JUDGMENT OF THE COURT (Grand Chamber)

9 March 2010 *

In Case C-378/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale della Sicilia (Italy), made by decision of 5 June 2008, received at the Court on 21 August 2008, in the proceedings

Raffinerie Mediterranee (ERG) SpA,

Polimeri Europa SpA,

Syndial SpA

v

Ministero dello Sviluppo economico,

* Language of the case: Italian.

Ministero della Salute,

Ministero Ambiente e Tutela del Territorio e del Mare,

Ministero delle Infrastrutture,

Ministero dei Trasporti,

Presidenza del Consiglio dei Ministri,

Ministero dell'Interno,

Regione siciliana,

Assessorato regionale Territorio ed Ambiente (Sicilia),

Assessorato regionale Industria (Sicilia),

Prefettura di Siracusa,

Istituto superiore di Sanità,

Commissario Delegato per Emergenza Rifiuti e Tutela Acque (Sicilia),

Vice Commissario Delegato per Emergenza Rifiuti e Tutela Acque (Sicilia),

Agenzia Protezione Ambiente e Servizi tecnici (APAT),

Agenzia regionale Protezione Ambiente (ARPA Sicilia),

Istituto centrale Ricerca scientifica e tecnologica applicata al Mare,

Subcommissario per la Bonifica dei Siti contaminati,

Provincia regionale di Siracusa,

Consorzio ASI Sicilia orientale Zona Sud,

Comune di Siracusa,

Comune di Augusta,

Comune di Melilli,

Comune di Priolo Gargallo,

Azienda Unità sanitaria locale Nº 8,

Sviluppo Italia Aree Produttive SpA,

Invitalia (Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa) SpA, formerly Sviluppo Italia SpA,

intervening parties:

ENI Divisione Exploration and Production SpA,

ENI SpA,

Edison SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, P. Lindh and C. Toader (Rapporteur), Presidents of Chambers, C.W.A. Timmermans, K. Schiemann, P. Kūris, E. Juhász, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2009,

after considering the observations submitted on behalf of:

— Raffinerie Mediterranee (ERG) SpA, by D. De Luca, M. Caldarera, L. Acquarone and G. Acquarone, avvocati,

— Polimeri Europa SpA and Syndial SpA, by P. Amara, S. Grassi, G.M. Roberti and I. Perego, avvocati,

— Sviluppo Italia Aree Produttive SpA and Invitalia (Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa) SpA, formerly Sviluppo Italia SpA, by F. Sciaudone, avvocato,

— ENI SpA, by G.M. Roberti, I. Perego, S. Grassi and C. Giuliano, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

— the Greek Government, by A. Samoni-Rantou and G. Karipsiadis, acting as Agents,

— the Netherlands Government, by C. Wissels, B. Koopman and D.J.M. de Grave, acting as Agents,

— the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the 'polluter pays' principle, Directive 2004/35/EC of the European Parliament and of the Council

of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56) and, in particular, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference was made in proceedings between Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA and various national, regional and municipal authorities in Italy concerning the measures for remedying environmental damage adopted by those authorities in relation to the Augusta roadstead (Italy), in the vicinity of which are located the installations and/or land of those companies.

Legal context

European Union law

3 The recitals in the preamble to Directive 2004/35 which are relevant to the present case are worded as follows:

‘(1) There are currently many contaminated sites in the Community, posing significant health risks, and the loss of biodiversity has dramatically accelerated over the last decades. Failure to act could result in increased site contamination and greater loss of biodiversity in the future. ...

(2) … The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable …

…

(8) This Directive should apply, as far as environmental damage is concerned, to occupational activities which present a risk for human health or the environment. Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for human health or the environment.

(9) This Directive should also apply, as regards damage to protected species and natural habitats, to any occupational activities other than those already directly or indirectly identified by reference to Community legislation as posing an actual or potential risk for human health or the environment. In such cases the operator should only be liable under this Directive whenever he is at fault or negligent.

…

(13) Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the

negative environmental effects with acts or failure to act of certain individual actors.

…

(24) It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken.

…

(30) Damage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions.

…'

4 In accordance with Article 3(1) of Directive 2004/35, entitled 'Scope', the directive is to apply to:

'…

(a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;

(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.'

5 Article 4(5) of the directive provides that it 'shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.'

6 Article 6 of the directive, entitled 'Remedial action', provides as follows:

'1. Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

…

(b) the necessary remedial measures, in accordance with Article 7.

2. The competent authority may, at any time:

…

(c) require the operator to take the necessary remedial measures;

(d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or

(e) itself take the necessary remedial measures.

3. The competent authority shall require that the remedial measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 2 … (c) or (d), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself, as a means of last resort.'

7 As regards costs connected with preventive and remedial action, Article 8 of Directive 2004/35 provides as follows:

'1. The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive.

2. Subject to paragraphs 3 and 4, the competent authority shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under this Directive.

However, the competent authority may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified.

3. An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:

(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place;

…

In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred.

…'

8 Article 9 of the directive, entitled 'Cost allocation in cases of multiple party causation' is worded as follows:

'This Directive is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product.'

9 Article 11 of the directive, entitled 'Competent authority', provides as follows:

'1. Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.

2. The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken with reference to Annex II shall rest with the competent authority. To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary.

…

4. Any decision taken pursuant to this Directive which imposes preventive or remedial measures shall state the exact grounds on which it is based. Such decision shall be notified forthwith to the operator concerned, who shall at the same time be informed of the legal remedies available to him under the laws in force in the Member State concerned and of the time-limits to which such remedies are subject.'

10 Article 16 of Directive 2004/35, entitled 'Relationship with national law' provides in paragraph 1 thereof that the directive 'shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.'

11 Article 17 of the directive, entitled 'Temporal application', provides that the Directive is not to apply to:

'…

— damage caused by an emission, event or incident that took place before the date referred to in Article 19(1);

— damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date;

— damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.'

12 The first paragraph of Article 19(1) of the directive states that Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 30 April 2007.

13 Section 1 of Annex III to Directive 2004/35 refers in particular to the operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

14 Article 1 of Directive 96/61 states that the purpose of the directive is to achieve integrated prevention and control of pollution arising from the activities listed in Annex I to the directive. Sections 2.1 and 2.4 of Annex I refer, respectively, to 'Energy industries' and the 'Chemical industry'.

National law

15 The Tribunale amministrativo regionale della Sicilia refers to Legislative Decree No 22 of 5 February 1997 transposing Directive 91/156/EEC [of the Council, of 18 March 1991, amending Directive 75/442/EEC on waste] (OJ 1991 L 78, p 32), Directive 91/689/EEC [of the Council, of 12 December 1991] on hazardous waste (OJ 1991 L 377, p. 20) and Directive 94/62/EC [of the European Parliament and of the Council, of 20 December 1994] on packaging and packaging waste (OJ 1994 L 365, p. 10) (GURI No 38, Ordinary Supplement, of 15 February 1997) ('Legislative Decree No 22/1997'). That decree was repealed and replaced by Legislative Decree No 152 of 3 April 2006 on environmental standards (GURI No 88, Ordinary Supplement, of 14 April 2006), Articles 299 to 318 of which transpose Directive 2004/35 into Italian law.

16 'Article 17 of Legislative Decree No 22/1997 provides that … any person who exceeds the limits laid down in paragraph 1(a), albeit inadvertently, or creates a tangible and genuine risk of those limits being exceeded, shall be required, at his own expense, to take measures for the safety, decontamination and environmental reinstatement of the polluted areas and the installations which present a threat of pollution …'.

17 Article 9 of Ministerial Decree No 471 of 25 October 1999 laying down the criteria, procedures and detailed rules for the safety, decontamination and environmental reinstatement of polluted sites, in accordance with Article 17 of Legislative Decree No 22 of 5 February 1997, as amended and supplemented (GURI No 293, Ordinary Supplement, of 15 December 1999), is worded as follows:

'The owner of a site or any other person who … intends of his own initiative to initiate the procedures for emergency safety measures and measures for decontamination

and environmental reinstatement, in accordance with Article 17(13)(a) of Legislative Decree [No 22/1997], shall be required to communicate to the region, the province and the municipality the situation concerning the pollution found and any emergency safety measures necessary for the protection of health and the environment which have been adopted and are being implemented. The communication must be accompanied by appropriate technical documentation which must disclose the nature of those measures … [T]he municipality or, where the pollution affects the territory of a number of municipalities, the region, shall verify the effectiveness of the emergency safety measures adopted and may impose additional requirements and measures, in particular monitoring measures to be implemented to assess the level of pollution and the controls to be carried out to assess the effectiveness of the measures implemented to protect public health and the immediate environment …'

18 Article 311(2) of Legislative Decree No 152 of 3 April 2006 provides as follows:

'Any person who, by committing an unlawful act or by failing to act or to exhibit due conduct, thereby infringing the law, regulations or administrative measures, as a result of negligence, incompetence, recklessness or breach of technical rules, damages the environment by altering, spoiling or destroying it in whole or in part shall be required to restore it to its previous condition or, failing which, to pay an equivalent amount by way of compensation to the State.'

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

19 The dispute in the main proceedings concerns the Priolo Gargallo Region (Sicily), which has been declared a 'Site of National Interest for decontamination purposes', and in particular the Augusta roadstead. The roadstead has been affected by recurring

incidents of environmental pollution, dating back as far as the 1960s, when the Augusta-Priolo-Melilli site was established as a hub for the petroleum industry. Since that time, numerous undertakings operating in the hydrocarbon and the petrochemical sectors have been set up and/or succeeded one another in the region.

20 The area was the subject of a 'characterisation' designed to assess the condition of the land, the water-table, the coastal sea and the seabed. In accordance with Article 9 of Ministerial Decree No 471 of 25 October 1999, the undertakings established on the petrochemical site, as owners of land-based industrial areas located on the site of national interest, submitted proposals for emergency safety measures and measures for decontaminating the water-table, which were approved by interministerial decree.

21 By various successive measures and in view of the delay in implementing the proposed measures, for which it criticised the undertakings concerned, the competent public authority required the undertakings to decontaminate and reinstate the seabed of the Augusta roadstead, and in particular to remove contaminated sediment existing there up to a depth of two metres. It indicated that, if those undertakings failed to comply, the works would be carried out by the authorities of their own initiative at the expense of those undertakings. At the preparatory meeting organised by the relevant departments on 21 July 2006, it was also decided that the measures previously approved should be supplemented by the physical containment of the water-table.

22 Claiming that such a task was impracticable and would expose them to disproportionate costs, the undertakings concerned brought actions against those administrative decisions before the Tribunale amministrativo regionale della Sicilia. By judgment No 1254/2007 of 21 July 2007, that court upheld the actions, taking the view that the decontamination obligations were unlawful, since account had not been taken, when

those obligations were imposed, of the 'polluter pays' principle or of the national rules governing decontamination procedures or indeed of the rule that the parties should be heard. Moreover, there had been no discussion with the undertakings in question concerning the conditions under which such a decontamination operation was to be implemented.

23 That judgment was challenged by the administrative authorities before the Consiglio di Giustizia amministrativa della Regione Sicilia (Council of Administrative Justice for the Region of Sicily), which, by interim order of 2 April 2008, considered that the prima facie case of the appeal had been made out and, taking account of the harmful consequences of the delay in implementing the measures prescribed by those authorities, ordered that judgment No 1254/02007 be stayed.

24 Subsequently, the administrative authorities came to the view that the measures previously approved were inadequate for the purpose of remedying the pollution in the Augusta roadstead. Faced, moreover, with the refusal to comply on the part of the applicant companies, it was decided at an interdepartmental meeting held on 20 December 2007 that the companies should be required to take further measures, including the building of a dam, the contract for the planning and execution of which was awarded to Sviluppo Italia Aree produttive SpA ('Sviluppo'). Those measures were confirmed by decisions of interdepartmental meetings held on 6 March and 16 April 2008. Lastly, Decree No 4378 of 21 February 2008 was adopted concerning 'a final measure approved by the interdepartmental meeting held on 20 December 2007 relating to the Priolo Site of National Interest' ('the Decree of 21 February 2008').

25 The applicants in the main proceedings brought a new action against that decree and other related administrative measures before the Tribunale amministrativo regionale della Sicilia. In that action, they submit, inter alia, that the project chosen, drawn up by Sviluppo, which was entrusted with the execution of the project without a public

tendering procedure, did not pursue an environmental objective but, instead, had as its purpose the construction of a public infrastructure, namely the creation of an artificial island within the Augusta roadstead, using contaminated sediment.

26 The Tribunale Amministrativo Regionale della Sicilia states that, in earlier decisions relating to the same dispute, the Consiglio di Giustizia amministrativa della Regione Sicilia, sitting as an appeal court, took the view, inter alia, that 'any assessment … aimed at determining whether or not the current proprietors or occupants of industrial areas are involved is irrelevant … as is any assessment aimed at determining whether there is any liability on the part of the bodies of the public administration which have authorised the exercise of polluting activities in the past …'. According to that court, '[a] balance between the various interests of constitutional importance of protection of health, the environment and private enterprise is … to be found ... in a criterion of strict liability, in accordance with which economic operators which produce by and derive profit from carrying on hazardous activities must, insofar as the activities pollute per se, or the operators use contaminated structures for production and sources of continuing pollution, themselves bear in full the costs necessary to secure the protection of the environment and of the health of the population, in a causal correlation with all of the aspects … of the hazards associated with the industrial use of the site'.

27 The referring court states that the practice of the competent public authority as it currently stands, which was confirmed by the appeal court, therefore consists in making the undertakings operating in the Augusta roadstead shoulder responsibility for existing environmental pollution, without any distinction being made between past and present pollution or any assessment carried out as to the direct responsibility of each of the undertakings concerned for the damage.

28 Envisaging that its case-law may develop in line with that of the appeal court, the Tribunale Amministrativo Regionale della Sicilia sets out the specific situation of the pollution that is particular to the Augusta roadstead. It points out in particular that there has been a whole succession of petrochemical undertakings in the area, so that it would be not only impossible but also pointless to determine each individual's share of responsibility, especially since the very fact of pursuing activities which are in themselves hazardous on a contaminated site should be regarded as sufficient to hold those undertakings liable.

29 Those were the circumstances in which the Tribunale amministrativo regionale della Sicilia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do the "polluter pays" principle (Article 174 EC …) and the provisions of Directive [2004/35] preclude national legislation which allows the public authorities to require private undertakings — merely owing to the fact that they currently carry on their activities in an area which has been contaminated for a long time or borders on an area which is historically contaminated — to implement rehabilitation measures, irrespective of whether or not any preliminary investigation has been carried out to identify the party responsible for the pollution?

(2) Do the "polluter pays" principle (Article 174 EC …) and the provisions of Directive [2004/35] preclude national legislation which allows the public authorities to impute liability to make good the environmental damage in a particular form to the person who owns the property rights and/or carries on commercial activities on the contaminated site without first having to assess whether there is a causal link between the conduct of that person and the occurrence of the contamination, by virtue merely of that person's "situation" (namely, that of being an operator whose activities are carried on inside the site)?

(3) Do the provisions of Community law in Article 174 EC … and Directive [2004/35] preclude national legislation which, overriding the "polluter pays" principle, allows the public authorities to impute liability to make good the environmental damage in a particular form to the person who owns the property rights and/or operates an undertaking on the contaminated site, without first having to assess whether there is a causal link between the conduct of that person and the occurrence of the contamination or the subjective requirement of intent or negligence?

(4) Do the Community competition principles laid down in the Treaty establishing the European Community and Directive 2004/18/EC, [Council] Directive 93/97/EEC [of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54)] and [Council] Directive 89/665/EEC [of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33)] preclude national legislation which allows the public authorities to award to private persons (Sviluppo SpA and [Sviluppo]) the activities of characterisation and of planning and performing decontamination operations — or more correctly, the carrying out of public works — in areas owned by the State directly, without first carrying out the necessary public tendering procedures?'

The questions referred

Admissibility

30 The Italian Government submits that the reference for a preliminary ruling is inadmissible, in particular because, first, the questions referred would require the Court

to examine national legislation and, second, the referring court's objective is not to resolve the disputes before it but to call into question the case-law of its appeal court.

31 In that connection, it is sufficient to point out that, although the Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with European Union law, it does have jurisdiction to supply the national court with a ruling on the interpretation of that law so as to enable that court to determine whether such compatibility exists and to decide the case before it (Case C-439/06 *citiworks* [2008] ECR I-3913, paragraph 21 and the case-law cited).

32 Moreover, a lower court must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (see, to that effect, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 4).

33 In view of the foregoing observations, the present reference for a preliminary ruling is admissible and it is therefore necessary to examine the various questions referred by the Tribunale amministrativo regionale della Sicilia.

The first three questions

34 By its first three questions, which it is appropriate to examine together, the Tribunale amministrativo regionale della Sicilia asks, in essence, whether the 'polluter

pays' principle, as laid down in the first subparagraph of Article 174(2) EC, and the provisions of Directive 2004/35, which seeks to give that principle concrete expression in the field of environmental liability, preclude national legislation which allows the competent authority to impose measures for remedying environmental damage on commercial operators on account of the fact that their installations are located close to a contaminated area, without carrying out any preliminary investigation into the occurrence of the contamination or establishing a causal link between the environmental damage and those operators or indeed intent or negligence on the part of those operators.

35 In the light of the facts of the case in the main proceedings, as set out by the referring court and as referred to by the Italian, Greek and Netherlands Governments and the Commission of the European Communities, it is necessary to determine the requirements for the applicability ratione temporis of Directive 2004/35 in the light of those facts, before replying to the questions referred.

The applicability ratione temporis of Directive 2004/35

— Observations submitted to the Court

36 The Italian and Netherlands Governments and the Commission doubt whether Directive 2004/35 is applicable ratione temporis to the facts of the dispute in the main proceedings, since the environmental damage occurred before 30 April 2007 and/or is the result, in any event, of earlier activities which ceased before that date. However, the Commission suggests that the directive could be applicable in so far as concerns damage occurring after 30 April 2007 as a result of the current activities of the

operators in question. It cannot be applicable, however, to any pollution occurring before that date caused by operators other than operators currently active in the Augusta roadstead but which is being attributed to the latter operators.

37 On the other hand, the Greek Government takes the view that Directive 2004/35 is applicable to the facts of the main proceedings. It considers that it follows from an a contrario reading of the second indent of Article 17 of the directive that it is applicable, even if the activity from which the damage derives began before 30 April 2007, provided that that activity did not finish before that date and continued beyond it.

— The Court's reply

38 As is apparent from recital 30 in the preamble to Directive 2004/35, the legislature of the European Union took the view that 'damage caused before the expiry of the deadline for implementation of [the] Directive should not be covered by' the provisions of the environmental liability mechanism established by the directive, that is to say, damage caused before 30 April 2007.

39 The EU legislature expressly set out, in Article 17 of Directive 2004/35, the types of situation in which the directive is not applicable. Since the situations which fall outside the scope ratione temporis of the directive were thus determined in negative terms, it must be concluded that any other temporal situation is, in principle, covered by the environmental liability mechanism established by that directive.

40 It is apparent from the first and second indents of Article 17 of Directive 2004/35 that the directive does not apply to damage caused by an emission, event or incident which took place before 30 April 2007 or to damage caused after that date which derives from a specific activity that was carried out and finished before that date.

41 It must be concluded that Directive 2004/35 applies to damage caused by an emission, event or incident which took place after 30 April 2007 where such damage derives either from activities carried out after that date or activities which were carried out but had not finished before that date.

42 Article 267 TFEU is based on a clear division of functions between the national courts and the Court of Justice, so that the Court may rule on the interpretation or validity of a provision of EU law only on the basis of the facts which the national court puts before it. It follows that, within the framework of the procedure under Article 267 TFEU, it is not for the Court of Justice but for the national court to apply to national measures or situations the rules of EU law as interpreted by the Court of Justice (see Case C-279/06 *CEPSA* [2008] ECR I-6681, paragraph 28).

43 It is therefore for the referring court to ascertain, on the basis of the facts, which it alone is in a position to assess, whether, in the main proceedings, the damage in respect of which environmental remedial measures were imposed by the competent national authorities falls within one of the situations referred to at paragraph 41 above.

44 If that court reaches the conclusion that Directive 2004/35 is not applicable in the case pending before it, such a situation is governed by national law, in compliance with the rules of the Treaty and without prejudice to other secondary legislation.

45 Article 174 EC states that Community policy on the environment is to aim at a high level of protection and is based, inter alia, on the principle that the polluter should pay. That provision is therefore confined to defining the general environmental objectives of the Community, since Article 175 EC confers on the Council of the European Union responsibility for deciding what action is to be taken, where appropriate following the codecision procedure with the European Parliament (see, to that effect, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraphs 57 and 58).

46 As the Netherlands Government correctly observes, since Article 174 EC, which establishes the 'polluter pays' principle, is directed at action at Community level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation — such as that at issue in the main proceedings — in an area covered by environmental policy for which there is no Community legislation adopted on the basis of Article 175 EC that specifically covers the situation in question.

47 If the Tribunale amministrativo regionale della Sicilia reaches the conclusion that Directive 2004/35 is applicable ratione temporis in the main proceedings, the questions referred should be addressed as follows.

The environmental liability mechanism laid down in Directive 2004/35

— Observations submitted to the Court

48 The Italian and Greek Governments consider that, under Article 3(1)(a) of Directive 2004/35, in the case of the activities listed in Annex III thereto, operators are deemed to be liable for the pollution found without there being any need to establish that they are at fault or any causal link between their activities and the damage to the environment.

49 According to the Greek Government, it is only where operators' activities do not fall within Annex III to Directive 2004/35 that the competent authority must establish, in accordance with Article 3(1)(b) of the directive, fault or negligence on their part if it is to impose environmental liability measures as provided for in the directive on those operators. Moreover, the competent authority does not have the burden of proving the extent of those operators' involvement, since Article 8(3) of the directive indicates that the burden of proof as to any causal link between the damage and the actual polluter in fact lies with the operator who does not wish to be required to bear the costs of damage which he can prove was caused by a third party. Accordingly, the fact that it is possible for the undertakings concerned to bring actions for an indemnity, possibly inter se, based on national rules governing liability means that potential pragmatic solutions exist.

50 The Italian Government states that, in any event, in the main proceedings the causal link is self-evident, with no need for an investigation to establish it, since the undertakings concerned have incriminated themselves and the substances which they

produce and the pollutants found were clearly the same. Moreover, Article 16(1) of Directive 2004/35 permits the Member States to adopt more stringent provisions than those laid down in the directive.

51 The Commission considers that Directive 2004/35 is not applicable where it is not possible to identify specifically the operator whose activities have caused the environmental damage. However, relying on Article 16(1) of the directive, it is of the opinion that the directive does not preclude the application of a more stringent set of rules, such as those at issue in the main proceedings, as regards the Member States' freedom to identify both other activities which may be made subject to the requirements of the directive and other responsible parties, since, in any event, such rules would have the effect of reinforcing the obligations laid down in the directive.

— The Court's reply

52 As stated in recital 13 in the preamble to Directive 2004/35, not all forms of environmental damage can be remedied by means of the liability mechanism and, for the mechanism to be effective, there needs to be, inter alia, a causal link established between one or more identifiable polluters and concrete and quantifiable environmental damage.

53 As is apparent from Article 4(5) and Article 11(2) of Directive 2004/35, if it is necessary for the competent authority to establish such a causal link in order to impose remedial measures on operators irrespective of the kind of pollution involved, then that requirement is also a condition for the application of the directive in the case of pollution of a diffuse, widespread character.

54 Such a causal link could easily be established where the competent authority is confronted with pollution which is confined to a particular area and period of time and is attributable to a limited number of operators. On the other hand, that is not the case with diffuse pollution phenomena and, therefore, the legislature of the European Union considered that, in the case of such pollution, a liability mechanism is not an appropriate instrument where such a causal link cannot be established. Consequently, Article 4(5) of Directive 2004/35 provides that the directive is to apply to that kind of pollution only where it is possible to establish a causal link between the damage and the activities of individual operators.

55 In that regard, it must be noted that Directive 2004/35 does not specify how such a causal link is to be established. Under the shared competence enjoyed by the European Union and the Member States in environmental matters, where a criterion necessary for the implementation of a directive adopted on the basis of Article 175 EC has not been defined in the directive, such a definition falls within the competence of the Member States and they have a broad discretion, in compliance with the Treaty rules, when laying down national rules developing or giving concrete expression to the 'polluter pays' principle (see, to that effect, Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, paragraphs 48, 52 and 55).

56 Accordingly, the legislation of a Member State may provide that the competent authority has the power to impose measures for remedying environmental damage on the basis of the presumption that there is a causal link between the pollution found and the activities of the operator or operators concerned due to the fact that their installations are located close to that pollution.

57 However, since, in accordance with the 'polluter pays' principle, the obligation to take remedial measures is imposed on operators only because of their contribution to the

creation of pollution or the risk of pollution (see, by analogy, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 77), in order for such a causal link to thus be presumed, the competent authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities.

58 Where the competent authority has such evidence, it is thus in a position to establish a causal link between the operators' activities and the diffuse pollution found. In accordance with Article 4(5) of Directive 2004/35, such a situation therefore falls within the scope of the directive, unless those operators are able to rebut that presumption.

59 It follows that, if the Tribunale amministrativo regionale della Sicilia considers that the pollution in question in the main proceedings is diffuse and no causal link can be established, such a situation does not fall within the scope ratione materiæ of Directive 2004/35 but within that of national law, in accordance with the conditions set out at paragraph 44 above.

60 On the other hand, if the referring court reaches the conclusion that Directive 2004/35 is applicable to the case before it, the following considerations are to be borne in mind.

61 It is apparent from Article 3(1)(b) of Directive 2004/35 that, where there is damage to protected species and habitats caused by any occupational activities other than those listed in Annex III to the directive, the directive applies, provided that it is established

that the operator has been at fault or negligent. On the other hand, there is no such requirement where one of the occupational activities listed in Annex III has caused environmental damage, namely — as defined in Article 2(1)(a) to (c) of the directive — damage to protected species and habitats, and water and land damage.

62 Subject to the findings of fact, which are a matter for the referring court, where environmental damage is caused by operators active in the energy and chemical industry sectors as referred to in Sections 2.1 and 2.4 of Annex I to Directive 96/61, which are, for that purpose, activities falling within Annex III to Directive 2004/35, precautionary measures or remedial measures may be imposed on such operators without there being any need for the competent authority to establish that they are at fault or negligent.

63 In the case of the occupational activities falling within Annex III to Directive 2004/35, environmental liability on the part of operators active in those areas is strict liability.

64 However, as the applicants in the main proceedings have correctly pointed out, the effect of Article 11(2) of Directive 2004/35, read in conjunction with recital 13 in the preamble, is that, in order to impose remedial measures, the competent authority is obliged to establish, in accordance with national rules on evidence, which operator is responsible for the environmental damage. It follows that, to that end, that authority must first investigate the origin of the pollution found and, as stated at paragraph 53 above, it cannot impose remedial measures without first establishing a causal link between the damage established and the activities of the operator whom the authority holds responsible for the damage.

65 Articles 3(1), 4(5) and 11(2) of Directive 2004/35 must therefore be interpreted as meaning that, when deciding to impose remedial measures on operators whose activities fall within Annex III to the directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must, first, carry out a prior investigation into the origin of the pollution found, and has a discretion as to the procedures, means to be employed and length of such an investigation. Second, the competent authority is required to establish, in accordance with national rules on evidence, a causal link between the activities of the operators at whom the remedial measures are directed and the pollution.

66 The applicants in the main proceedings submit that the pollution in the Augusta roadstead is attributable to Montedison SpA and to the Italian navy and the merchant navy. It follows, in their view, that the competent authority cannot require them to take remedial measures such as those imposed in the Decree of 21 February 2008.

67 It should be recalled, first, that in accordance with Article 11(4) of Directive 2004/35, operators have available to them legal remedies to challenge remedial measures adopted on the basis of the directive and the existence of any causal link between their activities and the pollution found. Second, in accordance with Article 8(3) of the directive, such operators are not required to bear the costs of remedial actions where they can prove that the environmental damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, since it is not a consequence of the 'polluter pays' principle that operators must take on the burden of remedying pollution to which they have not contributed (see, by analogy, Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 51).

68 It should also be added that Article 16(1) of Directive 2004/35, in the same way as Article 176 EC, expressly states that the directive is not to prevent Member States from maintaining or adopting more stringent measures in relation to the prevention and remedying of environmental damage. That provision also indicates that such measures may include, inter alia, the identification of, first, additional activities to be subject to the requirements of the directive and, second, additional responsible parties.

69 It follows that a Member State may decide, inter alia, that operators engaged in activities other than those set out in Annex III to Directive 2004/35 can be held strictly liable for environmental damage, that is to say, as defined in Article 2(1)(a) to (c) of the directive, not only damage to protected species and habitats but also water damage and land damage.

70 In view of the foregoing, the answer to the first three questions is that:

— Where, in a situation entailing environmental pollution, the conditions for the application ratione temporis and/or ratione materiæ of Directive 2004/35 are not met, such a situation is governed by national law, in compliance with the rules of the Treaty, and without prejudice to other secondary legislation.

— Directive 2004/35 does not preclude national legislation which allows the competent authority acting within the framework of the directive to operate on the presumption, also in cases involving diffuse pollution, that there is a causal link

between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area. However, in accordance with the 'polluter pays' principle, in order for such a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities.

— Articles 3(1), 4(5) and 11(2) of Directive 2004/35 must be interpreted as meaning that, when deciding to impose measures for remedying environmental damage on operators whose activities fall within Annex III to the directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must, first, carry out a prior investigation into the origin of the pollution found, and it has a discretion as to the procedures, means to be employed and length of such an investigation. Second, the competent authority is required to establish, in accordance with national rules on evidence, a causal link between the activities of the operators at whom the remedial measures are directed and the pollution.

Question 4

71 By its fourth question, the Tribunale amministrativo regionale della Sicilia asks the Court, in essence, whether the directives governing public contracts, in particular Directive 2004/18, preclude national legislation which allows the competent authority to award directly to a private-sector company the planning and implementation of public works and decontamination works to reinstate a polluted site.

72 In accordance with settled case-law, the procedure provided for by Article 267 TFEU is a means of cooperation between the Court of Justice and national courts, by which the Court provides the national courts with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, in particular, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-313/07 *Kirtruna and Vigano* [2008] ECR I-7907, paragraph 25).

73 In the context of that cooperation, it is for the national court before which the dispute has been brought, which alone has direct knowledge of the facts giving rise to the dispute and 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 questions submitted concern the interpretation of EU law, the Court of Justice is bound, in principle, to give a ruling (Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30 and the case-law cited).

74 However, 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, it must refuse to rule on a question referred by a national court (see, to that effect, *Mesquer*, paragraph 30).

75 As regards the question under consideration, it is apparent that the referring court has failed to specify the public body which awarded the contract for the execution of the works referred to in the question, the cost of those works or the act by which those works were awarded to the two companies named in the question.

76 The Tribunale amministrativo regionale della Sicilia refers simply to works 'of significant environmental impact and very high economic value' which were awarded to those companies by the competent authority without their having to compete with other private-sector companies for the contract.

77 Moreover, even though a written question was put by the Court to the Italian Government and oral submissions were made at the hearing, it has not been possible to clarify the circumstances under which the works in question were awarded to those companies. Invitalia (Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa) SpA even claimed that it was merely awarded a contract for simple planning activities and that the competent authority has abandoned the infrastructural works referred to in question 4.

78 In those circumstances, the Court considers that it does not have sufficient information on the factual context of the fourth question referred by the Tribunale amministrativo regionale della Sicilia and must therefore declare that question inadmissible.

Costs

79 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 (Grand Chamber) hereby rules:

Where, in a situation entailing environmental pollution, the conditions for the application ratione temporis and/or ratione materiæ of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage are not met, such a situation is governed by national law, in compliance with the rules of the Treaty, and without prejudice to other secondary legislation.

Directive 2004/35 does not preclude national legislation which allows the competent authority acting within the framework of the directive to operate on the presumption, also in cases involving diffuse pollution, that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area. However, in accordance with the 'polluter pays' principle, in order for such a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities.

Articles 3(1), 4(5) and 11(2) of Directive 2004/35 must be interpreted as meaning that, when deciding to impose measures for remedying environmental damage on operators whose activities fall within Annex III to the directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must, first, carry out a prior investigation into the origin of the pollution found, and it has a discretion as to the procedures, means to be employed and length of such an investigation. Second, the competent authority is required to establish, in accordance with national rules on evidence, a causal link between the activities of the operators at whom the remedial measures are directed and the pollution.

[Signatures]