

Case C-428/22

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:

28 June 2022

Referring court:

Administrativen sad Varna (Bulgaria)

Date of the decision to refer:

14 June 2022

Applicant:

‘DEVNIA TSIMENT’ AD

Defendant:

Zamestnik-predsedatel na Darzhavna agentsia ‘Darzhaven rezerv i voennovremenni zapasi’

Subject matter of the main proceedings

The dispute between the parties concerns the legality of an order on the creation of emergency stocks issued on 28 April 2021 by the Zamestnik-predsedatel na Darzhavna agentsia ‘Darzhaven rezerv i voennovremenni zapasi’ (Vice-President of the State Agency ‘State Reserves and War Supplies’).

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. In light of the objective of the directive and Article 2(d) of Regulation (EC) No 1099/2008 of the European Parliament and of the Council of 22 October 2008 on energy statistics, and in light of the principle of proportionality laid down in Article 52(1) in conjunction with Article 17 of the Charter of Fundamental Rights

of the European Union, must the 33rd recital, Article 1, Article 3, Article 8 and Article 2(i) and (j) of Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products be interpreted as precluding national legislation, such as that at issue in the main proceedings, according to which persons who have made intra-Community acquisitions of petroleum coke for production purposes in accordance with point 3.4.23 of Annex A to Regulation (EC) No 1099/2008 may be required to build up emergency stocks?

2. Must the 33rd recital, Article 1, Article 3, Article 8 and Article 2(i) and (j) of the directive be interpreted as precluding national legislation, such as that at issue in the main proceedings, which restricts the types of products in respect of which emergency stocks must be built up and held to some of the types of products in Article 2(i) of the directive in conjunction with Chapter 3.4 of Annex A to Regulation (EC) No 1099/2008?

3. Must the 33rd recital, Article 1, Article 3, Article 8 and Article 2(i) and (j) of the directive be interpreted as precluding national legislation, such as that at issue in the main proceedings, according to which the realisation by a person of intra-Community acquisitions or imports of a type of product referred to in Article 2(i) of the directive, read in conjunction with Chapter 3.4 of Annex A to Regulation (EC) No 1099/2008 entails an obligation on that person to build up and hold emergency stocks of another, different type of product?

4. Must the 33rd recital in the preamble, Article 1, Article 3, Article 8 and Article 2(i) and (j) of the directive be interpreted as precluding national legislation, such as that at issue in the main proceedings, according to which a person is obliged to build up and hold stocks of a product that they do not use in the course of their economic activity and that is unrelated to that activity and where that obligation also entails a significant financial burden (leading, in practice, to compliance being impossible) because the person is neither in possession of the product nor are they its importer and/or holder?

5. In the event that one of the above questions is answered in the negative: Having regard to the aim of the directive and in light of the principle of proportionality laid down in Article 52(1) in conjunction with Article 17 of the Charter of Fundamental Rights of the European Union, must the 33rd recital, Article 1, Article 3, Article 8 and Article 2(i) and (j) of Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products be interpreted as meaning that the importer of a particular type of product can only be required to build up and hold emergency stocks of the same type of product as the product that was imported?

EU legislation and case-law relied on

Article 122 TFEU

Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (hereinafter ‘the Directive’), 33rd recital, Article 1, Article 2(i) and (j), Article 3 and 8

Charter of Fundamental Rights of the European Union, Article 17(1), 51(1) and (2) as well as Article 52(1) and (2)

Explanations relating to the Charter of Fundamental Rights, Explanation relating to Article 17

The referring court is not aware that the provisions of the Directive have been subject to interpretation by the Court of Justice of the European Union.

National legislation cited

Zakon za zapasite ot neft i neftoprodukti (Law on stocks of petroleum and petroleum products, hereinafter ‘the ZZNN’), Article 1(1), Article 2(1) and (4), Article 3(4), Article 8(1) to (5), Article 12(1), (2), (4) and (11), Article 14(1) to (6), Article 17(1) to (4), Article 21(1), (11), (14) and (15), Article 23(1) and (2), Article 30(1) to (3), Article 38(1); Dopolnitelni razporedbi na ZZNN (supplementary provisions to the ZZNN), Paragraph 1 nos. 8 to 12 and paragraph 2 nos. 1 and 2

Brief summary of the facts and procedure

- 1 In 2020, ‘DEVNIA TSIMENT’ AD (hereinafter ‘the Company’) imported 34,657.39 tonnes of petroleum coke under the following CN customs code according to the Combined Nomenclature: 2713 11 00 (Annex A Chapter 3.4 no. 3.4.23 of Regulation [EC] No 1099/2008), which is used in a mineralogical process in the manufacture of cement clinker. There are no indications that the Company was economically active in 2020 with any other type of product listed in Chapter 3.4 of Annex A to Regulation (EC) No 1099/2008 or with fuel oil.
- 2 On 5 May 2021, the Company was served with an order of the Vice-President of the State Agency ‘State Reserves and War Reserves’ dated 28 April 2021 on the creation of emergency stocks (hereinafter ‘the Order’), which ordered ‘DEVNIA TSIMENT’ AD on the basis of Article 12, Article 8(2) no. 3 in conjunction with Article 8(3) of the ZZNN to organise and finance for a period of one year, namely from 1 July 2021 to 30 June 2022, the emergency stocks of heavy fuel oil amounting to 7 806.058 tonnes (seven thousand eight hundred and six tonnes and fifty-eight kilograms), as specified in Article 2(1) no. 3 of the ZZNN at its own expense and with its own resources.
- 3 The Order was issued in relation to the abovementioned import of petroleum coke in 2020.

- 4 On 19 May 2021, the Company filed a lawsuit against the Order, thus initiating the court proceedings before the Administrativen sad Varna (Administrative Court of Varna, Bulgaria). In its view, it should not be ordered to stockpile products and requests that the Order be set aside on the ground that it is unlawful for a number of reasons. In the statement of claim, the claimant argues that the Order is unlawful, inter alia, because the national law, the ZZNN, is not compatible with EU law, in particular the Directive, which was transposed into Bulgarian law by the ZZNN. Those objections are related to the assessment to be carried out by the court as to whether European Union law, in particular Directive 2009/119/EC, as transposed into national law by the ZZNN, has been properly applied.
- 5 The Company's activities do not include any transactions involving heavy fuel oil, gas oils, motor gasoline and/or diesel fuel; this applies both to the year 2020 as well as to the present time. The Company does not possess the emergency stock of heavy fuel stock; it would either have to purchase it or pay another company to discharge the obligation.
- 6 The Company does not have a registered storage facility for emergency stocks of petroleum and petroleum products as required by Article 38 of the ZZNN, particularly not for the petroleum products mentioned above, and it therefore does not have the status of a 'holder' as defined in the ZZNN.
- 7 The calculation of the ordered quantities of emergency stocks of heavy fuel oil to be created and maintained by the Company was verified by an appointed expert.

Brief summary of the basis for the reference

- 8 The Order under appeal at the referring court required the Company, which had imported petroleum coke in 2020, to build up and hold emergency stocks of heavy fuel oil amounting to 7 806.058 tonnes for the period from 1 July 2021 to 30 June 2022. This means that a company which imports a certain type of petroleum product was obliged to procure and store another type of petroleum product.
- 9 An interpretation of EU law is necessary in order to clarify the extent to which Member States have the power to determine which types of products are to be stocked and the extent of their powers vis-à-vis companies and, in particular, the precise meaning of the 33rd recital, Article 3, Article 8 and Article 2(i) and (j) of the Directive in the light of the objectives of the Directive and the principles governing the application of EU law, in particular the principle of proportionality. According to the referring court, it is necessary to ascertain, on the basis of an interpretation of the Directive by the Court of Justice of the European Union, whether the Directive has been lawfully transposed into national law and whether, accordingly, the Company can be the addressee of an obligation to stockpile heavy heating oil, in particular.
- 10 Article 3 in conjunction with Article 2(j) of the Directive sets out the result that Member States must achieve in relation to emergency stocks, namely to ensure

that certain quantities of oil stocks are maintained at all times. According to Article 2(i) of the Directive, oil stocks are stocks of energy products listed in Chapter 3.4 of Annex A to Regulation (EC) No. 1099/2008. Chapter 3.4 of this annex is entitled 'Oil (crude oil and petroleum products)' and contains 24 sub-groups. The Directive thus provides for the stockholding of all – and not only some of – the products listed in Chapter 3.4 of this annex. In Article 2(1) of the ZZNN, the national law does not provide for the stockholding of all products listed in Chapter 3.4 of the annex, but only of crude oil and four other petroleum products: 1. motor gasoline, 2. gas oils, kerosene jet fuels and diesel fuel, 3. heavy fuel oil, 4. liquefied petroleum gas.

- 11 An interpretation of the relevant provisions of EU law is important in this case in order to determine whether the Directive must be interpreted as precluding national legislation that restricts the types of products to be stockpiled.
- 12 According to the Directive, Member States have the option of fulfilling their stockholding obligations by delegating them to companies (i.e. legal persons governed by private law), i.e. to impose obligations on them to create and maintain emergency stocks. However, in imposing such obligations, Member States may not deviate from the principles and the objective of the Directive as set out in the 33rd recital of the Directive, namely *'to maintain a high level of security of oil supply in the Community through reliable and transparent mechanisms based on solidarity amongst Member States while complying with the internal market and competition rules'*. Based on a systematic interpretation of this objective and of the possible measure imposing obligations on companies (legal persons governed by private law), and having regard to the principle of proportionality under Article 52(1) of the Charter of Fundamental Rights of the European Union, and in the light of the facts of the case, the referring court has doubts as to whether the Directive should not be interpreted as meaning that a stockholding obligation may be imposed on a company only in respect of a product with which it has actually carried out an economic activity during the relevant period and from which its very status as a stockholder could be inferred.
- 13 The referring court asks itself whether it would run contrary to the objectives and spirit of the Directive and to the principle of proportionality under the Charter of Fundamental Rights of the European Union to require a company to organise a stock of a product with which it has not done or does not do business, which would of course require the company to purchase or borrow (partially transferring the obligation) the necessary quantities and to store them properly (in warehouses approved for that purpose). Such an approach results in a mainly financial burden for the company in question (payment of the purchase price, acquisition or rental of a storage facility for the stock, insurance pursuant to the ZZNN, payment of duties pursuant to Bulgarian tax rules, etc., and also if the obligation is transferred provided that such transfer is even an option open to the company in question) and affects the rules of the internal market and competition, both in relation to the petroleum product traded by the company and in relation to the petroleum product to be stocked.

- 14 The Directive is clearly not intended to impose financial (i.e. similar to levies) obligations on certain entities under private law. On the contrary, the principle underlying the Directive is that the authorisation of such interference with the legal sphere of entities under private law is related to their ability to fulfil the obligations imposed on them *in kind*. This is how (in line with the objective of the Directive, the principle of proportionality and the rules of the internal market and competition) a reasonable balance between the public (EU law) and private interest would be achieved since the fulfilment of the obligation to stock a certain product *in kind* by persons who carry out an economic activity with that product would not present any particular difficulty for those involved. The interference with the sphere of the persons concerned would be much less intense and would be in line with the requirements of the 33rd recital of the Directive, according to which such interventions must be made through a transparent system, taking into account the internal market and competition rules. It is far less burdensome for someone who has and operates with a certain product to hold part of it as an emergency stock than if someone would have to buy/borrow and store certain quantities of a product first because they are not involved in any economic activity with regard to that product and it is thus outside of their activity. This would basically only create an additional financial burden for the company, which is neither a statutory tax nor a fee paid in return for a specific return service, nor is it based on the activity of the company itself (thus, in the present case, a company producing cement, clinker, dry mortar, paints, plasters, sands, micronised and other fractions of limestone, hydraulic bonding agents and concrete products is put under an obligation to build up a stock of heavy fuel oil).
- 15 It is important to clarify whether the Directive must be interpreted as precluding national legislation, such as the Bulgarian legislation, which provides that a person is obliged to create emergency stocks of one type of product because they have carried out an economic activity (import) of another type of petroleum product.
- 16 According to national law, anyone who has imported any of the energy products listed in the Annex or brought them into the territory of the country from another EU country during the calendar year in question is under an obligation to build up emergency stocks. At the same time, contrary to the abovementioned provisions of the Directive, the types of products to be stocked are limited in the national law to those mentioned in Article 2(1) of the ZZNN (petroleum and four types of petroleum products). Bulgarian legislation provides that a person who has imported energy products listed in the Annex during the previous calendar year is obliged to build up emergency stocks of one of the products listed in Article 2(1) of the ZZNN.
- 17 The national law does not take into account the type of energy product imported by the person concerned and whether this type is a product that has to be stocked. By limiting the types of products to be stocked and by placing private individuals under an obligation to build up such emergency stocks, the national law does not ensure that the type of products the person subject to the obligation imports is the

same as the type of product to be stocked. Moreover, the law does not take into account whether the person subject to the obligation uses the product to be stocked in the course of their business, whether they can provide the necessary quantities of that product, what administrative requirements have to be met and what financial resources would have to be deployed in order to achieve that objective, and how that would affect the person's financial position and competitiveness.

- 18 In particular, Article 12(11) of the ZZNN provides that the importation of petroleum coke triggers the obligation to maintain a stock of heavy fuel oil. This is also the situation in the present case – the Company had imported petroleum coke and was therefore obliged to build up a stock of heavy fuel oil without being allowed to build up a stock of petroleum coke.
- 19 Consequently, in order to fulfil the obligation imposed upon it, the Company has to procure heavy fuel oil which it does not possess. Nor does it have the necessary authorisation as a warehouse keeper to be able to hold this fuel lawfully and independently (without paying a third-party warehouse keeper). Furthermore, according to the ZZNN, the Company is not entitled to demand that the quantities of heavy fuel oil imposed on it be replaced by petroleum coke.
- 20 The list of petroleum products to be stocked under Article 2(1) of the ZZNN is much shorter than the list of products in Chapter 3.4 of the Annex referred to in Article 2(i) of the Directive.
- 21 In the view of the referring court, it is important to clarify whether the Directive must be interpreted as precluding national legislation, such as the Bulgarian legislation, which places a person under an obligation to create emergency stocks of a certain type of product because they had been involved in an economic activity (import) of another type of petroleum product.
- 22 The referring court is of the view that the national legislation is contrary to the Directive, that is to say, that the Directive has not been properly transposed, which has an impact on the legality of the contested administrative act, i.e. the Order.
- 23 A finding that the Directive and the national law are inconsistent with each other would have implications for the legality of the contested Order. In particular, if this were the case, a finding would have to be made that the Order was issued on the basis of a national law which is inconsistent or does not correctly transpose the Directive, which is an act of European Union law. The result of this would be that the individual administrative act in question would have to be set aside in the course of the legal proceedings, given that its continued existence would be incompatible with EU law. This is also in line with the reasons given in paragraph 21 and paragraph 2 of the *Simmenthal* case (C-106/77). The interpretation of the Directive would provide clarity in the present case as to whether or not there is an inconsistency.

- 24 According to the terms of the third paragraph of Article 288 TFEU, a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods. Directives are addressed to the Member States. They must adopt measures to transpose them, which have legal effect at national level. If a directive is not transposed within the time limit or is transposed inadequately, it will undoubtedly fail to achieve the objective that is binding on the Member States. In order to prevent this, the national administrative and judicial authorities may directly apply the incorrectly transposed provision of the directive, while respecting the principle of sincere cooperation pursuant to Article 4(3) TEU. However, it is a prerequisite that the legal norm must be clear, precise and unconditional, i.e. that it does not leave a margin of discretion to the Member State.
- 25 The interpretation of the Directive and of the provisions of the Directive referred to, as requested by the referring court, is intended to bring about the necessary clarity and unconditionality, i.e. to set out what powers the national authorities have to determine stocks individually in order to achieve the relevant objectives, and to what extent companies may be obliged to do so.
- 26 However, a reference for a preliminary ruling is required to determine the precise meaning and content of the Directive, given that the interpretation of acts of EU law falls within the jurisdiction of the Court of Justice of the European Union pursuant to Article 267 TFEU.
- 27 In the view of the referring court, in the present case, the interpretation of the Directive will enable it to rule correctly on the dispute where there is doubt as to the correct interpretation of the Directive.