

Case C-120/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

15 February 2019

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

30 January 2019

Applicant:

X

Defendant:College van burgemeester en wethouders van Purmerend**Subject of the action in the main proceedings**

The applicant (X) is challenging the decision of the College van burgemeester en wethouders van Purmerend (Board of Mayor and Aldermen of Purmerend; ‘the College’) of 18 January 2016, whereby two additional safety regulations were imposed on a service station selling LPG. Under those regulations, the road tankers of suppliers which supply the service station with LPG must be fitted with an improved (safer) filler hose and a heat-resistant lining.

Subject and legal basis of the request for a preliminary ruling

At issue in the first question referred for a preliminary ruling is whether a licensing condition stipulating that an LPG service station must be supplied exclusively by LPG road tankers fitted with a heat-resistant lining is contrary to Article 5(1) of Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods. The second question referred for a preliminary ruling concerns the possibility of a national court assuming the lawfulness of such a licensing condition, unless it is clearly contrary to higher law, including Union law. That question is related to the

principles of national procedural autonomy, legal certainty and effectiveness of Union law.

Request under Article 267 TFEU.

Questions referred

Question 1A:

Must Article 5(1) of Directive 2008/68/EC (OJ 2008 L 260, inland transport of dangerous goods) be interpreted as precluding a licensing condition, included in the licence for the LPG service station, which stipulates that the individual LPG service station concerned may exclusively be supplied by LPG road tankers that are fitted with a heat-resistant lining whereas that obligation is not directly imposed on one or more operators of LPG road tankers?

Question 1B:

In answering the first question, does it matter that the Member State has concluded an agreement in the form of the ‘Safety Deal hittewerende bekleding op LPG-autogastankwagens’ (‘Safety Deal on heat-resistant lining on LPG automotive-fuel road tankers’) with organisations of market participants in the LPG industry (including operators of LPG service stations, producers, sellers and carriers of LPG), in which the parties have committed themselves to implementing the heat-resistant lining and that, subsequently, that Member State issued a circular such as the ‘Circulaire effectafstanden externe veiligheid LPG-tankstations voor besluiten met gevolgen voor de effecten van een ongeval’ (‘Circular on safety distances external safety LPG service stations for decisions with consequences for the effects of an accident’), in which an additional risk policy is laid down that is based on the assumption that LPG service stations are supplied by means of road tankers fitted with a heat-resistant lining?

Question 2A:

If a national court is assessing the lawfulness of an enforcement decision aimed at enforcing compliance with a licensing condition that has become legally unchallengeable and is contrary to EU law:

– does EU law, in particular the case-law of the Court of Justice on national procedural autonomy, allow the national court in principle to proceed on the assumption of the legality of such a licensing condition, unless it is clearly contrary to higher law, including EU law? And if so, does EU law impose (additional) conditions on that exception?;

– or does EU law entail, having regard to the judgments of the Court of Justice in *Ciola* (Case C-224/97, EU:C:1999:212) and *Man Sugar* (Case C-274/04,

EU:C:2006:233), that the national court should disregard such a licensing condition because it is contrary to EU law?

Question 2B:

In answering question 2A, is it relevant whether the enforcement decision is a remedy or a criminal charge?

Provisions of European Union law cited

The European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR): Annex A, Part 1, Chapter 1.2, point 1.2.1

Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (OJ 2008 L 260, p. 13): recitals 5 and 22, Article 5(1)

Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (OJ 2012 L 197, p. 1): recitals 1, 2 and 18, Article 13

Articles 34, 36, 71 and 114 TFEU

Provisions of national law cited

Algemene wet bestuursrecht (General Law on Administrative Law; 'Awb'): Article 8:69a

Besluit externe veiligheid inrichtingen (Decree on External Safety of Installations): Article 1, 2, 4(1) and (3), Article 6(1)

Regeling externe veiligheid inrichtingen (Regulation on External Safety of Installations): Article 2 and Annex 1, Table 1

Safety Deal hittewerende bekleding op LPG-tankwagens (Safety Deal on Heat-Resistant lining on LPG road tankers (Stcrt. 2016, No. 31448)

Brief summary of the facts and the procedure in the main proceedings

- 1 X lives in the vicinity of a service station where LPG is also sold. The sale of LPG was authorised by decision of 8 November 1977.
- 2 On 30 March 1998, the College granted a licence for the installation pursuant to the Wet milieubeheer (Law on Environmental Management). That licence was subsequently amended a number of times.

- 3 Since X was of the view that the sale of LPG in the vicinity of residential areas is unacceptable from a safety point of view (fire and explosion hazard), it requested the College on 5 May 2015 to withdraw the environmental licence for that service station, in so far as that licence allows the service station to sell LPG. The College rejected that request.
- 4 Subsequently, by decision of 18 January 2016, the College laid down two additional conditions regarding the manner in which the service station in question is to be supplied. Those conditions mean that the road tankers of suppliers which supply the service station with LPG must be fitted with a heat-resistant lining and an improved filler hose.
- 5 X lodged an appeal against the decision of 18 January 2016 with the Rechtbank (District Court) Noord-Holland. By judgment of 8 June 2017, that Rechtbank declared that appeal unfounded.
- 6 X lodged an appeal against that judgment with the Raad van State (Council of State).

Main submissions of the parties to the main proceedings

- 7 X argues that the two additional conditions concerning the improved filler hose and the heat-resistant lining are not enforceable, as they are contrary to Article 5(1) of Directive 2008/68/EC and/or Article 34 TFEU.
- 8 In the first place, she submits that the additional conditions contained in the environmental licence are contrary to Article 5(1) of Directive 2008/68/EC. According to that provision, Member States may, on grounds of transport safety, apply more stringent provisions concerning the national transport of dangerous goods, unless it concerns construction requirements. The additional conditions are therefore (prohibited) construction requirements as referred to in Article 5(1) of Directive 2008/68/EC.
- 9 In the second place, she argues that the decision of 18 January 2016 — in so far as that decision is not already contrary to Directive 2008/68/EC — is contrary to Article 34 TFEU. In her view, the two additional conditions constitute an obstacle to the free movement of goods contrary to Article 34 TFEU, which is not justified by one of the grounds set out in Article 36 TFEU or by a compelling reason in the general interest recognised in the case-law of the Court of Justice.
- 10 As a result, compliance with the additional conditions cannot be enforced in law and the referring court should annul them.
- 11 In the first place, the College argues that the additional conditions included in the environmental licence are not contrary to Article 5(1) of Directive 2008/68/EC.

- 12 According to the College, the condition regarding the improved filler hose cannot be a ‘construction requirement’, because that condition does not relate to a construction. With regard to the condition regarding the heat-resistant lining, the College argues that that condition cannot be regarded as a ‘construction requirement’ within the meaning of Article 5(1) of Directive 2008/68/EC, because it imposes an obligation on the individual operator of the service station when unloading LPG and not on (the owner or operator of) the vehicle used for transporting LPG. The College also argues that the licensing condition in question is not a general (binding) rule, or at least that that condition — or that restrictive measure — only concerns one specific LPG service station and is only addressed to the holder of that licence. According to the College, the prohibition in Article 5(1) of Directive 2008/68/EC does not apply to such an individual case.

Brief summary of the reasons for the referral

First question referred

- 13 As regards the condition relating to the improved filler hose, the referring court considers that that provision is not contrary to Directive 2008/68/EC and the rules on the internal market. It is of the view that the aforementioned condition can therefore also be retained.
- 14 As regards the condition relating to the heat-resistant lining, the referring court states that that requirement is a measure of a constructive nature, such that the question arises whether this is a prohibited construction requirement within the meaning of Article 5(1) of Directive 2008/68/EC.
- 15 In the first place, the referring court wishes to ascertain, in essence, whether a measure which in itself would have only minor — possibly even negligible — effects on the objectives pursued by the intended harmonisation of construction requirements, deprives Directive 2008/68/EC of its effectiveness (question 1A).
- 16 First of all, the referring court observes that the licensing condition stipulating that only LPG road tankers fitted with a heat-resistant lining may supply LPG does not have a significantly different effect, as regards the supplying of an LPG service station which is subject to that licensing condition, than a condition which creates a direct obligation with regard to the LPG tanker or tank. That condition could therefore undermine the intended uniformity of rules with regard to the construction of LPG road tankers or tanks.
- 17 Furthermore, the referring court recalls the case-law of the Court of Justice according to which the mere fact that a measure is not contained in a general binding rule does not affect its possible classification as a prohibited obstacle (see the judgments of 24 November 1982, *Commission v Ireland*, 249/81, EU:C:1982:402, paragraphs 27 and 28, and of 17 April 2007, *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraphs 59, 60 and 65). The referring court

questions whether the case-law of the Court of Justice on the free movement of goods — by analogy — applies to a case such as that at issue here, which concerns the interpretation of Article 5(1) of Directive 2008/68. It points out that that directive was adopted under Article 71 EC (now Article 91 TFEU) and not on the basis of Article 114 TFEU (and its predecessors), on the functioning of the internal market. According to the referring court, it is uncertain whether the term ‘requirement’ in Article 5(1) of Directive 2008/68 should be given an equally broad interpretation as the term ‘obstacle’ in the case-law on the free movement of goods and the internal market directives.

- 18 In the second place, the referring court wishes to ascertain whether it is relevant for the answer to that question that in 2016 a ‘Safety Deal hittewerende bekleding op LPG-autogastankwagens’ (‘Safety Deal on heat-resistant lining on LPG automotive-fuel road tankers’; ‘Safety Deal’) was concluded and a ‘Circulaire effectafstanden externe veiligheid LPG-tankstations voor besluiten met gevolgen voor de effecten van een ongeval’ (‘Circular on safety distances external safety LPG service stations for decisions with consequences for the effects of an accident’; ‘Circulaire’) was issued (question 1B).
- 19 The referring court explains that the Safety Deal is an agreement between the Staatssecretaris van Infrastructuur en Milieu (State Secretary for Infrastructure and the Environment) (as an administrative authority and as a representative of the State) and the Vereniging Vloeibaar Gas (Liquefied Gas Association) (an organisation of companies operating in the Netherlands LPG industry). Under that Safety Deal it was agreed, inter alia, that the members of the Vereniging Vloeibaar Gas, when supplying LPG to service stations, will use tankers that are fitted with a heat-resistant lining. The Circulaire lays down a supplementary risk policy based on the assumption that LPG service stations will be supplied by means of road tankers fitted with a heat-resistant lining.
- 20 The referring court observes that the reason why, at national level, the imposition, by virtue of a general binding rule, of a mandatory condition relating to a heat-resistant lining was waived, is in fact due to the possibility of such a rule being contrary to Article 5(1) of Directive 2008/68. Instead — in order to ensure the greatest possible level of safety in the vicinity of LPG service stations — agreements were concluded with the market parties concerned about supplying LPG service stations using road tankers that have been fitted with a heat-resistant lining.

Second question referred

- 21 The referring court observes that, under Netherlands law, an affirmative answer to the first question referred for a preliminary ruling does not in itself result in the annulment of the licensing condition relating to the heat-resistant lining. That follows from Article 8:69a Awb, which contains the ‘relativity requirement’ and stipulates that ‘[the] bestuursrechter (administrative court)... will not [annul] a decision on the ground that it is contrary to a written or unwritten legal rule or a

general legal principle, if that rule or principle manifestly does not serve to protect the interests of the person relying on it.’ According to the referring court, that requirement precludes a successful appeal by X. Article 5(1) of Directive 2008/68/EC is not intended to protect the interest which X is defending in the present proceedings — namely her safety — but to ensure the proper functioning of the internal transport market.

- 22 In the view of the referring court, this does not alter the fact that the College may not include unenforceable conditions in a licence and that X, as a person residing in the vicinity of the service station, has an interest in the enforceability of the licensing conditions. A licensing condition that has become legally unchallengeable can in principle be enforced under Netherlands law, unless it is clear — that is, without further investigation being required, or after only a summary examination — that that licensing condition should not have been laid down (the so-called ‘evidence criterion’).
- 23 In the light of the foregoing, the referring court wishes to ascertain whether EU law, more particularly the case-law of the Court of Justice on national procedural autonomy, permits the national court to assume, in principle, the lawfulness of such a licensing condition, unless it is clearly contrary to higher law, including EU law, and, if so, whether EU law lays down (additional) conditions in relation to that exception (question 2A, first indent).
- 24 The referring court emphasises in that regard that it is only by exception that a legally unchallengeable licensing condition will not be upheld because it is clear that it should not have been laid down. According to the referring court, this is illustrated by the fact that it has not yet issued any ruling accepting such an exception. It refers in that regard to the substantial importance that is attached to legal certainty. According to the referring court, the Court of Justice has also recognised the importance of legal certainty with regard to legally unchallengeable decisions (see, for example, the judgment of 13 January 2004, *Kühne & Heitz*, C-453/00, EU:C:2004:17).
- 25 However, according to the referring court, it is also possible that, in the light of the judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212) and the judgment of 6 April 2006, *ED & F Man Sugar* (C-274/04, EU:C:2006:233), EU law requires that the national court disregard the licensing condition in question because it is contrary to EU law (question 2A, second indent).
- 26 In particular, the referring court observes that, although legal certainty has great significance, the effectiveness of EU law may be impeded if licensing conditions which are clearly contrary to EU law are nevertheless enforced because they have become legally unchallengeable. In that regard, the referring court states that the Court of Justice has ruled that there may be grounds for disregarding an obligation arising from a decision when assessing a decision imposing a sanction because of incompatibility with EU law (judgments of 29 April 1999, C- 224/97, *Ciola*, EU:C:1999:212, and of April 6, 2004, C-274/04, *Man Sugar*, EU:C:2006:233).

The referring court considers that it appears to follow from that case-law that the lawfulness of a licensing condition can be fully addressed in the context of the appeal against the enforcement decision, or at least that those judgments provide insufficient justification for the view that it is possible in principle to proceed on the assumption of the enforceability of a licensing condition that has become legally unchallengeable.

- 27 Moreover, the referring court observes that it may be relevant that the cases cited in the previous paragraph involved decisions on sanctions of a punitive character. However, the Court of Justice has not explicitly identified this as a relevant circumstance. The referring court therefore finds that it is not clear from the judgments cited above how disregarding a (remedial) enforcement decision that is based on an earlier administrative act — which is already legally unchallengeable — relates to legal certainty.
- 28 It therefore wishes to ascertain whether it is important whether the enforcement decision relates to a remedy or to a criminal charge (question 2B).