

Case C-117/24**Request for a preliminary ruling****Date lodged:**

14 February 2024

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

1 February 2024

Applicant:

JYSK Kereskedelmi Kft.

Defendant:

Nemzeti Élelmiszerlánc-biztonsági Hivatal

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Applicant: JYSK Kereskedelmi Kft. (... Ecsér, Hungary ...)

...

Defendant: Nemzeti Élelmiszerlánc-biztonsági Hivatal (National Food Chain Safety Office) (... Budapest ...)

...

Subject matter of the Administrative proceedings concerning a decision ...
dispute: imposing a fine in respect of forest protection**DECISION**

The Fővárosi Törvényszék (Budapest High Court, Hungary) hereby refers a question to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 4(2) and (3) of Regulation (EU) No 995/2010 of the European Parliament and of the Council.

The Budapest High Court refers the following question to the Court of Justice of the European Union for a preliminary ruling:

Should Article 4(2) and (3) of Regulation (EU) No 995/2010, read in conjunction with Article 6(1) of that regulation, be interpreted as meaning that it is consistent with those provisions for the operator to have access to the elements, referred to in Article 6(1) of the regulation, of the due diligence system maintained and evaluated by its parent undertaking or used by its parent undertaking and established by a monitoring organisation within the meaning of Article 8 [of that regulation]?

... [Considerations of national procedural law]

Basis

- 1 The Budapest High Court, as an administrative court hearing a forest protection action, asks the Court of Justice of the European Union ('the Court of Justice'), under Article 267 TFEU, to interpret the provisions of EU law required to reach a decision in the main proceedings.

Subject matter of the main proceedings and relevant facts

- 2 The applicant is an operator within the meaning of Article 2(c) of Regulation (EU) No 995/2010 ('the regulation'), which is placing timber and timber products on the internal market for the first time. The applicant is wholly owned by LLG A/S, a company registered in Denmark ('the parent undertaking').
- 3 In 2023, the defendant, as the competent authority designated to enforce the regulation, carried out a check at the applicant's premises in which, inter alia, it examined whether the applicant had a due diligence system within the meaning of Articles 4(2) and 6(1) of the regulation ('due diligence system').
- 4 The due diligence system used by the applicant was found to have been established by its parent undertaking and was largely based on risk analyses carried out by Preferred by Natúré, a monitoring organisation within the meaning of Article 8. During the checking procedure, the applicant was able to extract the data stored in the due diligence system relating to each timber product and submit them to the defendant, and it is therefore demonstrated that the applicant also has access to various elements of that system. With regard to the risk analysis, the applicant itself acknowledged that this had been carried out in part by the parent undertaking.
- 5 As a result of this checking procedure, the defendant issued Decision No 6100/2466-24/2023 of 26 May 2023 ordering the applicant to pay, inter alia, a fine by way of forest protection for infringement of Articles 4(2) and 6(1) of the regulation and to put in place a due diligence system in full. It justified the abovementioned obligations by pointing out that, as established on the basis of the

available evidence, the applicant did not have a due diligence system deployed on its own behalf established in relation to the business it undertakes, as required by the regulation, and neither did it use a due diligence system established by a monitoring organisation within the meaning of Article 8 of the regulation. In the defendant's view, in order to comply with the above provisions of the regulation, the due diligence system must be maintained by the applicant, which has the status of operator, and not by its parent undertaking.

Arguments of the parties

- 6 In its application, the applicant is seeking the annulment of the abovementioned decision. It argues that this due diligence system maintained by its parent undertaking can be considered as its own due diligence system and thus fulfils the obligation laid down in Article 4(2) and (3) and Article 6(1) of the regulation. Specifically, the relevant provisions of the regulation impose on it the obligation to use a due diligence system, not the obligation to set up such a system. It asserts the fact – which it has substantiated through documentary evidence – that the competent German federal authority had checked in 2021, at the registered office of the German subsidiary, the legality of the due diligence system established by its parent undertaking and deployed in all European subsidiaries and that that check, unlike those carried out by the Hungarian authority, had not found any infringement and had recognised that the due diligence system in question complied with the requirements of Article 4(2) of the regulation. The applicant argues that this circumstance also supports the view that, since it is applying the due diligence system established by the parent undertaking, the obligation under Article 4(2) and (3) and Article 6(1) of the regulation should be regarded as having been fulfilled.
- 7 The defendant contends that the action should be dismissed. It attaches decisive importance to the fact that the applicant carries out activities involving importing into the territory of the European Union not only through the parent undertaking but also directly, which is why it has the status of an operator under the regulation. It does not dispute the fact that the parent undertaking has a due diligence system, but, rather, argues that the applicant, in its capacity as operator, cannot be exempted from the obligation of maintaining such a system in accordance with Article 4(2) and (3) of the regulation. According to the defendant, it is the parent undertaking's business decision how to manage the import of timber and timber products, but if it assigns autonomous tasks to its subsidiaries as importers, it follows from the relevant provisions of the regulation that, in such a case, those subsidiaries must maintain due diligence systems.

Relevant legal provisions

- 8 Article 4(2) and (3) of the Regulation:

‘2. Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a “due diligence system”, as set out in Article 6.

3. Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation referred to in Article 8. Existing supervision systems under national legislation and any voluntary chain of custody mechanism which fulfil the requirements of this Regulation may be used as a basis for the due diligence system.’

9 Article 6(1) of the Regulation:

‘1. The due diligence system referred to in Article 4(2) shall contain the following elements:

- (a) measures and procedures providing access to the following information concerning the operator’s supply of timber or timber products placed on the market:*
- description, including the trade name and type of product as well as the common name of tree species and, where applicable, its full scientific name,*
 - country of harvest, and where applicable:*
 - i) sub-national region where the timber was harvested, and*
 - ii) concession of harvest,*
 - quantity (expressed in volume, weight or number of units),*
 - name and address of the supplier to the operator,*
 - name and address of the trader to whom the timber and timber products have been supplied,*
 - documents or other information indicating compliance of those timber and timber products with the applicable legislation;*
- (b) risk assessment procedures enabling the operator to analyse and evaluate the risk of illegally harvested timber or timber products derived from such timber being placed on the market.*

Such procedures shall take into account the information set out in point (a) as well as relevant risk assessment criteria, including:

- *assurance of compliance with applicable legislation, which may include certification or other third-party-verified schemes which cover compliance with applicable legislation,*
 - *prevalence of illegal harvesting of specific tree species,*
 - *prevalence of illegal harvesting or practices in the country of harvest and/or sub-national region where the timber was harvested, including consideration of the prevalence of armed conflict,*
 - *sanctions imposed by the UN Security Council or the Council of the European Union on timber imports or exports,*
 - *complexity of the supply chain of timber and timber products;*
- (c) *except where the risk identified in course of the risk assessment procedures referred to in point (b) is negligible, risk mitigation procedures which consist of a set of measures and procedures that are adequate and proportionate to minimise effectively that risk and which may include requiring additional information or documents and/or requiring third party verification.'*

Statement of the reasons for the request for a preliminary ruling

- 10 In the present dispute, the Budapest High Court is asking whether the applicant's practice with regard to the due diligence system complies with Article 4(2) and (3) of the regulation, read in conjunction with Article 6(1) of that regulation, and thus whether the applicant should be regarded as complying with the obligations laid down in those provisions of the regulation when it applies a due diligence system maintained by its parent undertaking.
- 11 The Budapest High Court has not found any cases in the case-law of the Court of Justice in which that Court has interpreted Article 4(2) and (3) of the regulation. It therefore considered it necessary to refer the matter to the Court of Justice for a preliminary ruling in order to ascertain what specific obligations are imposed on operators in relation to the due diligence system.
- 12 It is important to note that the applicant is considered to be an operator placing timber and timber products on the internal market for the first time, and thus carrying out an activity as an independent importer, without any involvement by the parent undertaking. According to the regulation, the applicant is therefore subject to a number of obligations relating to the due diligence system in respect of timber and timber products that it places on the market and that have been obtained outside the European Union.
- 13 However, the Budapest High Court believes that the scope of these obligations is not clear. Article 4(2) of the regulation imposes an obligation on the operator to

‘use’ the due diligence system, while Article 4(3) requires the operator to ‘maintain’ and ‘regularly evaluate’ such a system.

- 14 The (non-legally binding) document entitled ‘Commission Notice of 12.2.2016 – Guidance document for the EU Timber Regulation’ serves as a reference when interpreting the regulation. According to this document, an operator has an obligation ‘to gather information about the timber and timber products it is handling and about its suppliers in order to carry out a full risk assessment’. Furthermore, ‘it is important that an operator that uses its *own* due diligence system evaluates this system at regular intervals to ensure that those responsible are following the procedures that apply to them and that the desired outcome is being achieved’. However, it is also unclear from the guidance document whether [a system] that is not maintained directly by the operator, but rather by its parent undertaking, can be considered an operator’s *own* due diligence system.
- 15 According to the Budapest High Court, if the requirement arising for the operator from Article 4(2) and (3) of that regulation consists exclusively in the use of a due diligence system by means of which data are collected and risks are assessed and reduced in relation to timber and timber products placed on the market for the first time by that operator in the territory of the European Union, the applicant cannot be regarded as not having a due diligence system in accordance with the regulation. In such a case, the fine imposed on this ground as forest protection would be unlawful and this part of the administrative decision should be set aside. Conversely, if it follows from Article 4(2) and (3) of the regulation that the applicant is required to have a due diligence system in place on its behalf established expressly in relation to the business it carries out, the findings in the administrative decision would be in accordance with the law and the action should be dismissed on that point.
- 16 The applicant’s parent undertaking, which is active in the sale of timber products, has subsidiaries throughout Europe that are considered to be operators and that, according to the applicant, also use the due diligence system maintained by the parent undertaking in the same way as the applicant. In the present dispute, the applicant has submitted the results of the check carried out at the German subsidiary’s head office by the competent German federal authority, according to which – as stated by the applicant – the same due diligence system was found to comply with Article 4(2) of the regulation. It is therefore important at European level to determine whether, based on the legal interpretation given by the Court of Justice, the operation of these subsidiaries complies with the regulation in relation to the due diligence system.
- 17 For those reasons, the Budapest High Court asks the Court of Justice to interpret whether the practice of the applicant operator, whereby it is not the applicant itself but rather its parent undertaking that carries out the tasks associated with maintenance and evaluation of the due diligence system in such a way as to enable the applicant to have access to the elements of that system, is in compliance with Article 4(2) and (3) of the regulation.

18 ...

19 ... [Considerations of national procedural law]

Budapest, 1 February 2024

[signatures]

WORKING DOCUMENT