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Court of Justice rules on retroactivity of EU law and the effects of political compromise reached on legislative acts (C-181/20 Vysočina Wind)

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Analysis



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“Court of Justice rules on retroactivity of EU law and the effects of political compromise reached on legislative acts (C 181/20 Vysočina Wind)”



Melanie Fink

On 25 January 2022, the Court of Justice, sitting as a Grand Chamber, delivered its ruling in [Case C-181/20 *Vysočina Wind*](#) on a preliminary reference from the Supreme Court of the Czech Republic concerning Article 13 of [Directive 2012/19/EU on waste electrical and electronic equipment \(the WEEE Directive\)](#). The case clarifies two central questions: First, under what circumstances may a provision of EU law have retroactive effect? Second, do Member States incur obligations in the period between political agreement on and adoption of a directive? Ultimately, in this case, the Court of Justice denied both.

Article 13(1) WEEE Directive requires producers of electrical and electronic equipment to pay the costs relating to the management of waste from equipment placed on the market after 13 August 2005 (‘polluter-pays principle’). Just a few weeks before the adoption of the WEEE Directive, the Czech Republic amended its Law on Waste (Law No 185/2001), requiring operators of solar power plants to finance the costs relating to the management of waste from photovoltaic panels (which qualify as EEE equipment under the

WEEE Directive). In accordance with this obligation, Vysočina Wind, a Czech company which operates a solar power plant equipped with photovoltaic panels, paid financial contributions amounting to almost EUR 60.000 over the course of two years. Arguing this to be contrary to Article 13(1) WEEE Directive, according to which the producer, not the user, is responsible to finance waste management, Vysočina Wind brought an action for damages before the Czech courts, which led to the preliminary ruling request giving rise to this case.

In answering the Czech Supreme Court’s request, the Court of Justice reached two important findings. First, relying on the principle of legal certainty as a general principle of EU law, it found Article 13(1) WEEE Directive to be partially invalid. The Court recalled that the principle of legal certainty requires rules to be predictable in their effect so as to make sure everyone knows what their rights and obligations are and can plan accordingly. Prior to the entry into force of Article 13(1) WEEE Directive on 13 August 2012, it was left to the Member States to decide whether producers or users of photovoltaic

panels should be financially responsible for waste management. Placing that financial burden on producers from 13 August 2005 onwards, the Court found that Article 13(1) WEEE Directive retroactively affected the legal situation in the Czech Republic where waste costs used to be born by users. This was unforeseeable, depriving operators of any possibilities to take appropriate steps, and thus infringed the principle of legal certainty, rendering Article 13(1) WEEE Directive invalid insofar as it regulates the situation before its entry into force.

Second, the Court of Justice found the amendments to the Czech Law on Waste just before the adoption of the WEEE Directive (yet contrary thereto) not to breach the Czech Republic's obligations under EU law. It is well-established under EU law that in the period between the adoption of a Directive and the expiry of the transposition period, Member States must refrain from taking any measures liable to seriously compromise the achievement of the result prescribed by the directive (see for instance [Case C-129/96 *Inter-Environnement Wallonie*](#)). The key question in *Vysočina Wind* was whether this obligation already applies *before* the directive is actually adopted, but *after* political compromise has been reached. Without going deeply into matter, the Court found that before its adoption, a Directive is not capable of producing legal effect vis-à-vis Member States, so the Czech Republic had not acted in breach of its obligations by adopting the amendments to its Law on Waste.

Beyond these two central questions clarified by the Court, two points are noteworthy. First, while the Court of Justice followed [Advocate General](#)

[Kokott](#) on the issue of non-retroactivity, this was not the case with respect to the question regarding Member States' obligations before adoption of directives. In contrast to the Court of Justice, Advocate General Kokott found the Czech Republic to be in breach of its obligation of sincere cooperation under Article 4(3) TEU because the laws it adopted were liable to seriously jeopardise the objectives of the WEEE Directive. In reaching that conclusion, she placed great emphasis on the fact that the Czech Republic was well aware when amending its Law on Waste that the WEEE Directive would soon be adopted, given that it represented a political compromise reached between the Council and the Parliament already on 21 December 2011.

Second, even though the national court framed the question as one of state liability based on the [Francovich](#) case-law, the Court of Justice never got to deal with the conditions for liability since it found the Czech Republic to not have breached EU law in the first place. However, since Advocate General Kokott disagreed on this question, she did touch upon the potential consequences for the Czech Republic's liability in this respect. She noted that given the unclear legal situation regarding the obligations of Member States prior to the adoption of directives, it was unlikely that the Czech Republic's breach would qualify as sufficiently serious, a necessary condition to incur liability.

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