

Case C-370/23

Request for a preliminary ruling

Date lodged:

13 June 2023

Referring court:

Najvyšší Správny súd Slovenskej republiky (Slovakia)

Date of the decision to refer:

26 April 2023

Applicant:

Mesto Rimavská Sobota

Defendant:

Ministerstvo pôdohospodárstva a rozvoja vidieka Slovenskej republiky

[...]

[*designation of the court, case number*]

DECISION

The Najvyšší Správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic), at the hearing of the case brought by **Mesto Rimavská Sobota** (Municipality of Rimavská Sobota; applicant), established in Rimavská Sobota, [...] [*address, identification number*], represented by the law firm [...], [*lawyer details*], against **Ministerstvo pôdohospodárstva a rozvoja vidieka Slovenskej republiky** (Ministry of Agriculture and Rural Development of the Slovak Republic; defendant), established at [...] [*address*] Bratislava, in the procedure for reviewing the legality of the decision of the defendant [...] [*case number*] of 25 June 2019, ruling on the applicant's appeal on a point of law against the judgment of the Krajský súd v Banskej Bystrici (Regional Court, Banská Bystrica, Slovakia) [...] [*case number*] of 13 May 2020,

o r d e r s:

- I. The Supreme Administrative Court of the Slovak Republic to **stay** the proceedings [...] [*indication of legal basis in national law*].
- II. Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Supreme Administrative Court of the Slovak Republic **refers the following question** to the Court of Justice of the European Union **for a preliminary ruling**:

Is Article 2(b) of Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market to be interpreted as meaning that the placing on the market of timber also constitutes a sale for consideration of raw timber or fuel wood within the meaning of Annex 1 to that regulation, if, under the harvest concession agreement, the purchaser harvests the timber under the direction and supervision of the seller?

G r o u n d s

- 1 The Court of Cassation has requested a preliminary ruling from the Court of Justice of the European Union on the interpretation of Article 2(b) and (c) of Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market ('the Regulation').

I.

The subject matter of the main proceedings and procedure before the national courts

- 2 The defendant imposed, by decision [...] [*proceedings number*] of 25 June 2019 ('the decision of the defendant') with regard to the decision of the Slovenská lesnícko-drevárska inšpekcia (Slovak Forestry and Timber Inspectorate) [...] [*number*] of 10 April 2019 ('the decision of first instance'), a fine of EUR 2 000 on the applicant pursuant to Paragraph 17(5)(b) of Zákon č. 113/2018 Z. z. o uvádzaní dreva a výrobkov z dreva na vnútorný trh a o zmene a doplnení zákona č. 280/2017 Z. z. o poskytovaní podpory a dotácie v pôdohospodárstve a rozvoji vidieka a o zmene zákona č. 292/2014 Z. z. o príspevku poskytovanom z európskych štrukturálnych a investičných fondov a o zmene a doplnení niektorých zákonov v znení neskorších predpisov (Law No. 113/2018 on the placing of timber and timber products on the internal market and amending and supplementing Law No. 280/2017 on the provision of support and subsidies to agriculture and rural development and amending Law No. 292/2014 on subsidies provided from European structural and investment funds and amending and supplementing certain laws) as amended ('the Timber Law') for committing another administrative offence pursuant to Paragraph 17(1)(c) of the Timber Law, for failing, as an operator, to apply the due diligence regime pursuant to

Paragraph 4(1), (2) and (3) of the Timber Law. The applicant was also ordered to take remedial action.

- 3 The defendant maintains that the applicant, as a municipality, is a legal person within the meaning of Paragraph 1(1) of Zákon č. 369/1990 Zb. o obecnom zriadení (Law No 369/1990 on municipal administration) as amended, which independently manages its own property and its own revenue under the conditions set out in that law. It is not, therefore, an organisation that was not set up for the purpose of carrying on economic activity or which is unable to do so.
- 4 While agreeing with the authority of first instance, the defendant brought, as evidence, till receipt records which showed that the applicant had sold the wood for use as fuel wood to private individuals by direct sale [...]. The till receipt records referred to the '*permit for independent timber production*' and '*LA 43 Proof of the origin of the wood*' forms, which specify the type of timber – fuel wood – and the corresponding volume. The defendant argued that, since it was a first sale of fuel wood, it was irrelevant who ultimately harvested the wood. It believes that, to the extent that the object of the applicant's trade is timber/fuel wood, who harvests the goods sold as such, and whether the sale is of recently harvested timber or of standing timber – albeit with the right to subsequent harvesting – is irrelevant to the possibility of classifying the applicant as an operator.
- 5 The defendant also raised the fact that the administrative file also contains a public tender notice for the '*sale of standing timber*' and a copy of the sales contract [...] [*number*], which the applicant signed on [...] [*date*] with [...] [...] [*name of buyer*], the buyer, whereas in Article II(1), it says that the subject of the contract is the obligation of the seller (the applicant) to '*sell wood mass*', while Article II(2) obliges the seller to allow the buyer to '*harvest wood*'. Further provisions of the contract show that, after harvesting, the wood mass was to be '*measured out*' in the presence of the applicant's staff, which means that even after harvesting the timber, the applicant had carried out further operations related to selling and placing timber on the market. The subject of the contract was wood in the rough. Here again, the defendant took the view that it was immaterial who harvested the timber, provided that the object of sale was timber alone. It believes that the applicant's status is therefore that of operator.
- 6 Since, as an operator, the applicant had not performed the required due diligence, the defendant asserted that the applicant had committed an administrative offence under Paragraph 17(1)(c) of the Timber Act and imposed a fine on it.
- 7 The applicant lodged an administrative appeal against the decision of the defendant, in which it submitted that, as it was selling standing timber together with the right to harvest it, it did not have operator status. At the same time, it expressed the view that it had never distributed timber or timber products or used them in the course of its business activities. The applicant therefore believes that it was not an operator, nor was it subject to the obligations laid down in Article 4(1),

(2) and (3) of the Timber Law, and it could not therefore be penalised for failing to comply with those obligations. The applicant referred to Scenario 10a of Commission Notice C(2016) of 12 June¹ 2016, containing examples of situations in which an enterprise/person would be considered an operator:

'Forest owner Z sells to company A the right to harvest standing trees on Z's land, for distribution or use through A's own business.

> Company A becomes an operator when it harvests the timber for distribution or use in its own business.'

- 8 In judgment [...] [*procedure number*] of 13 May 2020 ('the contested judgment'), the Krajský súd v Banskej Bystrici (District Court, Banská Bystrica) ('the Administrative Court') dismissed the applicant's administrative appeal. The Administrative Court considered it essential to determine whether the applicant has the status of an operator, which, pursuant to Article 4(2) of the Regulation, would require it to apply due diligence within the meaning of Article 6 of the Regulation. In view of the fact that, in the cases determined by the administration, the object of the sale was timber, the Administrative Court held that, from the point of view of classifying the applicant as an operator, it was irrelevant whether the timber sold was standing timber (and therefore harvested by the purchaser) or whether it was sold only after harvesting. In any event, the timber was being placed on the market for the first time, that is to say, it was supplied by some means and, irrespective of the selling technique used, for distribution or use in the context of commercial activity. In that regard, the object of sale was timber for use as fuel wood within the meaning of Annex 1 to the Regulation.
- 9 According to the Administrative Court, Scenario 10a of the Commission Notice C(2016) is only a recommendation and cannot be applied in the territory of the Slovak Republic as it does not conform to any national legislation. Indeed, in the sales model chosen by the applicant, the buyer does not have even the basic documents for establishing and applying a system of due diligence in a meaningful way, as it is not registered as a forest manager in the relevant register in accordance with the Forestry Law. Transferring responsibility for applying the system of due diligence to the purchaser would therefore undermine the objective of the Regulation and of the Forestry Law. If the applicant had actually sold the right to harvest standing timber, the purchaser would have had to become a forest manager and would have been obliged to keep forestry and related records. This, however, was not the case.
- 10 The applicant lodged an appeal in cassation against the contested judgment. The applicant takes the view that its chosen method of selling standing timber, where the purchaser does the harvesting, does not fall within the concept of '*placing on the market*' within the meaning of Article 2(b) of the Regulation, and that it was therefore not an '*operator*' within the meaning of Article 2(c) of the Regulation.

¹ Translator's note: refers to Commission Notice of 12 February 2016, C(2016) 755 final.

At the same time, the applicant again cited Scenario 10a of Commission Notice C(2016), which it believed applied in its case and according to which the applicant should not be classified as an operator.

- 11 At the same time, the applicant repeatedly requested that the Court of Cassation stay the proceedings in cassation and submit a request for a preliminary ruling on the interpretation of Article 2(c) of the Regulation to the Court of Justice of the European Union, as the dispute concerns the interpretation of the Regulation.
- 12 The defendant took a position on the applicant's appeal in cassation, essentially upholding the arguments presented in its decision. It pointed out that the operators who purchased timber from the applicant did not have even basic documents allowing a system of due diligence to be established and implemented. Only the applicant, as a forest manager (as it had not transferred harvesting rights to a third party), has at its disposal and maintains the specific records required by Zákon č. 326/2005 Z. z. o lesoch (Law No. 326/2005 on Forestry) as amended ('the Forestry Law') and is a registered forest manager in accordance with that Law, which enables it to access the documents needed to implement a system of due diligence. If the right to harvest standing timber had indeed been sold, as is apparent from the applicant's statement, the purchaser would have become the forest manager with all the rights and obligations pertaining thereto, which is not the case here. The defendant contends that the Court of Cassation should dismiss the applicant's action as unfounded.

II.

EU law

- 13 Under Article 2(b) and (c) of the Regulation:

(b) 'placing on the market' means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. The supply on the internal market of timber products derived from timber or timber products already placed on the internal market shall not constitute 'placing on the market';

(c) 'operator' means any natural or legal person that places timber or timber products on the market; [...]

- 14 According to Article 4(2) of the Regulation: *'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.'*

- 15 Under Article 19(1) of the Regulation *‘The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented.’*

III.

National law

- 16 Under Paragraph 1(1)(a) of the Timber Law: *‘The rights and obligations of operators placing timber and timber products on the internal market shall be governed by law.’*

- 17 Under Paragraph 4(1), (2) and (3) of the Timber Law:

‘1) An operator who places timber and timber products on the internal market shall apply a due diligence system; this shall not apply when it places on the internal market timber and timber products subject to a licensing system. The due diligence system shall be established in paper or electronic form before timber and timber products are placed on the internal market.’

2) Operators are required to apply and evaluate the due diligence system on a regular basis, save where the system has been set up by a monitoring authority.’

3) An operator who places on the internal market timber and products harvested from trees or bushes in the territory of the Slovak Republic and who is the owner, administrator or forest manager in forest areas, an administrator in accordance with specific provisions, a person authorised to harvest timber or remove timber in accordance with specific provisions, a person authorised to fell trees and bushes or a person who places timber and timber products on the internal market, shall include in the due diligence system information, documents and records in accordance with separate regulations, as well as information on the method of harvesting timber, the handling of timber and timber products, the transport and marketing of timber and timber products and related documents.’

- 18 According to Paragraph 17(1)(c) of the Timber Law, in the version in force until 31 December 2019:

‘An operator commits another administrative offence if it [...] fails to establish a system of due diligence or fails to adequately apply such a system and fails to submit it to the assessment provided for in Paragraph 4(1), (2), (3), or (5) [...].’

- 19 Under Paragraph 17(5)(b) of the Timber Law, in the version in force until 31 December 2019:

‘The supervisory authority shall impose a fine of between EUR 2 000 and EUR 10 000 if another administrative offence is committed in accordance with [...] Paragraph 1(b), (c) or (d).’

IV.**The reasoning for the question referred for a preliminary ruling**

- 20 Taking the administrative file and the judicial file as a basis, the Court of Cassation finds that the dispute in the present case concerns a penalty mechanism which was adopted by the national legislature on the basis of the powers conferred by Article 19(1) of the Regulation. This is a penalty procedure for breach of the obligations under Article 4(2) of the Regulation which the applicant was required to fulfil as an operator within the meaning of Article 2(b) and (c) of the Regulation. In the administrative court proceedings and in the cassation proceedings, the applicant essentially raised the issue of whether the method of selling timber it chose can be classified as placing on the market the meaning of Article 2(b) of the Regulation and, consequently, whether it is in fact an operator within the meaning of Article 2(c) that is subject to the obligations of Article 4(2) of the Regulation, and the associated mechanism for penalties pursuant Article 19(1) of the Regulation in conjunction with Paragraph 17(5)(b) of the Timber Law.
- 21 On the basis of administrative and judicial files, the court of cassation has established that the applicant, as a municipality, is a regional or local authority which is an autonomous legal person that has assets at its disposal (including timber). In the context of such disposal, the applicant chose a model in which it sold timber to natural and legal persons against payment. In that regard, it acted in a way in which it sold timber or timber mass of specified volumes to natural and legal persons through contracts or by direct sales, whereby it did not harvest the timber itself, but left the harvesting of the timber to the purchaser (either by itself or with the assistance of third parties). It is apparent from further contractual provisions, as well as from the applicant's submissions in both the administrative and judicial proceedings, that the harvesting of the timber sold to the buyers took place in such a way that authorised employees of the applicant (the seller) designated specific trees to be felled by the buyers. Alternatively, they would designate the area to be felled and the felling would take place under the seller/applicant's supervision.
- 22 The defendant considered that the method of dealing with timber chosen by the applicant constituted placing timber on the market within the meaning of Article 2(b) of the Regulation and, in its view, the applicant should, as an operator within the meaning of Article 2(c), have complied with its obligations under Article 4(2) of the Regulation. The defendant found it decisive in the present case that the applicant did not transfer the right to harvest and manage timber on a particular site to the buyers in accordance with national law, but sold only the timber mass directly, while leaving the harvesting of the timber to the buyer. According to the defendant, if the applicant had transferred the right to harvest timber from a particular area to the buyers, the buyers would have become forest managers, subject to registration under the Forestry Act (national legislation), and they would only have had sufficient information available to apply due diligence

if they had enjoyed this status. According to the defendant, if a particular volume of timber is sold, it is immaterial, for the purposes of Article 2(b) of the Regulation, who has harvested the wood, as the operator would be person who sold the timber and thus placed it on the market.

- 23 The applicant disputes this position, arguing that the method of selling the timber which it chose consists essentially in the fact that, although the volume of timber was specified in the contract, it was selling the right to harvest standing timber and was therefore not selling harvested wood. Referring to scenario 10a of Commission Notice C (2016) of 12 June² 2016 (paragraph [7] above), the applicant submits that this selling arrangement means that it is not itself placing the timber on the market within the meaning of Article 2(b) of the Regulation and is therefore not an operator within the meaning of Article 2(c) of the Regulation. Only buyers who harvested the timber sold would have that status.
- 24 In the light of the foregoing, the court of cassation considers this to be a dispute about the interpretation of EU law, more specifically Article 2(b) and (c) of the Regulation. The court of cassation is also of the opinion that the interpretation of the concepts of ‘operator’ or ‘placing [timber] on the market’ within the meaning of Article 2(b) and (c) of the Regulation is autonomous and independent of the provisions of national law or of the assumptions made therein about who should have the status of operator. [...] [*repetition of the question referred*].
- 25 When examining the present case, the court of cassation did not find any decision of the Court of Justice of the European Union which might relate to the questions referred for preliminary ruling or to Article 2(b) and (c) of the Regulation and was unable to find a clear answer to the questions referred from the wording of Article 2(b) and (c). Since the questions at issue concern the interpretation of EU law, the court of cassation considers that the Court of Justice of the European Union has jurisdiction to answer them.
- 26 From the perspective of the interpretation of Article 2(b) and (c) of the Regulation, the court of cassation draws attention in particular to the function and objective of the Regulation, which is to combat illegal logging and the marketing on the internal market of products made from illegally harvested timber (recitals 1, 3, 15 of the Regulation). In the opinion of the court of cassation, the issue in the present case is placing reasonable limits on the interpretation of Article 2(b) and (c) of the Regulation so that, on the one hand, the objective and spirit of the Regulation and the obligations arising under the system of due diligence cannot be circumvented by targeted selection of the way in which timber is marketed (sale of timber), while on the other hand, avoiding the excessive interpretation of the concept of operator in commercial relations to entities for whom this is not necessary in the light of the objectives of the Regulation.

V.

²See footnote 1.

[...]

27 [...]

28 [...]

29 [...]

30 The Order was adopted by the chamber of the Najvyší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) by a majority of 3:0.

[...] [*suspension of the proceedings, result of the vote of the chamber of the court, information on legal remedies*]

Bratislava, 26 April 2023

[...] [names of judges]

WORKING DOCUMENT