

Case C-604/21

Request for a preliminary ruling

Date lodged:

28 September 2021

Referring court:

Tribunal Administrativo e Fiscal de Braga, Juízo Administrativo Comum (Portugal) (Administrative and Finance Court, Braga, Common Administrative Court) (Portugal)

Date of the decision to refer:

14 September 2021

Applicant:

Vapo Atlantic, S.A.

Defendant:

Entidade Nacional para o Sector Energético, E.P.E. (ENSE)

Administrative and Finance Court, Braga

Common Administrative Court

REQUEST FOR A PRELIMINARY RULING

ARTICLE 267 TFEU

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I – Referring court

Administrative and Finance Court, Braga – Common Administrative Court

Proceedings No. 860/21.IBEBRG

[...]

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II – Parties to the dispute [...]

- **Applicant:** VAPO ATLANTIC, S.A., [...] Guimarães.

[...]

- **Defendant:** ENTIDADE NACIONAL PARA O SETOR ENERGÉTICO, E.P.E. (ENSE), [...] Lisbon.

[...]

- **Other party to the proceedings:** FUNDO AMBIENTAL, [...] Lisbon;

[...]

- **Other party to the proceedings:** FUNDO DE EFICIÊNCIA ENERGÉTICA, [*omissis*] Lisbon.

[...]

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III – Subject matter of the dispute in the main proceedings and relevant facts

III.A – Subject matter of the dispute

1. This dispute concerns the administrative decision by which the defendant determined the applicant's obligation to pay the sum of EUR 908 084.00 by way of compensation for failing to prove the incorporation of biofuels into fuels released for consumption in the second quarter of 2020, in accordance with Article 11(1) of Decree-Law No 117/2010 of 25 October 2010.

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III.B – Relevant facts

1. The applicant is an undertaking which operates in the fuel market in Portugal.
2. Its tax status is that of a registered consignee.
3. As such, it does not meet the statutory conditions for the physical incorporation of biofuels into the fuels which it releases for consumption in Portugal.

4. In fact, the applicant purchases the fuels which it markets in Portugal from a company established in Spain.
5. That fuel incorporates biofuel, but in accordance with the provisions of Spanish legislation.
6. The applicant did not present to the defendant, and has not presented in these proceedings, any proof of approval by the European Commission of the voluntary certification system operated by the entity from which it purchases fuel in Spain.
7. It has been established that the applicant released for consumption 7 582 tonnes of fuel in the second quarter of 2020.
8. Its account did not contain any biofuel certificates (the method used to demonstrate compliance with the obligation to incorporate biofuel), whereas it should have had at least 758 certificates, given that, at the material time (second quarter of 2020), it was under an obligation to ensure that its fuels contain 10% biofuel.
9. Consequently, it was ordered to pay the financial compensation which it is challenging in these proceedings.
10. The obligation to incorporate biofuel is laid down in Article 11(1) of Decree-Law No 117/2010 of 25 October 2010. There is no record of any draft of that legislation having been communicated to the European Commission before it was published and entered into force.

IV – Relevant provisions of national and European Union law

IV.A – Relevant provisions of national law

1. Article 11(1) of Decree-Law No. 117/2010 of 25 October 2010, as amended by Decree-Law No. 6/2012 of 17 January 2012 (subsequently amended by Decree-Law No. 8/2021 of 20 January 2021, although this version is not applicable to these proceedings), is worded as follows:

‘7 – Entities which release motor fuel for consumption by presenting declarations of release for consumption in accordance with the provisions of the Code of Excise Duties on Consumption, approved by Decree-Law No 73/2010 of 21 June 2010, as amended by Law No. 55-A/2010 of 31 December 2010, hereinafter referred to as entities subject to an obligation to incorporate, must contribute towards meeting the following biofuel incorporation targets expressed as percentages of energy content relative to the quantities of motor fuels which they have released for

consumption, with the exception of liquefied petroleum gas (LPG) and natural gas.

- a) 2011 and 2012 – 5.0%;
- b) 2013 and 2014 – 5.5%;
- c) 2015 and 2016 – 7.5%;
- d) 2017 and 2018 – 9.0%;
- e) 2019 and 2020 – 10.0%’.

IV.B – Relevant provisions of European Union law

1. Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998¹ (in force on the date of publication of the relevant national legislation but subsequently repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015):
 - Article 1(1) to (3);
 - Article 8(1);
 - Article 10(1).
2. Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998² (amended by Directives 2009/30/EC and (EU) 2015/1513):
 - a. Article 7a(2), introduced by Directive 2009/30/EC.
3. Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009,³ which amends Directive 98/70/EC:
 - a. second subparagraph of Article 4(1).
4. Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015,⁴ which amends Directives 98/70/EC and 2009/28/EC:
 - a. Article 4(1).

¹ <http://data.europa.eu/eli/dir/1998/34/oj>

² <http://data.europa.eu/eli/dir/1998/70/2018-12-24>

³ <http://data.europa.eu/eli/dir/2009/30/oj>

⁴ <http://data.europa.eu/eli/dir/2015/1513/oj>

5. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009⁵ on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (subsequently repealed by Directive (EU) 2018/2001):
 - a. Article 3(4).

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V – Reasons for the points of uncertainty as to the interpretation of European Union law

1. The need for this request for a preliminary ruling stems from the uncertainty prompted by the interpretation proposed by the applicant in connection with the obligation arising from Article 8(1) of Directive 98/34/EC, in force on the date when Decree-Law No 117/2010 of 25 October 2010 was published.
2. The provision contained in Article 11(1) of Decree-Law No 117/2010 of 25 October 2010, in the version thereof applicable to the proceedings, that is to say the version arising from the amendment introduced by Decree-Law No 6/2012 of 17 January 2012 (that provision subsequently having been further amended by Decree-Law No 8/2021 of 20 January 2021) is worded as indicated above.
3. Thus, the provision in question defines only the percentages of biofuels that must be incorporated, but does not actually define any technical characteristics thereof.
4. Furthermore, that provision is intended to give effect to Article 1(5) of Directive 2009/30/EC, which introduced Article 7a into Directive 98/70/EC (paragraph 2 of Article 7a lays down the obligation on Member States to require suppliers to reduce as gradually as possible life cycle greenhouse gas emissions by up to 10% by 31 December 2020), in keeping with the generic target set out in Article 3(4) of Directive 2009/28/EC.
5. Thus, the first point of uncertainty that arises here is, specifically, whether or not the definition of biofuel incorporation percentages must be regarded as a ‘technical regulation’ for the purposes of Directive 98/34/EC, in particular because it is regarded as ‘[an]other requirement’. This calls for an interpretation of the combined provisions of Articles 1(3) and 8(1) of the aforementioned directive in the light of Article 7a(2) of Directive 98/70/EC, introduced by Directive 2009/30/EC.

⁵ <http://data.europa.eu/eli/dir/2009/28/oj>

6. Furthermore, in addition to the question raised by the applicant, there are other questions concerning whether the application of Article 8(1) of Directive 98/34/EC may be excluded.
7. In the first place, whether the provision of national law at issue falls within the scope of the exception contained in the aforementioned Article 8(1) of Directive 98/34/EC, which refers to the exclusion of cases where [the technical regulation] ‘merely transposes the full text of [a] [...] European standard’.
8. Next, whether the provision of national law in question falls within the scope of the third indent of [Article 10](1) of Directive 98/34/EC, account being taken in particular of the second subparagraph of Article 4(1) of Directive 2009/30/EC and Article 4(1) of Directive (EU) 2015/1513.
9. In particular, this court is uncertain, from the point of view of interpretation, as to whether those provisions may be regarded as ‘safeguard clauses provided for in binding Community acts’, in so far as they appear to indicate that the Member State is required to communicate to the Commission only national provisions adopted under those directives, there being no requirement, therefore, to communicate the drafts of such provisions in any way.
10. If not already resolved by the answers given to the questions set out above, another interpretative uncertainty that arises concerns the consequences of non-compliance with the obligation to communicate draft legislation.
11. In particular, it is uncertain whether an economic operator may claim that the provisions of national legislation are unenforceable because they do not comply with Article 8(1) of Directive 93/34/EC, and that the obligation to incorporate biofuels does not therefore apply to that economic operator.
12. Indeed, it is material to the decision to be adopted in the present dispute to ascertain whether, in this particular situation, an economic operator may rely on the aforementioned non-compliance in order, in some way, not to remain subject to the obligation to incorporate biofuels, which, having been transposed into national law, actually originates from the aforementioned provisions of EU law.
13. It is common ground that the Court of Justice has already ruled on this issue in the past, but always in connection with different subject areas.
14. The reason why this court is minded to question the interpretation proposed by the applicant in this dispute (to the effect that the national provision is unenforceable) [is that] that interpretation would mean that there has been a comprehensive failure to comply with the obligation to incorporate biofuels, thus compromising not only the national target but also the European

Union's own target for reducing greenhouse gas emissions and promoting renewable energy sources.

15. This court therefore takes the view in this regard that the fundamental environmental targets set out in Article 191 of the Treaty would themselves be compromised.
16. To this court's knowledge, the Court of Justice has not to date ruled on the aforementioned unenforceability of national legislation in a subject area similar to that at issue here.
17. In fact, according to the search carried out by this court, the Court of Justice has ruled on a similar case only in the judgment in Case C-26/11 of 31 January 2013.⁶ Nonetheless, in the opinion of this court, the Court of Justice did not expressly rule on the nature of the definition of biofuel percentages, having simply taken this as read, given that, in that case, since the Member State in question had already communicated a first draft of the legislation concerned and had later included the Commission's suggestions in that legislation, the Court took the view that there was no need for further communication (what is more, the scope of the legislation in question in that case differed from that of the legislation at issue here, inasmuch as the former went further than requiring the incorporation of a certain percentage of biofuel).
18. In the light of the point made in the foregoing paragraph, this court considers that it cannot be said that there is a clear and unequivocal earlier ruling that would make it possible to dispense with the submission of a request for a preliminary ruling on the questions set out above.
19. It is on these grounds that this court is making this request for a preliminary ruling.

VII – Other information

1. These proceedings are urgent under national law.
2. Inasmuch as, compensation being paid quarterly, there are other disputes on the same subject, and those proceedings are stayed pending any ruling on the questions raised, the need for this request has arisen in other contexts too.

QUESTIONS REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING

⁶ EU:C:2013:44

In the light of the foregoing, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union:

1. Must Article 1(3) of Directive 98/34/EC be interpreted as meaning that, for the purposes of Article 8(1) of that directive, the concept of ‘other requirement’ includes the definition of the percentage of biofuels which, in accordance with Article 7a of Directive 98/70/EC, introduced by Directive 2009/30/EC, and in keeping with the target set out in Article 3(4) of Directive 2009/28/EC, a given economic operator is obliged to incorporate into the fuels it releases for consumption, as in the case of the definition given in the national legislation at issue?
2. Must Article 8(1) of Directive 98/34/EC, in particular the expression ‘except where [the draft technical regulation] merely transposes the full text of an international or European standard’, be interpreted as meaning that it excludes a provision of national law which defines biofuel incorporation percentages, in accordance with Article 7a(2) of Directive 98/70/EC, introduced by Directive 2009/30/EC, and in keeping with the target set out in Article 3(4) of Directive 2009/28/EC?
3. Must the second subparagraph of Article 4(1) of Directive 2009/30/EC and Article 4(1) of Directive (EU) 2015/1513 be interpreted as meaning that the provisions in question are safeguard clauses provided for in binding Community acts within the meaning of the third indent of Article 10(1) of Directive 98/34/EC?
4. If the answer to this question is not unnecessary in the light of the answers to the foregoing questions, must Article 8(1) of Directive 98/34/EC be interpreted as meaning that a national provision such as that at issue in this dispute, which defines biofuel incorporation percentages, in transposition of Article 7a(2) of Directive 98/70/EC, introduced by Directive 2009/30/EC, may not be enforced as against an economic operator?

Braga, 14 September [2021].

The Judge,

(Nuno Cerdeira Ribeiro)

[...]