

C-557/23**Request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

6 September 2023

Referring court:

Szegedi Törvényszék (Hungary)

Date of the decision to refer:

6 September 2023

Applicant:

SPAR Magyarország Kft.

Defendant:

Bács-Kiskun Vármegyei Kormányhivatal

Subject matter of the main proceedings

Administrative-law action for the annulment of a decision imposing a consumer protection fine.

Subject matter and legal basis of the request

Conformity with Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ('the CMO Regulation'), and, generally, with Articles 34 and 36 TFEU, of national legislation which, in the case of a number of agricultural products falling within the scope of the CMO Regulation, provides that traders are obliged to offer such products for sale (i.e. offer and sell them to purchasers at the point of sale) at a fixed authorised price in the same quantity as the average daily quantity thereof which the trader held in stock in the reference year, and which, in the event of failure to comply with that obligation, requires a fine to be imposed.

Legal basis of the request for a preliminary ruling: Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 83(5) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ('the CMO Regulation'), be interpreted as precluding a national measure such as that at issue in the main proceedings, which, on grounds of emergency, imposes on traders an obligation to offer for sale a number of agricultural products falling within the scope of the CMO Regulation at an authorised fixed price and in quantities determined not on the basis of the average daily quantities marketed by the trader in the reference year, but, irrespective thereof, on the basis of the average daily quantities which the trader held in stock in the reference year?
2. Must Article 90a(3) of the CMO Regulation be interpreted as precluding a national measure such as that at issue in the main proceedings, which provides for the mandatory imposition of a fine even in the case where the trader has, on the day on which the check is carried out, offered for sale a number of agricultural products falling within the scope of the CMO Regulation in quantities equivalent to the average daily quantities which it marketed in the reference year, and in the case where such products are available to consumers?

Provisions of European Union law relied on

Articles 34 and 36 TFEU

Recital 172 and Articles 83(5) and 90a(3) of the CMO Regulation

Provisions of national law relied on

Az árak megállapításáról szóló 1990. évi LXXXVII. törvény veszélyhelyzet ideje alatt történő eltérő alkalmazásáról szóló 6/2022. (I. 14.) Korm. rendelet [Government Decree 6/2022 of 14 January 2022 establishing for emergency purposes exceptions to the application of Law LXXXVII of 1990 on price formation ('the Price Decree')]

- 1 The Hungarian Government adopted the Price Decree in the context of the emergency brought about by the COVID-19 pandemic. According to the wording of that decree, in force with effect from 1 February 2022, traders were obliged to offer for sale six products listed in the annex to the CMO Regulation (granulated sugar; fine wheat flour; refined sunflower oil; leg of pork domestic species;

chicken breast; chicken carcass – back bone, rump and wing tips; and UHT cow's milk with a fat content of 2.8%; 'the first product group') at an authorised price which, in essence, could not be higher than the gross retail selling price charged on 15 October 2021. Traders were also obliged to sell such products if they were selling them on 15 October 2021 and to offer for sale on a daily basis at least the average daily quantity [sold] on the corresponding day of the week in 2021.

- 2 The Government, on grounds of the war in Ukraine, amended the Price Decree, with effect from 10 November 2022, in order to extend its scope to two further products (fresh eggs and table potatoes; 'the second product group'), and took as the reference value not the average daily quantity [sold by the trader] but the average daily quantity which the trader held in stock in the reference year (2021 in the case of the first product group and 2022 in the case of the second).
- 3 The relevant provisions of the Price Decree in force with effect from 12 January 2023 (following a further amendment) were worded as follows:

'Paragraph 2.

(1) As regards [the first product group], the trader is obliged:

(a) to sell the products that were being sold on 15 October 2021;

(b) in this connection, to offer for sale on a daily basis at least the average daily quantity which it held in stock on the corresponding day of the week in 2021; and

(c) to guarantee stocks – if necessary, in the volume of twice the quantity referred to in point (b) – and ensure that these are continuously made available to customers in quantities sufficient to meet their needs, and to avoid shortages'.
- 4 Article 2/A contained a similar provision in relation to the second product group, although this was based on sales as at 30 September 2022 and in 2022 as the reference year.
- 5 The Price Decree (Article 3) further provided that, in the event of a failure to fulfil the obligation to offer the products in question for sale at the authorised sale price or to maintain stocks thereof, the competent consumer protection authority was obliged to impose a fine of between 50 000 and 3 000 000 forint (HUF), or, alternatively, it could order a temporary cessation (of between one day and six months) of the trader's activity.
- 6 The Price Decree remained in force until 31 July 2023.

Succinct presentation of the facts and procedure in the main proceedings

- 7 During an on-the-spot check carried on 1 February 2023 at one of the applicant trader's shops, the defendant authority determined that the trader in question had, in the case of five products, failed to fulfil its obligation to offer for sale on a daily basis at least average daily quantities thereof equivalent to those which it had held in stock on the corresponding day of the week in 2021 or 2022, thereby infringing Articles 2(1)(b and 2/A(1)(b) of the Price Decree. Consequently, by its decision, the defendant imposed on the applicant company a consumer protection fine in the amount of HUF 2 200 000 (approximately EUR 5 756) and ordered it to sell in the shop forming the subject of the investigation the products in the groups in question in the quantities laid down in the Price Decree.
- 8 In determining the amount of the fine, the defendant authority took into account, in accordance with the Price Decree, how many people were affected by the infringement (a larger number), how long the infringement lasted (there is evidence of its existence on the day of the on-the-spot check), whether this was a repeated infringement (a consumer protection fine had been imposed on the applicant before), whether the applicant was willing to cooperate (it was), what economic impact the infringement had (significant), what the nature of it was (irreversible, non-cross-border) and how serious it was (very).
- 9 The applicant brought an administrative-law action against the defendant's decision, which it seeks to have annulled.

The essential arguments of the parties in the main proceedings

- 10 In the applicant's view, the adoption of a price regulation scheme by the authorities restricts certain essential rights enjoyed by traders (right to property, freedom to conduct a business, freedom of contract). Since the provisions of the Price Decree impose a significant additional burden on the applicant and require of it conduct completely alien to the regulation of trade, it is necessary to adopt an interpretation of the relevant legislation that is the least restrictive of those rights. The legislature's purpose was not to introduce a general obligation to supply goods/services, but to satisfy consumer demand. As the Government put it, 'nobody should go home with an empty basket'. The applicant met that objective in full: it had the goods concerned in quantities equal to or greater than the average quantities sold on the corresponding day of the week in 2021 or 2022. It fully satisfied consumer demand and even had some final stocks of those goods left over. An infringement could be said to have occurred only if it were shown that it did not meet customer demand and that consumers' interests were thereby harmed. The line of argument which it is putting forward here has been accepted by other authorities in previous checks.
- 11 The applicant also submits that, in the reference years, its stock levels were influenced by numerous random circumstances independent of customer demand (promotions, seasonal fluctuations, stock reductions, and so on), and that, since

the storage capacity of its business premises was limited, the obligation to maintain stocks would have put in jeopardy the supply of other products to consumers. What is more, the supermarket chain had the stock volumes required.

- 12 The defendant submits that the Price Decree must be interpreted literally: if the quantities specified in that decree were not available in the shop, there was a failure to fulfil the obligation laid down in that decree. The trader carries strict liability and the legal consequence [of its failure] (a fine) must be imposed on it irrespective of fault. The purpose pursued by the author of the Price Decree, [as the Kúria (Supreme Court, Hungary) has itself confirmed], is to protect the financial interests of families, to guarantee an uninterrupted supply of goods and to ensure that the products concerned are available to consumers at customary stock levels.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 13 As regards the first question referred for a preliminary ruling, the referring court starts from the premiss that the Common Agricultural Policy (CAP) falls within the sphere of competence shared by the European Union and the Member States. Where there are rules establishing a common organisation of the market in a given sector, Member States must refrain from adopting any measure that undermines or creates exceptions to that organisation. On the other hand, Member States retain in principle their competence to adopt certain measures which are not provided for in the CMO Regulation, provided that those measures are not such as to undermine that regulation or create exceptions to it or interfere with its proper operation.
- 14 The national legislation at issue in the dispute in the main proceedings, which, so far as concerns the retail selling of a number of products falling within the scope of the CMO Regulation, imposes an obligation to offer those products for sale in certain quantities at an authorised fixed price, is liable to undermine the CMO Regulation in that such a measure may be incompatible with the principle that is the foundation of that regulation: the free formation of selling prices of agricultural products on the basis of the free competition on which that regulation is founded.
- 15 The establishment of a common organisation of markets does not prevent Member States from putting in place measures that pursue an objective in the general interest other than the objectives covered by that organisation. However, such measures must comply with the requirements of proportionality that follow from the case-law of the Court of Justice. The issue of proportionality must be examined by taking into consideration, in particular, the objectives of the CAP and the proper functioning of the common market organisation, which necessitates that those objectives must be weighed against the objectives pursued by the national legislation in question, in particular the overriding reasons in the general interest. These may include the objective of avoiding the adverse effects of market dysfunctions (curbing inflation) and, conversely, as a social and welfare objective,

the need to ensure that the population has access to certain basic foodstuffs at artificially low prices. Those reasons must be non-discriminatory and meet the criterion of proportionality, and Member States must show that they are necessary.

- 16 The referring court is of the view that the provision relating to stock levels does not meet the criteria of necessity and proportionality and cannot be justified by an objective in the general interest. It is therefore contrary to recital 172 and Article 83(5) of the CMO Regulation, as well as to Articles 34 and 36 TFEU.
- 17 The objective of the Price Decree is to ensure that customer demand can continue to be met following the introduction of the authorised price, since traders would be inclined not to sell products subject to authorised prices that would cause them to make a loss. However, consumer demand is reflected not by stocks but by purchases actually made by consumers. There is no justification for obliging traders to maintain certain stock levels so long as consumer demand is being met. The previous wording of the Price Decree, which laid down a mandatory average daily sales volume, met that objective and was therefore in conformity with EU law.
- 18 As regards the second question referred for a preliminary ruling, the referring court notes that a trader failing to fulfil the obligation to offer for sale incurs strict liability: the imposition of a fine is mandatory in the event of a trader's failure to fulfil that objective, even if consumers have not suffered any harm. The referring court does not deny that Member States may apply administrative penalties, in accordance with Article 90a(3) of the CMO Regulation, but the imposition of a fine is an unnecessary and excessive penalty if the desired price-approved products are available to consumers.