

Case C-351/22

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:

31 May 2022

Referring court:

Tribunalul București (Romania)

Date of the decision to refer:

2 November 2021

Appellant:

Neves 77 Solutions SRL

Respondent:

Agenția Națională de Administrare Fiscală – Direcția Generală Antifraudă Fiscală

Subject matter of the main proceedings

Appeal brought by the company Neves 77 Solutions SRL ('the appellant') against the judgment of the Judecătoria Sectorului 1 București (Court of First Instance, Sector 1, Bucharest, Romania) concerning an application for the annulment of an infringement notice issued by the Agenția Națională de Administrare Fiscală – Direcția Generală Antifraudă Fiscală (National tax administration agency – Tax fraud department; 'ANAF' or 'the respondent').

Subject matter and legal basis of the request

On the basis of Article 267 TFEU, the interpretation is sought of Decision 2014/512/CFSP, and in particular Articles 2(2)(a), 5 and 7.

Questions referred for a preliminary ruling

1. Can Decision 2014/512/CFSP, in particular Articles 5 and 7 thereof, in the light of the principles of legal certainty and *nulla poena sine lege*, be interpreted as permitting (by way of a civil penalty) a national measure authorising the confiscation of the entire proceeds of a transaction, such as the one referred to in Article 2(2)(a) of Decision 2014/512/CFSP, in the event that an act categorised by domestic law as a summary offence is found to have been committed?
2. Is Article 5 of Decision 2014/512/CFSP to be interpreted as allowing Member States to adopt national measures providing for the automatic confiscation of any proceeds resulting from a breach of the obligation to notify a transaction falling within the scope of Article 2(2)(a) of Decision 2014/512/CFSP?
3. Is the prohibition laid down in Article 2(2)(a) of Decision 2014/512/CFSP applicable where goods constituting military equipment, which were the subject of brokering transactions, were never physically imported into the territory of the Member State?

Provisions of European Union law and case-law relied on

Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine: Article 2(2)(a) and Articles 5 to 7

Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine: Article 1

Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236)

Provisions of national law relied on

Ordonanța de urgență a Guvernului nr. 202/2008 privind punerea în aplicare a sancțiunilor internaționale (Decree-Law No 202/2008 on the implementation of international sanctions; 'Government Emergency Order No 202/2008'): Articles 1, 3, 7, 24 and 26. Pursuant to Article 26(1)(b), failure to comply with the obligation laid down in Article 24(1) constitutes a summary offence punishable by a fine of between RON 10 000 and RON 30 000, together with the confiscation of the goods destined for, used in or resulting from the summary offence. Pursuant to Article 24(1), natural or legal persons who, having established a legal relationship or being in a de facto relationship with any goods subject to an international sanction, become aware of the existence of notifiable or reportable situations under Article 7 or Article 18, respectively, are obliged, without delay and without prior notification to the competent authorities, to refrain from engaging in any

transaction involving the goods in question and to inform the competent authorities immediately.

Ordinul ministrului afacerilor externe nr. 156/2018 pentru aprobarea Listei cuprinzând produsele militare supuse regimului de control al exporturilor, importurilor și altor operațiuni (Decree No 156/2018 of the Minister for Foreign Affairs ratifying the list of military products subject to the system of control of exports, imports and other transactions), in force from 5 March 2018 until 4 July 2019, repealed and replaced by the *Ordinul ministrului afacerilor externe nr. 901/2019 pentru aprobarea Listei cuprinzând produsele militare supuse regimului de control al exporturilor, importurilor și altor operațiuni* (Decree No 901/2019 of the Minister for Foreign Affairs ratifying the list of military products subject to the system of control of exports, imports and other transactions), in force from 5 July 2019 until 6 October 2021. The annexes to that decree contained, in particular, a category ML11, entitled ‘Electronic equipment, “spacecraft” and components not specified elsewhere in this list’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 In 2009, the Ukrainian state-owned company SFTE Spetstechnoexport and the Indian state-owned company Hindustan Aeronautics Limited entered into a contract for the supply and repair of AN-32 civil aircraft, which SFTE Ukraine undertook to supply and repair using components that are manufactured solely in the Russian Federation. Following Russia’s invasion of Ukraine (Crimea) in 2014, SFTE Ukraine ceased purchasing the parts and equipment needed for the 2009 contract directly from Russia.
- 2 On 4 January 2019, SFTE Spetstechnoexport, as buyer, and the appellant, as seller, entered into a contract for the transfer of ownership of the V/UHD Corn R-800L2E system (32 pieces), whereby the seller undertook to deliver the goods FCA to Sharjah (United Arab Emirates), in accordance with INCOTERMS 2000.
- 3 On 8 January 2019, the appellant, as buyer, and the Portuguese company Additional Rhythm Unipessoal LDA, as seller, entered into a contract for 32 R-800L2E radio sets, with the goods to be delivered FCA to Sharjah (United Arab Emirates), in accordance with INCOTERMS 2010.
- 4 Of those 32 radio sets, 20 were exported from Russia to the United Arab Emirates, where SFTE Ukraine took delivery of them in Sharjah in January 2019.
- 5 On 21 January 2019, SFTE Ukraine asked the appellant to deliver the first batch of 20 R-800L2E radio sets directly to the end user of the products in India; the goods were shipped from Sharjah to India, where the final beneficiary received them on 31 January 2019.
- 6 The country of origin of the radio sets is the Russian Federation; the 20 R-800L2E radio sets were manufactured by the company Zavod Electrosignal and exported

by the company Rosaviaspetskomplekt from Russia to Sky Techniques FZE in the United Arab Emirates.

- 7 By notice of 26 July 2019, the Departamentul pentru Controlul Exporturilor (Department of Export Control; ‘ANCEX’) of the Ministerul Afacerilor Externe (Ministry of Foreign Affairs) informed the appellant that the R-800L2E radio set was on the list of military products (in category ML11) subject to the system of control of exports, imports and other transactions, approved by Decree No 901 of the Minister for Foreign Affairs of 4 June 2019. In addition, foreign trade involving the abovementioned product could be carried out, in accordance with the Ordonanța de urgență a Guvernului nr. 158/1999 privind regimul de control al exporturilor, importurilor și altor operațiuni cu produse militare (Decree-Law No 158/1999 governing the system of control of exports, imports and other transactions with military products), on the basis of the registration confirmation and the licences issued by ANCEX.
- 8 Following the notice of 26 July 2019, on 29 July 2019 ANCEX issued a notice informing the appellant that the brokering transaction relating to the R-800L2E radio sets came within the scope of Decision 2014/512/CFSP.
- 9 The appellant replied to the two ANCEX notices, claiming that the radio sets in question were intended for civil use and that Decree No 901/2019 did not apply at the time of delivery of those goods. Furthermore, the provisions of Article 2(2)(a) of Decision 2014/512/CFSP did not apply either, since the radio sets had not been sold to Russia or in Russia, but to the company Hindustan India. In addition, the R-800L2E model belonged to a whole category of radio sets which included models for both military and civil use: those supplied by the appellant were strictly for civil use.
- 10 Under the contract of 4 January 2019, on 6 and 9 August 2019, respectively, the appellant received the sum of EUR 577 746.08 from SFTE Ukraine by way of an advance and the sum of EUR 2 407 215.32 by way of consideration for the products delivered.
- 11 A complaint dated 19 August 2019, filed by the Oficiul Național de Prevenire și Combatere a Spălării Banilor (National anti-money laundering agency) with the Parchetul de pe lângă Tribunalul București (Public prosecutor’s office at the Regional Court, Bucharest), concerning an alleged money laundering offence committed by the appellant, was closed on 11 May 2020 since no criminal offence was found to have been committed.
- 12 On 12 May 2020, deciding that the appellant had infringed Article 2(2)(a) of Decision 2014/512/CFSP and Articles 3(1), 7(1) and 24(1) of Government Emergency Order No 202/2008, the respondent issued an infringement notice alleging that the applicant had committed a summary offence under Article 26(1)(b) of Government Emergency Order No 202/2008. The appellant was fined RON 30 000 as the main penalty. In addition, the sum of

RON 14 113 003 was confiscated, representing the consideration of EUR 2 984 961.40 received from SFTE Spetstechnoexport in Kyiv, Ukraine, on 6 and 9 August 2019. The appellant concluded that, although ANCEX had informed it that the R-800L2E radio set was on the list of military products subject to the system of control of exports, imports and other transactions and that the brokering transactions concerning that product came within the scope of Decision 2014/512/CFSP, the appellant had continued with the sale of those products, with the relevant consideration being paid into an account held with a bank in Romania.

- 13 Neves 77 Solutions SRL contested the infringement notice before the Court of First Instance, Sector 1, Bucharest by a complaint that was dismissed by the judgment of 2 November 2020. The court ruling on the merits found that, on the basis of the evidence obtained during the proceedings, Neves 77 Solutions SRL had failed to rebut the presumption of legality and the validity of the infringement notice.
- 14 Neves 77 Solutions SRL appealed the judgment before the referring court, the Tribunalul București (Regional Court, Bucharest).

The essential arguments of the parties in the main proceedings

- 15 The appellant alleges that the court ruling on the merits ignored most of its arguments, including those concerning the fact that Decree No 901/2019, on the basis of which the alleged military nature of the radio sets was affirmed, was not in force at the time of their sale. Furthermore, according to the appellant, the court ruling on the merits failed to rule on its complaints concerning ANCEX's failure to consider the military nature of the products at issue or an infringement of the system of export control for military products, the absence of a technical or laboratory study establishing the alleged military nature of the radio sets, ANAF's lack of jurisdiction to determine whether a given product can be classed as military, and the absence of any contract of sale for goods for military use sent to Russia or intended for use in Russia, in a situation where such radio sets were purchased by a Portuguese company and sold to a state-owned company in India (the final beneficiary).
- 16 The appellant contends that the alleged summary offence did not exist, since Decree No 901/2019 was not in force at the time of the sale of the radio sets and the characterisation of those sets as military was due to the retroactive application of the legislative decree in question.
- 17 The appellant further submits that the radio sets it supplied were purely for civil use and that it had not infringed the provisions of Article 2(2) of Decision 2014/512/CFSP, since the radio sets were not supplied to entities in Russia, nor were they intended for use in Russia.

- 18 Moreover, receiving sums of money representing consideration for the radio sets was not prohibited under Decision 2014/512/CFSP, which only prohibited the supply of military equipment, but not the transfer of funds.
- 19 In the alternative, the appellant requested that ANAF's confiscation order be found not to be proportionate to the gravity of the allegation, the tax authorities having acted disproportionately and unlawfully; the failure to identify the correct penalty amounted to a violation of the right to protection of property, enshrined in Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights.

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

- 20 First, the Regional Court of Bucharest states that the Court of Justice has not previously ruled on the provisions for which an interpretation is sought, namely Article 2(2)(a) and Articles 5 and 7 of Decision 2014/512/CFSP. Furthermore, the correct application of EU law in the present case is so obvious as to leave no scope for any reasonable doubt.
- 21 Second, the referring court points out that the circumstances of the dispute in the main proceedings are different from those in the dispute that led to the judgment of 28 March 2017 of the Court of Justice in *Rosneft* (C-72/15).
- 22 Third, the judgment that the referring court is called upon to give in the main proceedings is final in the national system of means of redress, such that it is obliged, pursuant to the third paragraph of Article 267 TFEU, to refer the matter to the Court of Justice.
- 23 Since one of the arguments put forward by the applicant concerns the lack of proportionality of the confiscation order which applies to the entire sum it received, the referring court raises the first question, which concerns the interpretation of Decision 2014/512/CFSP, in particular Articles 5 and 7 thereof.
- 24 The second question concerns the interpretation of Article 5 of Decision 2014/512/CFSP, in particular the question whether that provision precludes the introduction, in domestic legislation, of a separate obligation to inform/notify the competent authorities of any transaction involving goods falling within the scope of Article 2(2)(a) of Decision 2014/512/CFSP, under penalty of automatic confiscation of any proceeds resulting from the breach of the relevant obligation.
- 25 By its third question, the referring court seeks to clarify – considering the definition of the concept of 'brokering services' contained in Regulation No 833/2014 – whether the prohibition laid down in Article 2(2)(a) of Decision 2014/512/CFSP applies in the case of goods that come from Russia and that have not been physically imported into the territory of an EU Member State.

- 26 The Regional Court of Bucharest also points to the existence of national case-law on the application of the confiscation order to the entire sum of money destined for, used in or resulting from summary offences provided for in other legislative acts, noting that it takes into account the principles derived from the case-law of the European Court of Human Rights (*Ismaylov v. Russia* and *Moon v. France*, respectively), in which the penalty of confiscation was found to be disproportionate in cases where the infringement actually established (rather than the potential infringement, which is yet to occur) does not harm the State, and that compliance with the principle under discussion must also be examined in such situations from the point of view of the combination of the confiscation and the fine, to determine whether, overall, the penalty imposed on the offender goes beyond what is necessary in order to attain the objective pursued.

WORKING DOCUMENT