



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
CAMPOS SÁNCHEZ-BORDONA  
delivered on 25 May 2023<sup>1</sup>

**Case C-86/22**

**Papier Mettler Italia Srl**

**v**

**Ministero della Transizione Ecologica (già Ministero dell’Ambiente e della Tutela del  
Territorio e del Mare),**

**Ministero dello Sviluppo Economico,**

**intervener:**

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

(Request for a preliminary ruling  
from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio,  
Italy))

(Reference for a preliminary ruling – Directive 98/34/EC – Obligation of Member States to notify draft technical regulations to the European Commission – Effects of failure to notify a technical regulation – Directive 94/62/EC – Harmonisation of laws – Environment – Packaging and packaging waste – Lightweight plastic carrier bags – National legislation containing stricter technical rules than those laid down by EU legislation – Article 114(5) and (6) TFEU – Direct effect of Directive 94/62 – Liability for loss or damage to individuals caused by a Member State)

1. The commercial success of lightweight plastic carrier bags is the result of their low weight and resistance to degradation. Their proliferation – they are used once or a few times and are easily thrown away – creates a serious pollution problem.<sup>2</sup> Many lightweight plastic carrier bags escape waste-management streams and ultimately accumulate in nature, especially in the form of marine litter.<sup>3</sup>

<sup>1</sup> Original language: Spanish.

<sup>2</sup> See Resolution UNEP/EA.5/Res.14 of the United Nations Environment Assembly of 2 March 2022, *End plastic pollution: Towards an international legally binding instrument*.

<sup>3</sup> On that phenomenon in the European Union, see COM(2018) 28 final of 16 January 2018, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Plastics in a Circular Economy.

2. In this reference for a preliminary ruling, the Court of Justice must consider the compatibility with EU law of Italian legislation which prohibited the use on Italian territory of plastic carrier bags with certain characteristics, despite the fact that Directive 94/62/EC<sup>4</sup> permitted the marketing of such bags in all the Member States.

## I. Legal framework

### A. *European Union law*

#### 1. *Directive 94/62*

3. Pursuant to Article 1 ('Objectives'):

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

...'

4. Article 2 ('Scope') reads:

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

...'

5. Article 3 ('Definitions')<sup>5</sup> contains the following definitions:

'...

1b. "plastic carrier bags" shall mean carrier bags, with or without handle, made of plastic, which are supplied to consumers at the point of sale of goods or products;

1c. "lightweight plastic carrier bags" shall mean plastic carrier bags with a wall thickness below 50 microns;

...'

6. In accordance with Article 4(1a) ('Prevention'):<sup>6</sup>

<sup>4</sup> European Parliament and Council Directive of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

<sup>5</sup> As updated by Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62 as regards reducing the consumption of lightweight plastic carrier bags (OJ 2015 L 115, p. 11).

<sup>6</sup> Ibid.

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

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

...’

7. Article 9 (‘Essential requirements’) is worded as follows:

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

...’

8. Article 16 (‘Notification’) states:

‘1. Without prejudice to [Council] Directive 83/189/EEC [of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8)], before adopting such measures, Member States shall notify the drafts of measures which they intend to adopt within the framework of this Directive to the [European] Commission, excluding measures of a fiscal nature, but including technical specifications linked to fiscal measures which encourage compliance with such technical specifications, in order to permit the latter to examine them in the light of existing provisions following in each case the procedure under the above Directive.

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

9. Article 18 (‘Freedom to place on the market’) provides:

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

10. Annex II governs ‘[essential] requirements on the composition and the reusable and recoverable, including recyclable, nature of packaging’.

## 2. Directive 98/34/EC<sup>7</sup>

### 11. Article 1 provides:

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

...

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

...’

### 12. In accordance with Article 8:

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

...

5. When draft technical regulations form part of measures which are required to be communicated to the Commission at the draft stage under another Community act, Member States may make a communication within the meaning of paragraph 1 under that other act, provided that they formally indicate that the said communication also constitutes a communication for the purposes of this Directive.

The absence of a reaction from the Commission under this Directive to a draft technical regulation shall not prejudice any decision which might be taken under other Community acts.’

## ***B. National law: Decree of 18 March 2013***<sup>8</sup>

13. Article 1 defines shopping bags as ‘bags available at sales points, in return for payment or free of charge, for consumers to carry foodstuffs and non-food products’.

<sup>7</sup> Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18). That directive was replaced, from 6 October 2015, by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

<sup>8</sup> Decreto ministeriale – Individuazione delle caratteristiche tecniche dei sacchi per l’asporto delle merci, del Ministero dell’Ambiente e della Tutela del Territorio e del Mare e del Ministero dello Sviluppo Economico (Ministerial Decree of the Ministry of the Environment and the Protection of the Land and the Sea and of the Ministry of Economic Development defining the technical specifications of shopping bags) of 18 March 2013 (GURI No 73 of 27 March 2013; ‘the 2013 Decree’).

14. Article 2 provides:

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

- (a) biodegradable and compostable disposable bags, conforming to harmonised standard UNI EN 13432:2002; [9]
- (b) reusable bags composed of polymers other than those mentioned in (a), with external handles to fit the useful size of the bag:
  - (b.1) with a thickness exceeding 200 microns and containing at least 30% recycled plastic, if they are intended for food use;
  - (b.2) with a thickness exceeding 100 microns and containing at least 10% recycled plastic, if they are not intended for food use;
- (c) reusable bags composed of polymers other than those mentioned in (a), having internal handles to fit the useful size of the bag:
  - (c.1) with a thickness exceeding 100 microns and containing at least 30% recycled plastic, if they are intended for food use;
  - (c.2) with a thickness exceeding 60 microns and containing at least 10% recycled plastic, if they are not intended for food use.

2. The marketing of reusable shopping bags made of paper, natural fibre, polyamide fibre and non-polymer materials is also permitted.

...’

15. In accordance with Article 6:

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

## **II. Facts, dispute and questions referred for a preliminary ruling**

16. Papier Mettler Italia Srl (‘Papier Mettler’) is a company involved in the distribution of packaging. In particular, its business focuses on the production of polyethylene packaging, including plastic carrier bags.

<sup>9</sup> UNI EN 13432:2002 of 1 March 2002, Imballaggi – Requisiti per imballaggi recuperabili mediante compostaggio e biodegradazione – Schema di prova e criteri di valutazione per l'accettazione finale degli imballaggi. It is available, upon payment, on the website of the UNI Ente Italiano di Normazione.

17. Since it considered itself harmed by the 2013 Decree, Papier Mettler applied to the referring court for the annulment of that decree and for compensation for the loss and damage which it had sustained, and which it might sustain in the future, as a result.<sup>10</sup>

18. Papier Mettler put forward the following arguments in support of its application:

- the 2013 Decree prohibits the marketing of plastic carrier bags permitted by Directive 94/62. Specifically, Article 2 provides that plastic carrier bags must meet certain technical requirements, contrary to Directives 94/62 and 98/34;
- from a procedural point of view, since Directive 94/62 is a harmonisation directive, the technical rules introduced by the national authority should be notified to the Commission prior to their adoption (Article 114(5) and (6) TFEU);
- Article 16 of Directive 94/62 requires Member States to notify the Commission in advance of the drafts of measures which they intend to adopt, in order to permit the latter to examine them in the light of existing provisions;
- Article 8 of Directive 98/34 also provides that ‘any draft technical regulation’ and ‘the grounds which make the enactment of such a technical regulation necessary’ must be communicated to the Commission before the adoption of the regulation;
- consequently, the 2013 Decree should have been notified to the Commission in advance, which the Italian Republic failed to do;
- from a substantive point of view, the 2013 Decree is contrary to Directive 94/62 in that it prohibits the marketing of bags which comply with one of the requirements for recoverability laid down in point 3 of Annex II to that directive.<sup>11</sup>

19. The defendant authority contested the claims put forward by Papier Mettler, arguing as follows:

- the 2013 Decree was duly notified to the Commission on 12 March 2013. Its entry into force was subject to the conclusion, with a successful outcome, of the procedure provided for in Directive 98/34. The procedure was concluded on 13 September 2013;
- the technical rules laid down in the 2013 Decree are necessary to counteract the problem of contamination of the separate collection of organic waste in Italy and to encourage the use of biodegradable and compostable plastic bags;<sup>12</sup>

<sup>10</sup> At the hearing, Papier Mettler identified that loss and damage as lost profits resulting from the inability to sell in Italy bags manufactured in accordance with the requirements laid down in Directive 94/62, which it marketed legally in other Member States.

<sup>11</sup> The 2013 Decree prohibits the marketing of bags that do not meet the specifications of UNI EN 13432:2002 or that do not meet other technical specifications in terms of thickness and shape. Those requirements are not provided for in Directive 94/62 and, therefore, the Italian Republic prohibits the marketing of bags which comply with the requirements laid down in point 3 of Annex II to Directive 94/62.

<sup>12</sup> The defendant submits that Italian consumers tend to use single-use plastic bags for organic waste.

- in identifying certain types of marketable bags,<sup>13</sup> the 2013 Decree introduced a selective ban which is limited only to plastic bags that, unless they are a certain thickness, are unlikely to be reused and are soon destined to become plastic waste.

20. Against that background, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) has referred the following questions for a preliminary ruling:

- (1) Do Article 114(5) and (6) TFEU, Article 16(1) of Directive [94/62] and Article 8 of Directive [98/34] preclude the application of a national provision such as that laid down in the contested interministerial decree, which prohibits the marketing of single-use shopping bags made of non-biodegradable materials but otherwise complying with the requirements laid down in Directive [94/62], where that national provision containing more restrictive technical rules than the EU legislation was not notified by the Member State to the European Commission in advance, but only after the adoption and before the publication of the measure?
- (2) Must Articles 1, 2, 9(1) and 18 of Directive [94/62], as supplemented by the provisions of points 1, 2 and 3 of Annex II to the directive, be interpreted as precluding the adoption of a national rule prohibiting the marketing of single-use shopping bags made of non-biodegradable materials, which otherwise comply with the requirements laid down in Directive [94/62], or may the additional technical rules laid down by national law be justified by the aim of ensuring a higher level of environmental protection, considering, if need be, the specific problems regarding waste collection in the Member State and the need for that State to implement the EU obligations laid down in that related context?
- (3) Must Articles 1, 2, 9(1) and 18 of Directive [94/62], supplemented by the provisions of points 1, 2 and 3 of Annex II to the directive, be interpreted as constituting a clear and precise rule aimed at prohibiting any obstacle to the marketing of bags complying with the requirements laid down in the directive and leading to the necessary disapplication of any conflicting national legislation by all [bodies] of the State, including public authorities?
- (4) Lastly, could the adoption of national legislation prohibiting the marketing of single-use non-biodegradable shopping bags manufactured in compliance with the requirements laid down in Directive [94/62], where that national legislation is not justified by the aim of ensuring a higher level of environmental protection, by the specific problems regarding waste collection in the Member State and by the need for that State to implement the EU obligations laid down in that related context, constitute a manifest and serious infringement of Article 18 of Directive [94/62]?

### III. Procedure before the Court of Justice

21. The request for a preliminary ruling was received at the Court on 9 February 2022.

<sup>13</sup> Namely: (i) biodegradable and compostable single-use bags, conforming to harmonised standard UNI EN 13432:2002; (ii) traditional plastic carrier bags of a certain thickness, which are therefore reusable; (iii) reusable shopping bags made of paper, natural fibre, polyamide fibre and non-polymer materials.

22. Written observations were lodged by Papier Mettler, the Associazione Italiana delle Bioplastiche e dei Materiali Biodegradabili e Compostabili ('Assobioplastiche'), the Italian Government and the European Commission. All those parties took part in the hearing, which was held on 22 March 2023.

#### IV. Assessment

##### A. Preliminary remarks

23. First, it is necessary to clarify which type of plastic carrier bags the national court is referring to. Although the order for reference does not always use uniform terminology, it appears to refer in all cases to single-use lightweight plastic carrier bags<sup>14</sup> which are disposable and are made from non-biodegradable and non-compostable materials, but which comply with the other requirements laid down by Directive 94/62.

24. Second, it is important to identify the relevant provisions of EU law for the purpose of answering the questions referred:

- although the referring court cites Articles 1 and 2 of Directive 94/62, the interpretation of those provisions (concerning the objectives and scope of that directive, respectively) is not in fact necessary because no questions have been raised regarding the status of plastic bags as packaging;<sup>15</sup>
- by contrast, Article 9(1) and Article 18 of Directive 94/62 may indeed be decisive for the outcome of the proceedings.

##### B. Admissibility of the reference for a preliminary ruling

25. Assobioplastiche and the Italian Government submit that the reference for a preliminary ruling is inadmissible because the 2013 Decree never entered into force or was repealed.

26. Assobioplastiche also contests the admissibility of the reference on the grounds that the referring court did not take account of Article 4(1a) of Directive 94/62.

27. I do not believe that either of those pleas justifies the dismissal of the reference for a preliminary ruling at the outset. The referring court is responsible for identifying the national legislative framework applicable to the dispute in which the questions referred for a preliminary ruling have arisen. It is common knowledge that those questions enjoy a presumption of relevance.<sup>16</sup>

<sup>14</sup> More accurately perhaps, they should be described as disposable bags that are not necessarily single-use, for consumers may use such bags more than once if they so wish and the bag is durable enough.

<sup>15</sup> Judgments of 29 April 2004, *Plato Plastik Robert Frank* (C-341/01, EU:C:2004:254), and of 10 November 2016, *Eco-Emballages and Others* (C-313/15 and C-530/15, EU:C:2016:859).

<sup>16</sup> Judgments of 13 November 2018, *Levola Hengelo* (C-310/17, EU:C:2018:899, paragraph 28), and of 6 October 2022, *Contship Italia* (C-433/21 and C-434/21, EU:C:2022:760, paragraph 24).



28. At the hearing, the parties debated at length the validity and application of the 2013 Decree but their interventions did not suggest a clear solution in that regard. They agreed that the legislative situation created was confused; one described it as chaotic, another as inexplicable and another as a legislative mess.

29. In the Commission's submission, the 2013 Decree entered into force and applied in Italy from its official publication until it was formally repealed in 2017.<sup>17</sup> Under Article 6, it was possible to delay the application of the decree, in any event, until 13 September 2013, the date on which the standstill period laid down in Article 9 of Directive 98/34 ended. Since the decree was officially published on 27 March 2013, it was no longer a draft and became a provision in force and therefore the Commission did not issue a report on its compatibility with EU law.

30. The Italian Government and Assobioplastiche contend that the 2013 Decree never entered into force because the procedure for notification to the Commission did not have a successful outcome and the suspensive condition laid down in Article 6 thereof took effect. Some years later, the decree was formally repealed in order to 'remove it' from Italian law, but, in fact, that did not involve the repeal of a provision that was in force.

31. Papier Mettler explained that the penalties laid down in Decree-law No 2/2012<sup>18</sup> became operational upon the adoption of the 2013 Decree and applied irrespective of whether or not that decree had entered into force. The reason Papier Mettler was not made subject to penalties was because it ceased selling the plastic carrier bags prohibited in Italy by the 2013 Decree, resulting in the loss of profits which it is claiming.

32. In any event, it is for the referring court, which alone has jurisdiction to interpret domestic law, to rule on this imbroglio concerning the entry into force and effects of the 2013 Decree. The Court may not involve itself in a dispute which must be decided on by the national court.

33. The reference for a preliminary ruling would be inexplicable if the referring court were to take the view that the 2013 Decree (with which the action brought before it by Papier Mettler is concerned) had never entered into force or produced legal effects. It would suffice for the referring court to consider that fact to be established in order to give a decision on the main proceedings without further consideration. The referring court has not taken that view and has made a reference for a preliminary ruling because, implicitly, it appears to adopt the contrary position.

34. Regardless, I do not believe that the dispute before the referring court, and the reference for a preliminary ruling itself, can be categorised as spurious. I consider, therefore, that the reference is admissible, subject to the final decision regarding the entry into force and the interpretation of the 2013 Decree resting with the national court.

<sup>17</sup> Assobioplastiche submits (paragraph 4 of its written observations) that the 2013 Decree has not been in force since 13 August 2017, the date on which it was replaced by the Italian legislation transposing Directive 2015/720, that is, by Decreto-legge n. 91, disposizioni urgenti per la crescita economica nel Mezzogiorno (Decree-law No 91 on urgent provisions for the economic development of the Mezzogiorno) of 20 June 2017 (GURI No 141 of 20 June 2017, p. 1), now, after amendment, Legge n. 123 (Law No 123) of 3 August 2017 (GURI No 188 of 12 August 2017, p. 1).

<sup>18</sup> Decreto-Legge n. 2, misure straordinarie e urgenti in materia ambientale (Decree-law No 2 on urgent special measures concerning the environment; 'Decree-law No 2/2012') of 25 January 2012 (GURI No 20 of 25 January 2012, p. 1), now, after amendment, Legge n. 28 (Law No 28) of 24 March 2012 (GURI No 71 of 24 March 2012, p. 1).

35. As regards the second plea of inadmissibility, I shall merely state that Article 4(1a) of Directive 94/62 is not applicable *ratione temporis* to the facts of the dispute. Those facts occurred in 2013 while Article 4(1a) was inserted into Directive 94/62 in 2015 (by Directive 2015/720).

### C. Question 1

36. The referring court asks whether a national rule worded as set out above,<sup>19</sup> which was notified by the Member State to the Commission after its adoption but several days before its official publication,<sup>20</sup> is compatible with Article 16(1) of Directive 94/62 and Article 8 of Directive 98/34.

#### 1. Application of Directive 98/34

37. Neither the referring court nor the parties to the proceedings have any doubts that the provisions contained in the 2013 Decree constitute a technical regulation (within the meaning of Directive 98/34). The difficulties created by that classification, which are frequently raised before the Court,<sup>21</sup> are not at issue in this case, the undisputed basis of which is that that legislation constitutes a technical regulation.

38. As I shall examine below, the Italian State was required to notify that technical regulation (the 2013 Decree) to the Commission *at the draft stage*, in other words, before its adoption.<sup>22</sup>

39. Article 8(1) of Directive 98/34 provides that Member States must immediately communicate to the Commission any *draft technical regulation*. In the notification, they must indicate ‘the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft’. Where the draft merely transposes the full text of an international or European standard, information regarding the relevant standard will suffice.

40. Failure to comply with that obligation renders the technical regulation concerned unenforceable against individuals, be it in criminal proceedings or in proceedings of another kind between individuals.<sup>23</sup>

41. Directive 98/34 grants the Commission powers of review in respect of draft technical regulations notified to it by the Member States.<sup>24</sup> It is specifically in order to safeguard those powers that consequences are provided for which are directly linked to the failure to notify, as the Court has held since the judgment in *CIA Security International*: the obligation laid down in Article 8 of Directive 98/34 has direct effect and national technical regulations which have not been notified are unenforceable against individuals.

<sup>19</sup> In other words, a provision which prohibits the marketing of single-use (disposable) plastic bags manufactured from non-biodegradable materials but which otherwise satisfy the conditions laid down in Directive 94/62.

<sup>20</sup> The first question is therefore concerned with procedural matters. I shall state my view on the compatibility, on material grounds, of the 2013 Decree with Article 114(5) and (6) TFEU when I examine the second question.

<sup>21</sup> See, for example, judgment of 24 November 2022, *Belplant* (C-658/21, EU:C:2022:925).

<sup>22</sup> See the definition above of ‘draft technical regulation’ in Article 1(12) of Directive 98/34.

<sup>23</sup> Judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172; ‘judgment in *CIA Security International*’, paragraphs 49 and 50); of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 84); of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821, paragraph 64); and of 3 December 2020, *Star Taxi App* (C-62/19, EU:C:2020:980, paragraph 57).

<sup>24</sup> After notification, a period begins of three, four or six months in which the notified draft cannot be adopted definitively in order to enable the Commission and the other Member States to present to the notifying State detailed comments or opinions regarding the compatibility of the draft with EU law. That period is extended to 12 months if the Commission decides to propose a harmonisation measure in that field.

42. The same conclusion was reached in relation to other information and monitoring procedures similar to the one examined here, such as the procedure laid down in Directive 2000/31/EC,<sup>25</sup> with regard to information society services, with which the judgment in *Airbnb Ireland* was concerned.<sup>26</sup>

43. The Court confirmed in the judgment in *Airbnb Ireland* the consequences flowing from the obligation laid down in a directive that confers on the Commission powers of that nature, which is sufficiently clear, precise and unconditional: it has direct effect and, therefore, it may be invoked by individuals before the national courts.<sup>27</sup>

44. According to the order for reference, the 2013 Decree was notified to the Commission on 12 March 2013,<sup>28</sup> was adopted six days later and was officially published on 27 March 2013.

45. A notification made to the Commission in those terms breaches the obligation laid down by Article 8(1) of Directive 98/34, since:

- the drawing up of the draft technical regulation was so advanced when it was notified to the Commission that it was no longer possible to insert any substantive amendments (any type of amendment, in fact) into it;
- what must be notified immediately to the Commission is a ‘draft’ technical regulation and not the final version of that regulation;<sup>29</sup>
- that timing meant that the Italian Republic was unable to take into account the comments of the Kingdom of Sweden or the detailed opinions of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland relating to the draft technical regulation because the 2013 Decree was adopted before those were issued.

46. Therefore, the procedure provided for by Directive 98/34 was circumvented. The adoption of the draft technical regulation six days after it was notified to the Commission infringed the standstill obligation laid down by Article 9(1) of Directive 98/34: a Member State may not adopt a notified draft for a period of at least three months from the date on which the Commission receives the notification.

47. The Italian Government puts forward two grounds on which it justifies its actions and denies that Directive 98/34 was infringed:

- the notification of the 2013 Decree reproduces another previous notification sent in 2011;

<sup>25</sup> Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1). The second indent of Article 3(4)(b) imposes on Member States the specific obligation to notify the Commission and the Member State on whose territory the service provider is established of its intention to take a measure which restricts the free movement of that service.

<sup>26</sup> Judgment of 19 December 2019 (C-390/18, EU:C:2019:1112; ‘judgment in *Airbnb Ireland*’; paragraphs 88 to 97).

<sup>27</sup> The notification and monitoring procedure enables the Commission to avoid the adoption or at least the maintenance of obstacles to trade contrary to the TFEU, in particular by proposing amendments to be made to national measures (judgment in *Airbnb Ireland*, paragraphs 90 and 92).

<sup>28</sup> Notification No 2013/152/I of 12 March 2013, Draft interministerial decree identifying the technical characteristics of shopping bags, established in Article 2 of Decree-law No 2/2012, converted into Law No 28/2012, available at: <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2013&num=152>.

<sup>29</sup> Judgment of 8 September 2005, *Commission v Portugal* (C-500/03, not published, EU:C:2005:515, paragraph 39).

– the entry into force of the 2013 Decree is, in accordance with Article 6 thereof, conditional on the successful outcome of the notification procedure. Since the Commission did not issue an opinion, that procedure did not have a successful outcome<sup>30</sup> and therefore the decree never entered into force. As a result, the Italian Republic did not notify the definitive text of that technical regulation to the Commission.<sup>31</sup>

48. I am not persuaded by either of those explanations.

49. As far as the 2011 notification<sup>32</sup> is concerned, the draft technical regulation notified to the Commission at that time was (the future) Decree-law No 2/2012, which extended the prohibition on the marketing of disposable plastic carrier bags not conforming to harmonised standard UNI EN 13432:2002. Article 2(1) of that draft provided for the drafting of a subsequent ministerial decree to determine the scope of the prohibition on the marketing of plastic carrier bags which are neither biodegradable nor compostable. It also laid down penalties for infringements of that future legislation.

50. Consequently, as the Commission argued at the hearing, the 2013 notification cannot be considered to be a simple repetition of the 2011 notification. The 2013 version includes new restrictions on plastic carrier bags, the notification of which to the Commission was mandatory under Directive 98/34.

51. As regards the standstill clause (Article 6), the Italian State's conduct when inserting that clause into the text of the 2013 Decree is incompatible with Directive 98/34.

52. The official publication of the 2013 Decree may, by itself, affect the free movement of goods, having an impact on the types of plastic carrier bags which may be placed on the market in Italy. Making the entry into force of a decree conditional on the successful outcome of the notification procedure laid down in Directive 98/34 is a legislative technique which is incompatible with the principle of legal certainty because individuals do not know when there will be an outcome (whether successful or unsuccessful) with which they must bring their conduct into line.

53. That legislative technique also prevents proper account from being taken of the detailed comments and opinions of the Commission and other Member States on the compatibility of the draft technical regulation with the provisions of EU law, as occurred in this case. That frustrates the aim pursued by Directive 98/34, which is the prevention of technical obstacles to trade before they begin to produce their restrictive effects.

54. In short, I believe that the adoption of the 2013 Decree infringed Article 8(1) and Article 9(1) of Directive 98/34 on formal grounds.

<sup>30</sup> The Italian Government refers to the letter sent to it by the Commission, dated 23 June 2015.

<sup>31</sup> The Italian Government submits that that fact led to the adoption of Decreto-legge n. 91 (Decree-law No 91/2014) of 24 June 2014 (GURI No 144 of 24 June 2014, p. 1), now, after amendment, Legge n. 116, recante disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficiamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea (Law No 116 containing urgent provisions for the agricultural sector, protection of the environment and the energy efficiency of school and university buildings, the revival and development of businesses, the containment of the costs imposed on electricity tariffs, and the immediate definition of the obligations derived from EU legislation) of 11 August 2014 (Ordinary Supplement to GURI No 192 of 20 August 2014), Article 11(2-bis) of which deleted all references to the ministerial decree in Article 2(4) of Decree-law No 2/2012, with a view to making the penalties laid down therein directly applicable.

<sup>32</sup> Notification No 2011/174/1 of 5 April 2011, Draft law prohibiting the marketing of non-biodegradable shopping bags, available at: <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2011&num=174>.

## 2. Application of Directive 94/62

55. Pursuant to Article 16(1) of Directive 94/62, before adopting such measures, Member States are required to notify the drafts of measures (relating to packaging and packaging waste) which they intend to adopt within the framework of that directive to the Commission.

56. Article 16(2) states that, if the proposed measure is a technical matter, the Member State concerned may indicate that the notification is equally valid for Directive 83/189 (subsequently replaced by Directive 98/34).

57. The Italian State notified the draft of the 2013 Decree to the Commission in accordance with Article 16 of Directive 94/62. That provision (unlike Article 9 of Directive 98/34) does not lay down a period during which a Member State must await the comments of the Commission and the other Member States before adopting the draft national measure. Therefore, I do not consider that the Italian Republic infringed that provision, despite the fact that the 2013 Decree was, as I have already noted, officially published six days after it was notified to the Commission.

58. The procedure laid down in Article 16 of Directive 94/62 is simply a procedure for the *provision of information*, whereas the corresponding procedure in Directive 98/34 is a procedure for the *provision of information about and monitoring of* national regulations. They are, therefore, different procedures, with effects which are also different.

59. Neither the wording nor the purpose of Article 16 of Directive 94/62 suggests that failure to comply with the advance notification obligation leads to the same outcome as failure to comply with Directive 98/34.

60. Article 16 of Directive 94/62 concerns relations between Member States and the Commission and therefore does not give rise to any right for individuals which might be infringed by a Member State's breach of the obligation laid down therein. Therefore, the provision may not be invoked before the national courts in order to obtain the annulment or suspension, vis-à-vis individuals, of measures which have not been notified.<sup>33</sup>

61. In my view, Article 16 of Directive 94/62 creates a procedure for the provision of information alone, which is similar to the procedures examined by the Court in its judgments in *Enichem Base* and *Bulk Oil*.<sup>34</sup>

62. It seems to me to be logical that, contrary to the Commission's contention at the hearing, the non-application to individuals of the national provisions concerned should be rejected in procedures of that kind where those provisions were adopted in breach of a prior notification obligation imposed by an EU provision which does not provide for legal consequences that are directly linked to the breach of that obligation.

<sup>33</sup> See, by analogy, in relation to Article 3(2) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), judgment of 13 July 1989, *Enichem Base and Others* (380/87, EU:C:1989:318; judgment in *Enichem Base*; paragraphs 22 to 24).

<sup>34</sup> Judgment of 18 February 1986, *Bulk Oil (Zug)* (174/84, EU:C:1986:60, paragraph 62).

63. As I have already pointed out, the procedure for the provision of information alone, laid down in Article 16 of Directive 94/62, is not comparable to the procedure laid down in Directive 98/34 or the procedures laid down in other provisions which follow the same model as Directive 98/34, as occurred with the obligation laid down in the second indent of Article 3(4)(b) of Directive 2000/31, to which I referred above.<sup>35</sup>

64. The cross references contained in Article 16(2) of Directive 94/62 and Article 8(5) of Directive 98/34 do not alter the foregoing considerations. Those are provisions which merely state that the notification of a national draft may be valid for two procedures for the provision of information laid down by different 'Community acts'. That prevents the same draft from being notified more than once to the Commission. However, that rule does not alter the different natures of the two procedures.

65. I should also clarify that, as the Commission pointed out at the hearing, the notification of a draft technical regulation under Article 8 of Directive 98/34 is not valid for the purposes of the application of Article 114(5) TFEU. In order to rely on that provision of the TFEU, the Member State must demonstrate that the national rule that it will adopt responds to the need for a higher level of protection of the environment (also the working environment) owing to specific features of the notifying State arising as a result of new scientific evidence after the adoption of the harmonisation measure.

66. The notification for the purposes of applying of Directive 98/34 does not require such a thorough justification. Moreover, notification under that directive simply brings the entry into force of the draft legislation to a standstill for a period of time, pending a possible response from the Commission and from the other Member States.

67. By contrast, a notification under Article 114(5) TFEU is aimed at obtaining the Commission's approval of a more protective national rule, after verification that that provision is not a means of arbitrary discrimination or a disguised restriction on trade between Member States and that it does not constitute an obstacle to the functioning of the internal market.

#### **D. Question 2**

68. The referring court asks, in short, whether a national rule which prohibits the marketing of disposable (single-use) bags made from non-biodegradable materials but which otherwise comply with the requirements laid down in Directive 94/62:

- infringes Article 18 of Directive 94/62, in conjunction with Article 9 of and Annex II to that directive;
- may be justified by the aim of ensuring a higher level of environmental protection.

<sup>35</sup> Judgment in *Airbnb Ireland*, paragraph 94: that obligation 'is not simply a requirement to provide information, comparable to the one at issue in the case which gave rise to the judgment [in] *Enichem Base and Others* ... but rather an essential procedural requirement which justifies the unenforceability of non-notified measures restricting the freedom to provide an information society service against individuals'. That statement is not detracted from by the fact that there is no 'standstill obligation on a Member State which intends to adopt a measure restricting the freedom to provide an information society service' (paragraph 93).

### 1. *Incompatibility of the national rule with Article 18 of Directive 94/62*

69. Pursuant to that article, ‘Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive’.

70. In accordance with Article 9 of Directive 94/62, ‘packaging may be placed on the market only if it complies with all essential requirements defined by this Directive including Annex II’. For its part, that annex governs ‘[essential] requirements on the composition and the reusable and recoverable, including recyclable, nature of packaging’.<sup>36</sup>

71. According to the Court, ‘the marking and identification of packaging and the requirements on the composition of packaging and its capacity to be reused or recovered’ (Articles 8 to 11 of and Annex II to Directive 94/62) have been the subject of complete harmonisation.<sup>37</sup>

72. The following conclusions can be drawn from that statement:

- where an EU provision provides for full harmonisation, it guarantees that a product manufactured in line with the harmonised requirements benefits from free movement throughout the territory of the European Union. Member States lose the right to impose additional requirements based on the protection of public interest grounds;<sup>38</sup>
- when providing for exhaustive harmonisation, the EU authorities perform the necessary balancing exercise between the objective of free movement of the product and the objective of protection of the public interest, which means that national authorities may not repeat that balancing exercise;
- where a matter has been the subject of exhaustive harmonisation within the European Union, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law.<sup>39</sup>

73. On that basis, Article 18 of Directive 94/62, in conjunction with Article 9 thereof and Annex II thereto, precludes, on material or substantive grounds, the adoption of a national rule like that at issue in this case.

74. The 2013 Decree prohibits the marketing of bags which do not conform to a technical standard (UNI EN 13432:2002), even if those bags otherwise comply with the requirements in the field of recovery laid down in point 3 of Annex II to Directive 94/62, unless they satisfy other technical specifications regarding thickness and shape which are not laid down in that directive either.

<sup>36</sup> In particular, point 1 of the annex sets out various requirements relating to the manufacturing and composition of packaging; point 2 sets out requirements relating to the reuse of packaging; and point 3 sets out requirements relating to the recovery of packaging. As regards the latter, four alternative criteria are established for the recovery of packaging, which can be guaranteed by the recycling of materials, by energy recovery, by composting or by the biodegradability of the packaging. The use of any of those packaging-recovery technologies ensures in all cases that such packaging may be marketed in the EU internal market.

<sup>37</sup> Judgments of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799, paragraph 56), and of 14 December 2004, *Commission v Germany* (C-463/01, EU:C:2004:797, paragraph 44). However, ‘the organisation of national systems intended to encourage the reuse of packaging is therefore not the subject of complete harmonisation’.

<sup>38</sup> Judgments of 5 May 1993, *Commission v France* (C-246/91, EU:C:1993:174, paragraph 7); of 8 May 2003, *ATRAL* (C-14/02, EU:C:2003:265, paragraph 44); and of 12 April 2018, *Fédération des entreprises de la beauté* (C-13/17, EU:C:2018:246, paragraph 23).

<sup>39</sup> Judgments of 24 February 2022, *Viva Telecom Bulgaria* (C-257/20, EU:C:2022:125, paragraph 23), and of 19 January 2023, *CIHEF and Others* (C-147/21, EU:C:2023:31, paragraph 26).

75. Therefore, although the 2013 Decree is intended to ensure effective protection of the environment and more efficient collection of waste, it opts for (and prioritises) composting and biodegradability methods as opposed to the recycling of materials and energy recovery which are permitted by Directive 94/62.

76. Point 3 of Annex II to Directive 94/62 refers equally to those four methods of waste recovery. A national rule may not, therefore, run counter to the choice made by the EU legislature when the latter provided for full harmonisation of that area without leaving the Member States with any option to prioritise or dismiss certain packaging recovery methods over or in favour of others.

## 2. Justification based on protection of the environment?

77. It must be stressed that Articles 8 to 11 of and Annex II to Directive 94/62 provide for exhaustive harmonisation in relation to the marking and identification of packaging, and the requirements relating to its composition and its reusability or recoverability. That is why the only option available to the Italian Republic when it came to adopting a more restrictive regulation was that provided for in Article 114(5) and (6) TFEU.<sup>40</sup>

78. Those provisions of the TFEU grant a Member State the option to enact new national provisions based on new scientific evidence relating to, inter alia, the protection of the environment and justified by a problem specific to that Member State which arose after the adoption of the harmonisation measure.

79. However, that option is conditional on prior notification of the national measure and its approval by the Commission within six months of notification.<sup>41</sup> Since it does not appear that the Italian Government complied with those requirements, the exception laid down in Article 114(5) and (6) TFEU is not applicable in this case.

## 3. Effects of Article 4(1a) of Directive 94/62

80. The Italian Government and Assobioplastiche contend that the 2013 Decree was confirmed by the insertion, under Directive 2015/720, of the new Article 4(1a) into Directive 94/62.

81. Their line of reasoning cannot be accepted because:

- Directive 2015/720, for which the transposition period expired on 27 November 2016 (Article 2), is not applicable *ratione temporis* to the dispute, which arose as a result of the adoption of the 2013 Decree;
- in any event, although Directive 2015/720 permits national exceptions to the free movement of packaging compatible with Directive 94/62, it does so for lightweight plastic carrier bags (with a thickness below 50 microns). However, the 2013 Decree included a broader prohibition since it applied to plastic carrier bags with a thickness exceeding 60 microns.

<sup>40</sup> See, by analogy, judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142, paragraph 37).

<sup>41</sup> The Commission has to establish whether the national measure is a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether it constitutes an obstacle to the functioning of the internal market.



82. In summary, Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, precludes national legislation which prohibits the marketing of disposable (single-use) carrier bags which are made from non-biodegradable materials but which otherwise comply with the requirements laid down in Directive 94/62, where the Member State has failed to notify and receive approval from the Commission in respect of that legislation, in accordance with Article 114(5) and (6) TFEU.

### *E. Question 3*

83. The referring court asks whether Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, has direct effect and whether or not the bodies of a Member State are required to apply that contrary national legislation.

84. According to settled case-law on the direct effect of directives:<sup>42</sup>

- ‘... whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly ...’
- ‘... a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms ...’
- ‘... even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it ...’

85. Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, is a clear, precise and unconditional EU provision which has direct effect and which individuals may enforce before the national courts against the authorities of the Italian State.

86. Suffice it to confirm, in that connection, that Article 18 of Directive 94/62 prohibits, categorically and without exceptions, Member States from impeding the placing on the market in their territory of packaging which complies with the requirements established in the directive.

87. Those requirements (Articles 8 to 11 and Annex II), relating to marking and identification, and to the composition and reusable or recoverable nature of plastics bags, are referred to in Article 9(1) of Directive 94/62, which provides that only packaging which complies with those requirements may be placed on the market.

<sup>42</sup> Judgments of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 63); of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraphs 46 and 47); and of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2022:168, paragraphs 17 to 19).

88. In particular, Annex II lays down the requirements relating to the manufacture and composition of packaging (point 1), the reuse of packaging (point 2) and the recovery of packaging (point 3). As I have already examined, it refers to four alternative criteria for the recovery of packaging (recycling of materials, energy recovery, composting or biodegradability).

89. Until Directive 94/62 was amended by Directive 2015/720, packaging manufactured in accordance with Directive 94/62 could be freely placed on the market without any conditions. Only since the entry into force of Directive 2015/720 have Member States been permitted to introduce more restrictive measures for the marketing of lightweight plastic carrier bags.

90. Since Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, has direct effect, the national court must disapply in the proceedings any contrary national legislation.<sup>43</sup>

#### F. Question 4

91. Since the claim in the main proceedings is for ‘compensation for the loss and damage which has been sustained, and which might be sustained in the future ... as a result of the unlawful conduct of the [Italian] administration’, the national court asks whether ‘national legislation prohibiting the marketing of single-use non-biodegradable shopping bags manufactured in compliance with the requirements laid down in Directive [94/62]’ constitutes a serious and manifest infringement of Article 18 of Directive 94/62.

92. For a Member State to incur liability for loss or harm caused to individuals as a result of infringements of EU law attributable to it, it is necessary that:

- the infringed provision of EU law is intended to confer rights on those individuals;
- the infringement of that provision is sufficiently serious;
- there is a direct causal link between that infringement and the loss or harm sustained by those individuals.<sup>44</sup>

93. Those three conditions are necessary and sufficient to found a right in individuals to obtain redress. However, there is nothing to preclude the State from incurring liability under less strict conditions on the basis of national law.<sup>45</sup>

94. In principle, it is for national courts to establish, in accordance with the guidelines laid down by the Court, whether those three conditions are met.<sup>46</sup> Of those conditions, the referring court asks only about the sufficiently serious infringement of EU law. It does not, therefore, appear to have any doubts about the other two.

<sup>43</sup> Judgments of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 68), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 20).

<sup>44</sup> Judgment of 28 June 2022, *Commission v Spain (Breach of EU law by the legislature)* (C-278/20, EU:C:2022:503, paragraph 31), and of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (State liability for air pollution)* (C-61/21, EU:C:2022:1015, paragraph 44).

<sup>45</sup> Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 66), and of 28 June 2022, *Commission v Spain (Breach of EU law by the legislature)* (C-278/20, EU:C:2022:503, paragraph 32).

<sup>46</sup> Judgments of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 100), and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 95).

95. The Court may provide the referring court with guidance so that that court may determine whether or not there has been a sufficiently serious infringement in this case, in the light of all the circumstances of the dispute. The relevant factors for the purpose of its determination include:

- the clarity and precision of the rule breached;
- the measure of discretion left by that rule to the authorities;
- whether the infringement committed or the damage caused were intentional or involuntary;
- whether any error of law was excusable or inexcusable; and
- the fact that the position taken by an EU institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to EU law.<sup>47</sup>

96. As regards *clarity and precision*, Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, satisfies both those criteria. They are unambiguous provisions which impose a negative obligation (not to impede the placing on the market of packaging which satisfies the characteristics laid down in the directive, which provides for full harmonisation) on the Member States.

97. There is no doubt that the Italian State's *intention* was to permit only the marketing of the plastic carrier bags referred to in the 2013 Decree, while at the same time prohibiting other bags that are permitted under Directive 94/62. Although it is true that the aim of that measure was to reduce contamination, the Italian legislature was aware that, by establishing that rule, it was liable to infringe Directive 94/62.<sup>48</sup>

98. Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, did not leave any *discretion* to the national authorities to prohibit, on their territory, packaging which complied with the harmonised rules. The Italian Government could have adopted stricter rules affording greater environmental protection under the procedure laid down in Article 114(5) and (6) TFEU, but, as I have already stated, it does not appear to have used that procedure.

99. As I have also already pointed out, the Member States had no discretion to adopt stricter national measures on the marketing of lightweight single-use plastic carrier bags until the adoption of Directive 2015/720, which inserted the new Article 4(1a) into Directive 94/62.

<sup>47</sup> Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 56), and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraph 42).

<sup>48</sup> That is why it made the entry into force of the 2013 Decree conditional on the successful outcome of the procedure laid down in Directive 98/34.

100. That legislative amendment might, however, have some bearing<sup>49</sup> if the national court were to find that the Italian State (due to an *error*, the excusable nature of which it is for that court to examine) sought to anticipate the Commission's draft legislation presented on 4 November 2013,<sup>50</sup> which resulted in Directive 2015/720.

101. That proposal, as such, post-dated the publication of the 2013 Decree. It can hardly be argued, therefore, that, in this case, *an EU institution contributed towards the adoption of the national measure*.

102. In summary, the prohibition on the marketing of single-use lightweight plastic carrier bags which are non-biodegradable and non-compostable, and of bags which do not fulfil certain conditions relating to thickness, where those bags comply with the requirements laid down by Directive 94/62, may constitute a manifestly serious infringement of Article 18 of Directive 94/62, which it is for the national court to determine.

## V. Conclusion

103. In the light of the foregoing considerations, I propose that the Court of Justice reply to the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) as follows:

- (1) National legislation which prohibits the marketing of single-use (disposable) carrier bags made from non-biodegradable materials and which was notified by the Member State to the European Commission after its adoption, albeit several days before its official publication:
  - infringes Article 8(1) and Article 9(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, and that legislation is unenforceable against individuals;
  - does not infringe the procedure for the provision of information alone, laid down in Article 16(1) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, where those bags otherwise comply with the requirements laid down in that directive.
- (2) Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, precludes national legislation which prohibits the marketing of disposable (single-use) lightweight plastic carrier bags made from non-biodegradable materials, which otherwise comply with the requirements laid down in Directive 94/62, where the Member State has not notified that legislation to the Commission or received the Commission's approval in the context of the procedure laid down in Article 114(5) and (6) TFEU.

<sup>49</sup> In any event, the temporal factor could affect the *calculation* of the compensation payable by the Italian State, based on the duration of the adverse effects of the infringement for economic operators: the manifestly serious infringement would have ceased to exist upon the entry into force of Directive 2015/720, at least as regards the prohibition on the marketing of single-use plastic bags with a thickness below 50 microns.

<sup>50</sup> Document COM(2013) 761 final of 4 November 2013, Proposal for a Directive of the European Parliament and of the Council amending Directive 94/62/EC on packaging and packaging waste to reduce the consumption of lightweight plastic carrier bags.

- (3) Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, has direct effect and all the bodies of a Member State, including courts, are required to disapply, in the specific dispute before them, any contrary national legislation.
- (4) The prohibition on the marketing of single-use lightweight plastic carrier bags which are non-biodegradable and non-compostable, and of bags which do not fulfil certain conditions relating to thickness, where those bags comply with the requirements laid down by Directive 94/62, may constitute a manifestly serious infringement of Article 18 of Directive 94/62, in conjunction with Article 9(1) thereof and Annex II thereto, which it is for the national court to determine.