the market after the expiry of the implementation period, as a retroactive imposition of an obligation would constitute impermissible retroactivity and a corresponding breach of the general principles of the protection of legitimate expectations and legal certainty. Furthermore, it objects that many producers that placed photovoltaic panels on the market between 2005 and 2013 no longer exist and, hence, the obligation to finance waste management cannot be imposed on them.

22. Vysočina Wind was successful before the courts of first instance and appeal. The case is now pending before the Nejvyšší soud (Supreme Court, Czech Republic), which has referred the following questions to the Court of Justice:

'(1) Must Article 13 of Directive [2012/19] be interpreted such that it prevents a Member State from imposing the obligation to finance the costs of the collection, treatment, recovery, and environmentally sound disposal of WEEE coming from photovoltaic panels placed on the market prior to 1 January 2013 on their users, rather than their producers?

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

23. Vysočina Wind, the Czech Republic, the Federal Republic of Germany and the European Commission submitted written observations in accordance with Article 23 of the Statute of the Court of Justice. In addition, the European Parliament and the Council of the European Union submitted written observations at the request of the Court. The Court dispensed with an oral procedure.

IV. Legal assessment

24. The request for a preliminary ruling is intended to clarify the requirements for a State liability claim under EU law. The referring court therefore asks whether Article 13 of Directive 2012/19 prevents a Member State from imposing the obligation to finance the costs of disposing of photovoltaic panels placed on the market prior to 1 January 2013 on their users, rather than their producers (see section A). It can be concluded from the facts of the case in the national proceedings that this only concerns panels placed on the market after 13 August 2005.

25. In the event that Member States are not permitted to impose those costs on the users of such panels, the Nejvyšší soud (Supreme Court) also asks what significance for the liability of the Member State is to be attached to the fact that the Member State itself regulated the responsibility for waste from such panels before adoption of the EU legislation (see section B).

A. First question – commencement of producer responsibility for photovoltaic panels

26. For the purposes of answering the first question, I will demonstrate, first, that under Article 13 of Directive 2012/19 the costs for the disposal of photovoltaic panels that have been placed on the market since 13 August 2005 are to be charged to the producers (see section 1). I will then discuss whether that provision is compatible with the principle of non-retroactivity (see section 2).

1. Normative content of Article 13(1) of Directive 2012/19

27. It follows clearly from Directive 2012/19 that the costs for the disposal of photovoltaic panels placed on the market after 13 August 2005 cannot be imposed on the users. This is because, in accordance with Article 13(1), Member States must ensure that the financing of the costs for the collection, treatment, recovery and environmentally sound disposal of WEEE from users other than private households from products placed on the market after that point in time is to be provided *by producers*.

28. Photovoltaic panels are EEE according to Directive 2012/19.

29. In accordance with Article 2(1)(a) of Directive 2012/19, the latter has applied, since 13 August 2012, to EEE falling within the categories set out in Annex I. The indicative list of EEE in Annex II specifies those categories. Photovoltaic panels are expressly referred to in both point 4 of Annex I and point 4 of Annex II. The legislature clearly proceeds on the assumption that such panels constitute EEE as defined in Article 3(1)(a) of Directive 2012/19, and it intended to extend the scope of the directive to cover such panels when recasting it.

30. If owners of photovoltaic panels within the meaning of Article 3(1) of the Waste Directive discard, wish to discard or are required to discard the panels, the latter become waste and thus *waste* electrical and electronic equipment according to the definition of Article 3(1)(e) of Directive 2012/19.

31. For such panels, Article 13(1) of Directive 2012/19 provides that the financing of the costs for the collection, treatment, recovery and environmentally sound disposal of such equipment is to be provided for *by producers*.

32. It is true that Directive 2012/19 was not adopted and published until July 2012. In respect of photovoltaic panels, it in fact applied only from 13 August 2012, in accordance with Article 2(1)(a). In accordance with Article 24(1), the transposition deadline for the directive did not expire until 14 February 2014. Nevertheless, Article 13(1) unambiguously provides that producer responsibility applies to all equipment placed on the market after 13 August 2005. This must therefore also be the case for photovoltaic panels. The Commission also states that, in contrast to other provisions, there is no transitional arrangement for producer responsibility for photovoltaic panels.

33. The transposition deadline and the date of application of Directive 2012/19 may be decisive for the point in time from which producers of photovoltaic panels can be required to bear the costs in question.

34. In particular, the Commission discusses the question of whether producers must bear the costs of panels that became waste before those dates. However, the present proceedings do not concern such panels, as Vysočina Wind seeks reimbursement of payments that it made in the event that its panels become waste only in the future, that is to say, after the expiry of the transposition deadline.

35. There is no doubt that such panels, which were placed on the market after 13 August 2005 but become waste only later, fall under the producer responsibility provided for in Article 13(1) of Directive 2012/19.

36. It would not be compatible with Article 13(1) of Directive 2012/19 to release producers from their responsibility and instead to impose the costs for collection, treatment, recovery and environmentally sound disposal on the users of photovoltaic panels. The extent to which users can be made responsible if producers are unable to meet the costs is not the subject of the present proceedings.

37. As an interim conclusion, it must therefore be stated that under Article 13(1) of Directive 2012/19 Member States must impose the costs for the collection, treatment, recovery and environmentally sound disposal of photovoltaic panels from users other than private households resulting from products placed on the market after 13 August 2005 on *producers*.

2. The principle of non-retroactivity

38. According to the Czech Republic and the Federal Republic of Germany, however, the application of producer responsibility to photovoltaic panels placed on the market after 13 August 2005 but before the expiry of the transposition deadline of Directive 2012/19 would be regarded as impermissible retroactivity.

39. Those two Member States therefore propose to the Court a restrictive interpretation of Article 13(1) of Directive 2012/19. That provision does not preclude legislation of Member States which provides for producer responsibility only for photovoltaic panels placed on the market after the transposition deadline.

40. However, that outcome would be *contra legem* and therefore cannot be achieved by an interpretation of Article 13(1) of Directive 2012/19.[9] That provision unambiguously states that producer responsibility commences on marketing as from 13 August 2005. In so far as that rule is incompatible with the principle of non-retroactivity, it would therefore be invalid.

41. Although the request for a preliminary ruling does not call the validity of Article 13(1) of Directive 2012/19 into question, the Court exceptionally examines the validity of rules of EU law of its own motion where this is necessary to give a full answer to the referring court.[10]

(a) The retroactivity of producer responsibility for photovoltaic panels

42. The case-law on retroactivity is based on the principle of protection of legitimate expectations and the principle of legal certainty, which form part of the EU legal order. They must accordingly be observed by the EU institutions, but also by the Member States when exercising the powers conferred on them by EU directives.[11]

43. As a general rule, the principle of legal certainty precludes an EU measure from taking effect from a point in time before its publication.[12] However, Directive 2012/19 does not provide for producer responsibility to apply to photovoltaic panels before its publication on 24 July 2012. On the contrary, Member States are not required to implement such producer responsibility until the expiry of the transposition deadline of 14 February 2014. The directive therefore does not require producers to take responsibility for panels that became waste prior to 14 February 2014.

44. However, a condition of producer responsibility could already be established before the publication of Directive 2012/19, as it covers photovoltaic panels placed on the market since 13 August 2005, that is to say, before the publication of the directive on 24 July 2012.

45. Such a legislative technique does not necessarily infringe the principle of protection of legitimate expectations and the principle of legal certainty. Rather, as emphasised by the Commission, the Council and the Parliament, a new rule applies directly to the future effects of situations which arose under the earlier rule (retrospective application).[13] The scope of the

[9] See judgments of 1 October 2020, *Entoma* (C-526/19, EU:C:2020:769, paragraph 43), and of 17 December 2020, *De Masi and Varoufakis* v *ECB* (C-342/19 P, EU:C:2020:1035, paragraphs 35 and 36). As regards the meaning of the wording, see also judgments of 24 November 2005, *Deutsches Milch-Kontor* (C-136/04, EU:C:2005:716, paragraph 32), and of 19 December 2019, *Puppinck and Others* v *Commission* (C-418/18 P, EU:C:2019:1113, paragraph 76).

[10] Judgments of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 67); of 16 July 2020, *Facebook Ireland and Schrems* (C-311/18, EU:C:2020:559, paragraph 161); and of 17 September 2020, *Compagnie des pêches de Saint-Malo* (C-212/19, EU:C:2020:726, paragraph 30).

[11] Judgments of 3 December 1998, *Belgocodex* (C-381/97, EU:C:1998:589, paragraph 26); of 26 April 2005, '*Goed Wonen*' (C-376/02, EU:C:2005:251, paragraph 32); of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539, paragraph 43); and of 10 December 2015, *Veloserviss* (C-427/14, EU:C:2015:803, paragraph 30).

[12] Judgments of 25 January 1979, *Racke* (98/78, EU:C:1979:14, paragraph 20); of 26 April 2005, '*Goed Wonen*' (C-376/02, EU:C:2005:251, paragraph 33); and of 30 April 2019, *Italy* v *Council (Mediterranean swordfish fishing quota)* (C-611/17, EU:C:2019:332, paragraph 106).

[13] Judgments of 5 December 1973, *SOPAD* (143/73, EU:C:1973:145, paragraph 8); of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 49); and of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 49).

principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose earlier. [14]

46. However, it must also be taken into account that a new legal rule does not apply to legal situations which have arisen and become definitive before that point in time. [15] Rather, acts performed before the date of entry into force of new legislation continue to be governed by the previous law. [16] This is true, for example, in the case of registered trade marks, the registration of which is not to be called into question by subsequent requirements. [17]

47. The decisive question is therefore whether the establishment of producer responsibility under waste law for photovoltaic panels that producers had already placed on the market, that is to say, as a general rule, had sold, changes the legal consequences of an act performed or merely regulates the future effects of a situation that arose under the old rule.

48. When they produce panels, producers must already assume that they will become waste at a later point in time. From that point of view, the establishment of producer responsibility appears to regulate only the future effects of a situation that has arisen previously.

49. In that sense, the Court has recently assessed an increase in the costs of waste management. The case in question concerned an extension of the duration of the after-care period of a landfill that had been closed, thereby leading to increased costs. Those costs were to be imposed on the original holders of the waste deposited in the landfill in the past, since the extension of the after-care period concerned only the future effect of the deposit of the waste, for which the original waste holders were responsible. [18] The Court made a similar assessment of the calculation of future pension entitlements for periods of service prior to the adoption of the directive in question [19] and the effects of new rules on existing contracts of employment. [20]

50. However, a simple transfer of that case-law to the present case would fail to take account of the fact that responsibility under waste law for photovoltaic panels placed on the market was already regulated at the time of the establishment of producer responsibility and, in most cases, was definitively incorporated into the agreements between producers and users.

51. This is because Article 14 and Article 15, respectively, of the applicable waste directives required that Member States regulate who is to bear the costs of waste management. The respective provisions left Member States the choice of imposing the costs of waste management on the holder of the product when it became waste, the producer or certain other persons.

[14] Judgments of 16 May 1979, *Tomadini* (84/78, EU:C:1979:129, paragraph 21); of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 55); and of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 49).

[15] Judgments of 16 December 2010, *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:779, paragraph 32); of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 22); and of 14 May 2020, *Azienda Municipale Ambiente* (C-15/19, EU:C:2020:371, paragraph 57).

[16] Judgment of 27 January 2011, *Flos* (C-168/09, EU:C:2011:29, paragraph 51).

[17] Judgment of 14 March 2019, *Textilis* (C-21/18, EU:C:2019:199, paragraphs 30 to 32).

[18] Judgment of 14 May 2020, *Azienda Municipale Ambiente* (C-15/19, EU:C:2020:371, paragraph 58).

[19] Judgment of 7 November 2018, *O'Brien* (C-432/17, EU:C:2018:879, paragraphs 35 and 36).

[20] Judgments of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 52), and of 12 September 2013, *Kuso* (C-614/11, EU:C:2013:544, paragraph 31).

52. In so far as the respective Member State already provided for producer responsibility for photovoltaic panels on 13 August 2005, Article 13(1) of Directive 2012/19 did not require a change in the legal situation and therefore also did not have retroactive effect in practice. Such Member States therefore also cannot be obliged to change their legislation if it transpires that Article 13(1) has impermissible retroactive effect with regard to photovoltaic panels.

53. However, if the Member State in question had previously imposed the responsibility under waste law on other persons, the transposition of Article 13(1) of Directive 2012/19 would interfere with existing legal relationships. Accordingly, under the Waste Directive, Member State were permitted to impose the responsibility under waste law on the holder of the product when it became waste, that is to say, the last user of the panels. In that case, the producer had to assume that it had transferred the responsibility under waste law to the user when it handed over the photovoltaic panels, that is to say, that it itself was released from such responsibility.

54. It is to be assumed that such a legal situation entailed considerable economic consequences: producers and users of photovoltaic panels had to take the applicable legislation governing responsibility under waste law into account in the agreed prices. It is to be assumed that prices for photovoltaic panels in the case of producer responsibility are higher than in the case of user responsibility, because the producer must take the costs of subsequent disposal into account in its calculation.

55. The second subparagraph of Article 12(3) of Directive 2012/19 illustrates this in respect of electrical and electronic equipment from private households. According to that provision, each producer is to provide a guarantee when placing a product on the market showing that the waste management of the equipment will be financed.

56. In so far as the Member State concerned originally provided for user responsibility, the subsequent establishment of producer responsibility for products already placed on the market therefore does not define more precisely obligations which already exist – unlike in the abovementioned case of an extension of after-care obligations.[21] Nor does it establish any new obligations which prudent market participants should have expected. Rather, obligations and the associated costs are subsequently shifted between various market participants. However, those market participants can no longer take that shift into account in their prices because the respective transactions have already been concluded. Nor is provision made for compensation for that additional burden on producers.

57. Consequently, the establishment of producer responsibility for photovoltaic panels that have already been placed on the market interferes with legal situations which have arisen and become definitive or acts which have been performed before that time, in so far as producer responsibility was not yet provided for in national law.

58. Moreover, the Commission implicitly accepts that assessment by stating that Article 13 of the directive cannot be interpreted as calling into question the validity of agreements which users of photovoltaic panels had concluded with disposal undertakings before the expiry of the transposition deadline for Directive 2012/19 on the basis of the Czech rules in force at the time. However, if this were to constitute retroactivity, the imposition on producers of disposal costs would also constitute retroactivity if they had agreed on the prices for their products when these costs still were incumbent on the users.

[21] See point 49 above.

(b) Unequal treatment

59. Moreover, when originally establishing producer responsibility for other WEEE in Directive 2002/96, the legislature ensured through the adoption of Directive 2003/108 [22] that producers were not required to bear any responsibility under waste law for 'historical' waste of commercial users that was placed on the market before 13 August 2005.

60. Rather, Member States were permitted to impose responsibility for historical waste in the context of the supply of replacement products on the producers of those new products or on the users. If such waste equipment is discarded without being replaced, the users are responsible for the costs in any event. In that respect, recital 3 of Directive 2003/108 stated that the take-back obligation for WEEE put on the market in the past created a retroactive liability for which no provision was made and which is likely to expose certain producers to serious economic risks.

61. Therefore, Directive 2003/108 not only excluded retroactivity, but also granted a transitional period of approximately one and a half years.

62. In comparison with those producers of other EEE, the producers of photovoltaic panels were thus clearly placed at a disadvantage, because their responsibility under waste law was not established with a transitional period, but was in fact established with retroactive effect from 13 August 2005. Therefore, not only legal certainty and the protection of legitimate expectations but also – as noted by the Federal Republic of Germany and the Czech Republic – the principle of equal treatment are affected by the establishment of producer responsibility for photovoltaic panels already placed on the market.

(c) Justification for retroactivity

63. Retroactivity may exceptionally be permissible where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. [23] Furthermore, in some cases the Court has even required that decisions having such effect must include in the statement of the reasons on which they are based particulars which justify the desired retroactive effect. [24]

64. Since, in the present case, the date set for the entry into force of the legislation was not prior to the publication of the directive, such justification is not to be subject to excessive requirements. However, due to the economic importance of establishing producer responsibility for panels already placed on the market, and taking into account the associated unequal treatment, a certain degree of weight must be attached to the justification.

[22] Cited in footnote 6.

[23] Judgments of 25 January 1979, *Racke* (98/78, EU:C:1979:14, paragraph 20); of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 10); of 13 November 1990, *Fédesa and Others* (C-331/88, EU:C:1990:391, paragraph 45); and of 28 November 2006, *Parliament* v *Council* (C-413/04, EU:C:2006:741, paragraph 75).

[24] Judgment of 1 April 1993, *Diversinte and Iberlacta* (C-260/91 and C-261/91, EU:C:1993:136, paragraph 10). See also order of the President of the Court of 1 February 1984, *Ilford* v *Commission* (1/84 R, EU:C:1984:41, paragraph 19); judgments of 11 July 1991, *Crispoltoni* (C-368/89, EU:C:1991:307, paragraph 20); and of 29 April 2004, *Sudholz* (C-17/01, EU:C:2004:242, paragraph 36); and the Opinions of Advocate General Mischo in *Crispoltoni* (C-368/89, not published, EU:C:1991:125, point 17); and in *Cargill* v *Commission* (C-248/89, EU:C:1991:141, point 52).

Objectives of the legislation

65. However, it is not possible to infer from the recitals of Directive 2012/19 any reasons for requiring the establishment of producer responsibility for photovoltaic panels already placed on the market.

66. On the substance, the Federal Republic of Germany correctly submits that the establishment of producer responsibility for products already placed on the market is unsuitable for encouraging producers, in accordance with recital 12 of Directive 2012/19, to take into full account and facilitate the repair, possible upgrading, re-use, disassembly and recycling of their products when designing them. The reason for this is that, when they manufactured the products already placed on the market, the producers did not know that they would subsequently assume responsibility for waste management. The Council's submission that the *retroactive* establishment of producer responsibility is necessary to promote the circular economy is therefore not convincing. [25]

67. Nor would the objective of uniform producer responsibility set out in recital 6 of Directive 2012/19, of ensuring a comparable economic burden, be attained by changing the responsibility for products already placed on the market at the time of adoption of the legislation. Rather, it would create new differences in the burden because the producers had already taken the responsibility regime previously existing in the Member State in question into account in their prices.

68. The legislative history of Directive 2012/19 also provides no indication as to why that specific regime was established instead of limiting it to panels placed on the market in the future.

69. The Commission's original proposal did not provide for the inclusion of photovoltaic panels in the scope of the directive at all, [26] and the Parliament still expressly rejected inclusion at first reading. [27] The Council also initially met with opposition from certain Member States, [28] but, in its common position, it ultimately took the view that the exemption in respect of photovoltaic panels was not justified. [29] The Commission understood this to mean that the Council proposed to extend the scope of the directive to photovoltaic panels *from the date of its entry into force*. [30] However, there is no corresponding transitional arrangement that would, for example, limit producer responsibility to panels that were placed on the market after the directive entered into force.

70. Although the Commission commissioned a study on the inclusion of photovoltaic panels in the directive during the legislative process, [31] that study does not address the extension of producer responsibility to panels already placed on the market upon the adoption of the legislation.

25 Similar to the situation in the judgment of 11 July 1991, *Crispoltoni* (C-368/89, EU:C:1991:307, paragraphs 18 and 19).

26 Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (Recast) of 3 December 2008 (COM/2008/0810 final).

27 Recital 10 of the Position of the European Parliament adopted at first reading on 3 February 2011 with a view to the adoption of Directive 2011/…/EU of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (recast) (OJ 2012 C 182E, p. 50).

28 See Council documents 16041/09 of 17 November 2009, p. 2, and 17345/09 of 14 December 2009, p. 4.

29 Council Common Position at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (Recast) – Adopted by the Council on 19 July 2011 (Council document 7906/2/11).

30 Communication from the Commission to the European Parliament pursuant to Article 294(6) TFEU concerning the position of the Council on the adoption of a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (COM/2011/0478 final).

31 Bio Intelligence Service, Study on Photovoltaic Panels: Supplementing the Impact Assessment for a recast of the WEEE Directive (2011).

71. Nor have the Parliament, the Council or the Commission presented in the present proceedings any convincing reasons for the retroactivity of producer responsibility.

72. It is true that they submit that producer responsibility would take effect only with a very long delay due to the 25-year lifespan of the panels. In that connection, the Parliament refers to the need to finance the disposal of waste. However, that consideration cannot justify retroactively interfering with agreements that were based on a different distribution of responsibility.

73. Unlike in the case of the extension of the after-care obligations already referred to above,[32] there is also no need to fear a financing gap in the absence of retroactive effect. This is because, for older panels, responsibility for costs would be based on the national provisions transposing the Waste Directive.

74. The polluter-pays principle cited by the Commission does not call the conclusion reached thus far into question either. It is true that the polluter-pays principle can justify the responsibility of producers. However, as shown by Article 14 of the Waste Directive, it also allows current or former waste holders – that is to say, users, in particular – to be made responsible.

Expectations of those concerned

75. Moreover, the expectations of those concerned were also not duly respected.

76. The right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where European Union authorities have caused him or her to entertain legitimate expectations. However, a person may not plead breach of the principle unless he or she has been given precise assurances by the administration. If a prudent and alert economic operator can foresee that the adoption of an EU measure is likely to affect his or her interests, he or she cannot plead that principle if the measure is adopted.[33]

77. It is true that it is not apparent that European Union authorities gave a specific assurance that producer responsibility would not be established. Rather, Article 13 of Directive 2002/96 already provided for the possibility of including photovoltaic panels in its scope.

78. However, when marketing photovoltaic panels, producers were permitted to rely on the national legislation governing responsibility for waste, which in turn transposed the Waste Directive. That legislation constituted a concrete assurance based on EU standards.

79. It is not apparent that the legislator took into account that expectation at all when producer responsibility for photovoltaic panels already placed on the market was established, let alone that the legislator gave due consideration to that expectation.

[32] See point 49 above.

[33] Judgments of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *EEC* (265/85, EU:C:1987:121, paragraph 44); of 15 July 2004, *Di Lenardo and Dilexport* (C-37/02 and C-38/02, EU:C:2004:443, paragraph 70); and of 3 December 2019, *Czech Republic* v *Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 153).

80. Nor did the provision of Article 13 of the old Directive 2002/96 – to which the institutions drew attention – which gave the Commission the facility to include photovoltaic panels in the previous regime, lead to producers having to expect retroactive producer responsibility. This is because retroactivity is of a fundamentally different nature to that of mere inclusion in the system. The lack of a recognisable need for retroactivity confirms such an assessment.

(d) Similar regimes

81. However, the institutions concerned warn that the assumption of impermissible retroactivity on the part of Article 13 of Directive 2012/19 with regard to photovoltaic panels would also call into question other regimes on producer responsibility in EU waste law.

82. Nonetheless, that argument is not capable of casting doubt on the previous assessment of producer responsibility for photovoltaic panels. On the contrary, if there are further cases of impermissible retroactivity, such regulatory practice must be called into question all the more so.

83. Moreover, it cannot be ruled out that the retroactivity in the other cases cited may be justified in a specific examination of the respective regimes.

84. For example, Directive 2000/53/EC on end-of-life vehicles [34] establishes producer responsibility for end-of-life vehicles that were placed on the market long before that directive was adopted. However, it appears that the burden of that responsibility is relatively limited due to the residual value of the vehicles. [35] Moreover, motor vehicles are complex products. Therefore, the knowledge of the manufacturers may be of particular importance for disposal.

85. The temporally undifferentiated responsibility of the producers of batteries and accumulators under Article 16(1) and (6) of the Battery Directive [36] could possibly be supported by pointing to the increased risk of those often relatively small items otherwise being disposed of with the residual waste. Furthermore, an individual assessment of when they were placed on the market would in all likelihood be disproportionate and in many cases perhaps even impossible.

86. However, none of those questions requires a decision in the present proceedings. Consequently, no further considerations are needed.

3. Interim conclusion

87. It must therefore be stated that the establishment, by virtue of Article 13(1) of Directive 2012/19, of producer responsibility for photovoltaic panels that have already been placed on the market interferes, without sufficient justification and due regard for the expectations of those concerned, with legal situations which have arisen and become definitive or acts which have been performed before that time, in so far as producer responsibility was not yet provided for in national law.

[34] Directive of the European Parliament and of the Council of 18 September 2000 (OJ 2000 L 269, p. 34).

[35] See Commission Staff Working Document, Evaluation of Directive (EC) 2000/53 of 18 September 2000 on end-of-life vehicles, SWD(2021) 60 final of 15 March 2021, pp. 57 to 59.

[36] Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC (OJ 2006 L 266, p. 1).

88. The relevant date for the determination of the legal situations to be protected is the date of publication of the directive,[37] in this case 24 July 2012. Contrary to the view taken by the Federal Republic of Germany and the Czech Republic, the expiry of the transposition deadline is not relevant in that respect, because, from the moment the directive was published, economic operators had to expect that the Member State concerned would regulate the responsibility for the disposal of photovoltaic panels in accordance with the directive.

89. Member States were permitted and required therefore to establish producer responsibility for photovoltaic panels in accordance with Article 13(1) of Directive 2012/19 only with effect from that date.

90. Therefore, owing to a failure to have due regard to the principle of non-retroactivity, Article 13(1) of Directive 2012/19 is invalid in so far as it provides for the establishment of producer responsibility, not previously provided for in national law, for photovoltaic panels placed on the market by producers between 13 August 2005 and 24 July 2012.

91. By contrast, Member States must impose the costs for the collection, treatment, recovery and environmentally sound disposal of photovoltaic panels from users other than private households placed on the market after the publication of the directive on 24 July 2012 on producers, in accordance with Article 13(1) of the directive.

B. Second question – effect of the national legislation

92. The second question seeks to ascertain the extent to which the liability of a Member State for damage resulting from an infringement of EU law is influenced by the fact that the national legislation contrary to EU law was adopted prior to the directive from which the alleged infringement arises.

93. That question is raised only in the event that Article 13(1) of Directive 2012/19 requires producer responsibility for photovoltaic panels placed on the market before 1 January 2013. It follows from the answer to the first question that producer responsibility must be established at least in respect of photovoltaic panels that have been placed on the market by producers since 24 July 2012.

94. In the main proceedings, there are doubts as to whether panels placed on the market between 24 July 2012 and 1 January 2013 are affected. This is because Vysočina Wind commissioned the solar power plant back in 2009. However, it cannot be ruled out with absolute certainty that the undertaking acquired and installed certain photovoltaic panels of the power plant only in the abovementioned period.

95. On the substance, it must be stated, first, that the Czech legislation is not contrary to EU law at first sight, as it concerns the period before the expiry of the transposition deadline of Directive 2012/19. At that time, the general regime in Article 14(1) of the Waste Directive, which was transposed by the Czech legislation, still applied to photovoltaic panels. Article 14(1) of the Waste Directive expressly provides that the costs of waste management are to be borne by the original waste producer or by the current or previous waste holders. Although the establishment of producer responsibility is provided for in Article 14(2), it is merely an option for the Member States, not an obligation.

[37] Judgment of 29 April 2004, *Sudholz* (C-17/01, EU:C:2004:242, paragraph 35).

96. An infringement of EU law could therefore result, at most, from an advance effect of Directive 2012/19. This is because, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. [38]

97. However, the Czech legislation was already published on 30 May 2012, almost two months before the publication of Directive 2012/19 on 24 July 2012. The directive was not yet in force at that time and therefore could not create any obligations with respect to the Czech Republic. [39]

98. However, the present case shows that it is not sufficient to protect the objectives of a piece of EU legislation only formally during the transposition period. The reason for this is that Directive 2012/19 expresses a political compromise between the Council and the Parliament that had already been reached on 21 December 2011. [40] When it adopted its national legislation, the Czech Republic was therefore aware of the objectives of the EU legislation that would soon enter into force. To circumvent such legislation and seriously jeopardise its objectives would be incompatible with the principle of Union loyalty. According to the third sentence of Article 4(3) TEU, the Member States are to refrain from any measure which could jeopardise the attainment of the Union's objectives. [41]

99. Since the Czech legislation requires users to bear the costs of the disposal of photovoltaic panels in advance, it is also liable seriously to jeopardise the objective of producer responsibility for such panels set out in Article 13 of Directive 2012/19. This is because it relieves producers completely or at least predominantly of the disposal costs for the panels in question.

100. Therefore, the fact that a Member State adopts, prior to the adoption of a directive, legislation which is incompatible with the directive and seriously jeopardises its objectives may give rise to liability on the part of that Member State for damage suffered by individuals as a result. Such liability is based on a breach of the duty of sincere cooperation under Article 4(3) TEU. It enters into consideration if the EU institutions involved in the regulatory process had already agreed politically on the new EU legislation prior to the adoption of the national legislation and the Member State was aware of that agreement.

101. However, it must be stated that the considerations regarding the retroactivity of producer responsibility for photovoltaic panels and regarding the duties of sincere cooperation arising from the political agreement reached in the regulatory process give rise to doubts as to whether the breach by the Czech legislation of the duties of sincere cooperation is sufficiently serious. [42] Such seriousness would require that the Czech Republic manifestly and gravely disregarded the limits set on its discretion. [43] However, it is not manifestly apparent that the retroactivity is to be

[38] Judgments of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45); of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 57); and of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 55).

[39] See judgment of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 41).

[40] Fifth indent of European Parliament legislative resolution of 19 January 2012 on the Council position at first reading with a view to the adoption of a directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (Recast) (07906/2/2011 – C7-0250/2011 – 2008/0241(COD)).

[41] See judgments of 5 May 1981, *Commission* v *United Kingdom* (804/79, EU:C:1981:93, paragraph 28), and of 2 June 2005, *Commission* v *Luxembourg* (C-266/03, EU:C:2005:341).

[42] See judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51); of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 30); and of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249, paragraph 113).

[43] Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 55), and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 105).

based not on the expiry of the time limit for transposition [44] – as submitted by the Czech Government – but on the time of publication of the directive. [45] Nor is there any relevant case-law to date that has identified the Member States' duties of sincere cooperation prior to the publication of a directive. However, it is not necessary to take a definitive decision on the seriousness of a possible infringement, because the referring court has not asked about this in the present case and it is likely to be irrelevant. [46]

V. Conclusion

102. I therefore propose that the Court of Justice give the following ruling:

(1) The answer to the first question is that Article 13(1) of Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) prevents Member States from imposing the costs for the collection, treatment, recovery and environmentally sound disposal of photovoltaic panels from users other than private households placed on the market after the publication of the directive on 24 July 2012 on users, rather than producers.

By contrast, Article 13(1) of Directive 2012/19 is invalid in so far as it provides for the establishment of producer responsibility, not previously provided for in national law, for photovoltaic panels placed on the market by producers between 13 August 2005 and 24 July 2012. In that respect, Member States can impose the costs on the users.

(2) The answer to the second question is that the fact that a Member State adopts, prior to the adoption of a directive, legislation which is incompatible with the directive and seriously jeopardises its objectives may give rise to liability on the part of that Member State for damage suffered by individuals as a result. Such liability is based on a breach of the duty of sincere cooperation under Article 4(3) TEU. It enters into consideration if the EU institutions involved in the regulatory process had already agreed politically on the new EU legislation prior to the adoption of the national legislation and the Member State was aware of that agreement.

44 See judgment of 15 January 2019, *E.B.* (C-258/17, EU:C:2019:17, paragraph 53).

45 See point 88 above.

46 See point 94 above.