



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 28 January 2021¹

Case C-120/19

X

joined parties:

**College van burgemeester en wethouders van de gemeente Purmerend,
Tamoil Nederland BV**

(Request for a preliminary ruling from the Raad van State (Council of State, Netherlands))

(Reference for a preliminary ruling – Transport of dangerous goods – Concept of ‘construction requirement’ – Condition that an LPG service station may take delivery of LPG only from road tankers that are equipped with a heat shield – Agreements concerning that heat shield – Presumption of legality concerning that condition)

1. The present case as referred to the Court raises two distinct questions – one relating to the proper interpretation of Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods² and more specifically Articles 1(5) and 5(1) thereof, and the other concerning the principle of effectiveness and the limits that principle places on the Member States’ procedural rules. These issues have arisen in the context of a legal challenge to certain conditions imposed on an LPG service station in the context of an environmental permit which requires the LPG service station to take delivery of liquefied petroleum gas (‘LPG’) only from road tankers that comply with certain special safety requirements. The first question concerns whether those conditions are compatible with EU law, and specifically Directive 2008/68, and the second question concerns whether those conditions are enforceable in the event that they are found to be contrary to EU law.

I. Legal framework

A. Directive 2008/68

2. Recital 5 to Directive 2008/68 states that the European Agreement concerning the International Carriage of Dangerous Goods by Road,³ the Regulations concerning the International Carriage of Dangerous Goods by Rail and the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways lay down uniform rules for the safe international transport of dangerous goods. Such rules are also to be extended to national transport in order to harmonise across the Union the conditions under which dangerous goods are transported and to ensure the proper functioning of the common transport market.

¹ Original language: English.

² OJ 2008 L 260, p. 13.

³ The European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), done at Geneva on 30 September 1957 under the auspices of the United Nations Economic Commission for Europe (the ‘ADR’).

3. Further, it is stated in recital 13 to Directive 2008/68 that each Member State is to retain the right to apply more stringent rules to national transport operations performed using means of transport registered or put into circulation within its territory.

4. Recital 22 to Directive 2008/68 states that the objectives of the directive are to ensure the uniform application of harmonised safety rules throughout the Union and a high level of safety in national and international transport operations.

5. Article 1 of Directive 2008/68, entitled ‘Scope’, provides:

1. ‘This Directive shall apply to the transport of dangerous goods by road ... within or between Member States, including the activities of loading and unloading ...’

...

5. Member States may regulate or prohibit, strictly for reasons other than safety during transport, the transport of dangerous goods within their territory.’

6. Article 3 of Directive 2008/68, entitled ‘General provisions’, provides:

‘1. Without prejudice to Article 6, dangerous goods shall not be transported in so far as this is prohibited by Annex I, Section I.1 ...

2. Without prejudice to the general rules on market access or the rules generally applicable to the transport of goods, the transport of dangerous goods shall be authorised, subject to compliance with the conditions laid down in Annex I, Section I.1 ...’

7. Article 5, entitled ‘Restrictions on grounds of transport safety’ states:

‘1. Member States may on grounds of transport safety apply more stringent provisions, with the exception of construction requirements, concerning the national transport of dangerous goods by vehicles, wagons and inland waterway vessels registered or put into circulation within their territory.’

8. Annex I, entitled ‘Transport by road’ provides in point I.1 (ADR):

‘Annexes A and B to the ADR [...], it being understood that ‘contracting party’ is replaced by ‘Member State’ as appropriate.’

B. The European Agreement concerning the International Carriage of Dangerous Goods by Road

9. Annex A to the ADR provides the following definitions in point 1.2.1 (‘Definitions’):

“Liquefied Petroleum Gas (LPG)” means a low pressure liquefied gas composed of one or more light hydrocarbons which are assigned to UN Nos 1011, 1075, 1965, 1969 or 1978 only and which consists mainly of propane, propene, butane, butane isomers, butane with traces of other hydrocarbon gases;

...

“Protective lining” (for tanks) means a lining or coating protecting the metallic tank materials against the substances to be carried,

NOTE: This definition does not apply to a lining or coating used only to protect the substance to be carried.

...

“Shell” (for tanks), means the part of the tank which retains the substance intended for carriage, including openings and their closures, but does not include service equipment or external structural equipment;

...

“Tank” means a shell, including its service and structural equipment. ...

...

“Tank-vehicle” means a vehicle built to carry liquids, gases or powdery substances and comprising one or more fixed tanks. In addition to the vehicle proper, or the units of running gear used in its stead, a tank-vehicle comprises one or more shells, their items of equipment and the fittings for attaching them to the vehicle or to the running-gear units;

...’

C. Netherlands law

10. Article 8:69a of Algemene wet bestuursrecht (the Netherlands Administrative Code) is worded as follows:

‘The administrative judge shall not annul a decision on the grounds that it is contrary to a written or unwritten legal rule or a general legal principle, if this rule or this principle clearly does not have as its purpose the protection of the interests of the person(s) invoking it.’

II. The facts, the main proceedings and the questions referred for a preliminary ruling

11. The dispute in the main proceedings concerns legal actions brought by a resident (‘X’) of the Dutch town Purmerend in order to contest certain conditions attached to an environmental permit issued to the operator of an LPG service station. According to the order for reference, the ultimate goal of X’s lawsuit is not the overturning of those conditions, but rather to have the sale of LPG from the LPG service station banned. X is concerned about the safety issues related to the sale of LPG in a residential neighbourhood.

12. The LPG service station has held a permit to sell LPG since 8 November 1977. On 30 March 1998, the College van burgemeester en wethouders van de gemeente Purmerend (Board of the Mayor and Aldermen of Purmerend) (the ‘College’) granted a permit for the installation pursuant to the Dutch law on environmental management (the ‘Wet milieubeheer’). That permit was subsequently amended several times. On 18 January 2016, two conditions were added to the environmental permit concerning the vehicles used to supply the LPG service station with LPG; one requiring those vehicles to be equipped with a heat shield⁴ and another requiring the vehicles to be fitted with an improved (and safer) filling hose. According to the observations submitted to the Court by the College, those additional conditions were added to the conditions attached to the environmental permit at the request of the operator of the LPG service station in order to increase the safety level of the LPG service station so that it would be able to retain its environmental permit under new, stricter standards than those that had previously been applicable to it.

⁴ In Dutch: ‘hittewerende bekleding’.

13. The additional requirements were imposed quasi-contemporaneously with the College's treatment of a complaint launched by X against the LPG service station's environmental permit. According to the College, the LPG service station is legally required to comply with the additional conditions, which reduces the risk of a catastrophic event to a level that is deemed acceptable.

14. X seeks the annulment of two conditions included in the environmental permit, namely the condition that the LPG service station may only be supplied by LPG road tankers that are fitted with a heat shield and the condition concerning the road tanker's LPG filling hose. X does not disagree with the conditions as such, but seeks their annulment on the basis that they are unenforceable because they are contrary to EU-law. The ultimate aim of X's challenge is to have the environmental permit for the LPG service station withdrawn. Without the added safety provided by the conditions, the required safety distances to relatively vulnerable objects would be greater, and the LPG service station would, due to its location, not be able to comply with those greater safety distances.

15. More specifically, X submitted, in the case before the referring court, that the two conditions are contrary to Directive 2008/68 and/or Article 34 TFEU and are therefore unenforceable.

16. The referring court has concluded that under Netherlands law, the College may not attach unenforceable conditions to the environmental permit, and that X as a neighbour to the LPG service station has an interest in the enforceability of the conditions. As a consequence, the referring court is of the opinion that it must rule on the substance of X's claim that the conditions are unenforceable and therefore only provide the appearance of safety.

17. The referring court considered that the condition concerning the filling hose does not infringe the provisions of Directive 2008/68, and that consequently that condition may be upheld. The questions referred therefore do not relate to the filling hose requirement, but the order for reference still contains a detailed description of that requirement.

18. In those circumstances, the Raad van State (Council of State, Netherlands) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

- '(1) (a) Must Article 5(1) of Directive 2008/68/EC be interpreted as precluding a licensing condition, included in the licence for the LPG service station, which stipulates that the individual LPG service station concerned may exclusively be supplied by LPG road tankers that are fitted with a heat-resistant lining whereas that obligation is not directly imposed on one or more operators of LPG road tankers?
- (b) In answering the first question, does it matter that the Member State has concluded an agreement in the form of the 'Safety Deal hittewerende bekleding op LPG-autogastankwagens' ('Safety Deal on heat-resistant lining on LPG automotive-fuel road tankers') with organisations of market participants in the LPG industry (including operators of LPG service stations, producers, sellers and carriers of LPG), in which the parties have committed themselves to implementing the heat-resistant lining and that, subsequently, that Member State issued a circular such as the 'Circulaire effectafstanden externe veiligheid LPG-tankstations voor besluiten met gevolgen voor de effecten van een ongeval' ('Circular on safety distances external safety LPG service stations for decisions with consequences for the effects of an accident'), in which an additional risk policy is laid down that is based on the assumption that LPG service stations are supplied by means of road tankers fitted with a heat-resistant lining?

- (2) (a) If a national court [...] assesses the lawfulness of an enforcement decision aimed at enforcing compliance with a licensing condition that has become legally unchallengeable and is contrary to EU law:
- does EU law, in particular the case-law of the Court of Justice on national procedural autonomy, allow the national court in principle to proceed on the assumption of the legality of such a licensing condition, unless it is clearly contrary to higher law, including EU law? And if so, does EU law impose (additional) conditions on that exception?;
 - or does EU law entail, having regard to the judgments of the Court of Justice in *Ciola* (Case C-224/97, EU:C:1999:212) and *Man Sugar* (Case C-274/04, EU:C:2006:233), that the national court should disregard such a licensing condition because it is contrary to EU law?
- (b) In answering Question 2(a), is it relevant whether the enforcement decision is a remedy or a criminal charge?

19. Written observations were submitted by College van burgemeester en wethouders van de gemeente Purmerend (the ‘College’), the German and the Netherlands Governments and the European Commission.

20. Initially, the Court put two questions for an oral answer to the parties intending to participate in the planned hearing. Due to the Covid-19 pandemic, the hearing was cancelled and the two questions were instead put to the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union for a written response.

21. The questions were the following:

‘Are the Member States, pursuant to Article 1(5) of Directive 2008/68, read in conjunction with Article 5(1) of that directive, free to apply more stringent requirements if the application of those requirements is motivated by reasons other than transport safety, such as for instance the protection of the environment?

If so, what consequences should be drawn from this for the purposes of the answer to the first question referred?’

22. The College, the German and the Netherlands Governments and the European Commission submitted written answers to the questions.

III. Analysis

A. Question 1

1. Preliminary remarks regarding Question 1

23. Question 1(a), as posed by the referring court, asks only for the Court’s clarification concerning the application of Article 5(1) of Directive 2008/68. However, what the referring court is really concerned with is whether the conditions attached to the environmental permit concerning the LPG road tankers by which the LPG service station in Purmerend may take delivery, namely the heat shield and the filling hose requirements, are unenforceable as those conditions are contrary to EU law (and more specifically, contrary to the provisions of Directive 2008/68). If those conditions are not enforceable, and the LPG service station effectively is free to take delivery from any LPG road tanker that satisfies

the safety requirements of Directive 2008/68, it is possible that the LPG service station in Purmerend may fail to satisfy the required safety standards under Netherlands law. If the conditions are legally binding, it would appear – according to the order for reference – that the required safety standards for the LPG service station may be met.

24. The referring court considered that the filling hose requirement does not infringe EU law and has therefore not requested clarification concerning that requirement. I am not convinced that that conclusion is correct, and I will therefore, in order to provide the referring court with answers that are useful to resolving the issues in the main proceedings, provide the Court with advice as to how it may provide the referring court with guidance on that requirement.

25. The referring court quite logically divided its questions into two parts: Question 1(a) and (b) concerning whether the conditions are contrary to EU law, and Question 2(a) and (b) concerning whether the conditions may be enforceable even if they are, as a substantive matter, contrary to EU law, because the decision imposing the conditions has become legally unchallengeable under Netherlands procedural law.

26. The Commission suggested in its written submissions that Article 1(5) of Directive 2008/68 may be relevant to the question whether the conditions are permissible, and the Court posed the two questions referred to in point 21 above to the interested parties, thus providing them with the opportunity to comment on that issue.

27. In accordance with the structure and logic of the directive, I will first address the arguments concerning Article 1(5) – both with respect to the heat shield requirement and the filling hose requirement – before I turn to the analysis of Article 5(1).

28. Question 1(b) concerns the possible effects of the Safety Deal⁵ and the Circular⁶ on the answer to Question 1(a). I will address that sub-question together with Question 1(a).

2. The purpose of Directive 2008/68

29. Directive 2008/68 was enacted in order to replace Directives 94/55⁷ and 96/49⁸ and set up a common regime covering all aspects of the inland transport of dangerous goods (by road, rail or inland waterways).⁹ Directive 2008/68 achieves this by extending the rules laid down with respect to international transport of dangerous goods in three international agreements to transport within and between the Member States in order to harmonise the conditions under which dangerous goods are transported and ‘ensure the proper functioning of the common transport market’.¹⁰ The stated objectives of Directive 2008/68 are ‘to ensure the uniform application of harmonised safety rules throughout the [Union]’ and a ‘high level of safety in national and international transport operations’.¹¹

⁵ Safety Deal hittewerende bekleding op LPG-autogastankwagens (the ‘Safety Deal’).

⁶ Circulaire effectafstanden externe veiligheid LPG-tankstations voor besluiten met gevolgen voor de effecten van een ongeval (the ‘Circular’).

⁷ Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road (OJ 1994 L 319, p. 7).

⁸ Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail (OJ 1996 L 235, p. 25).

⁹ See recital 3 to Directive 2008/68.

¹⁰ See Article 1(1) of and recital 5 to Directive 2008/68.

¹¹ See recital 22 to Directive 2008/68.

3. Do the requirements (heat shield, filling hose) go beyond what is provided for in the Directive and the ADR?

30. The questions posed by the referring court presuppose that the heat shield requirement contained in the conditions attached to the environmental permit for the LPG service station in Purmerend goes beyond what is generally required for LPG road tankers under Directive 2008/68 and under the ADR. The additional analysis in the order for reference concerning the filling hose assumes the same. If those requirements were not in excess of what is required under the directive, the questions referred would be moot. None of the parties that have submitted observations have argued otherwise. It is also apparent from the order for reference that the Netherlands government refrained from imposing the matching heat shield requirement included in the Safety Deal in the form of binding, generalised rules applicable on the national level, because of concerns that it might infringe Article 5(1) of Directive 2008/68.¹²

31. I have consequently based my analysis on the premiss that the heat shield requirement and the filling hose requirement are both requirements that go beyond the requirements that must be fulfilled by an operator of an LPG road tanker in order to comply with the requirements of Directive 2008/68.

4. Does Directive 2008/68 apply to conditions contained in an environmental permit such as the environmental permit for the LPG service station in Purmerend?

32. The Netherlands government and the College have argued in their written submissions that the conditions attached to the environmental permit for the LPG service station in Purmerend fall outside the material scope of Directive 2008/68. In that context, the College noted that the conditions attached to the environmental permit are addressed to the operator of the LPG service station and not to the transporter or the operator of the LPG road tankers.

33. The College further emphasised that the conditions attached to an environmental permit concern the activities of an ‘installation’, and that it follows from the very nature of such a permit that it is impossible by means of it to impose any construction requirements, or other requirements for that matter, that are applicable to LPG road tankers.

34. The College also pointed out that the conditions attached to the permit are not conditions of a general nature concerning construction. They do not concern all LPG road tankers (regardless of their place of registration or where they were put in circulation), or all LPG service stations in the Netherlands. They only prohibit the operator of the LPG service station in Purmerend from taking delivery from an LPG road tanker that is not equipped with the required heat shield (and, I should add, filling hose).

35. The College also noted that the two conditions concerning the heat shield and the filling hose were put in place at the request of the LPG service station operator.

36. None of these arguments are, in my opinion, convincing.

¹² See the order for reference, point 44.

37. According to recital 22 of the preamble, Directive 2008/68 is intended to achieve two objectives, namely to ‘ensure the uniform application of harmonised safety rules throughout the [Union]’ and to ensure a ‘high level of safety in national and international transport operations’. It does so essentially by importing the rules from three international agreements on international carriage of dangerous goods and extending them to cover inland transport of such goods within the Union,¹³ with certain limited exceptions. In the present case, of those three international agreements, only the ADR is relevant.

38. Directive 2008/68 imposes, in Article 3(2), an obligation on the Member States to authorise the transport of dangerous goods subject to compliance with the conditions specified in the directive.

39. The environmental permit issued to the LPG service station in Purmerend by the College and the conditions attached thereto are clearly legal acts of a decentralised public authority. The effect of the conditions attached to the environmental permit is to limit the vehicles that can in fact service that particular LPG service station by requiring the LPG service station operator to refrain from taking delivery from road tankers that – though fully compliant with the requirements of Directive 2008/68 – do not fulfil those additional requirements. The environmental permit’s character as a specific, individual administrative decision is in this context irrelevant.¹⁴

40. To the extent that the conditions in the environmental permit go beyond what is required pursuant to Directive 2008/68, those conditions are in conflict with the directive, unless they can be justified under one of the provisions of Directive 2008/68 that provide the Member States with the discretion to enact more stringent measures. Unless that is the case, those conditions should therefore, as a starting point, not be enforceable by the Netherlands authorities.

5. Is Article 34 TFEU relevant to the answer to Question 1?

41. As the German government noted in point 34 of its observations, Directive 2008/68 must, as far as the safety requirements for LPG road tankers are concerned, be considered to provide for exhaustive harmonisation at the EU level. The issue of the compatibility of the two conditions in the environmental permit must, therefore, be assessed in the light of the provisions of the directive and not primary law.¹⁵ An analysis of the conditions and the requirements they impose in the light of Article 34 TFEU is therefore not required. In any event, the questions referred do not ask for clarification in that regard.

6. Article 1(5) of Directive 2008/68

42. The Commission argued in its written submissions that it is conceivable that the conditions could be permissible under Article 1(5) of Directive 2008/68, if they were put in place for reasons other than transport safety. The German government, in its written answer to the questions posed by the Court, argued against that notion, whereas the College and the Netherlands government, in their responses, argued in favour.

¹³ See recitals 4 and 5 of the Directive.

¹⁴ See judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraphs 32 and 33).

¹⁵ See, to that effect, judgments of 17 June 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraph 50) and of 1 July 2014, *Ålands Vindkraft*, (C-573/12, EU:C:2014:2037, paragraph 57).

43. The German government in its answer argued that the purpose of the exception in Article 1(5) is to allow the national authorities to place limitations on passage, such as limitations on the passage through protected areas, for reasons such as national security or environmental protection. It relies on a literal interpretation of the text of the provision, which allows the Member States to regulate or prohibit the ‘transport’¹⁶ (in the sense of the act of transporting the goods in question) within their national territory, and points out that this provision, in its view, cannot justify construction requirements within the meaning of Article 5(1).

44. The College argued in its response that the reason for the inclusion of the conditions was to protect the environment and safeguard the external safety of the LPG service station, which is located in a residential area, and that those grounds, in its view, were distinct from transport safety.

45. I should point out, first, that Article 1(5) and Article 5(1) of Directive 2008/68 in a complementary way set out the circumstances in which the Member States may, respectively, ‘regulate or prohibit’ transport of dangerous goods within their territory for ‘reasons other than safety during transport’, or apply ‘restrictions on grounds of transport safety’. Thus, Article 1(5) delineates what the Member States can do within the ambit of the directive for ‘reasons other than safety during transport’ and Article 5(1) does the same in terms of which restrictions the Member States can impose ‘on grounds of transport safety’.

46. The Member States’ discretion to regulate or prohibit transport of dangerous goods pursuant to Article 1(5) of Directive 2008/68 is an exception to the general rule contained in Article 3(1) and (2), which provides that dangerous goods are not to be transported if prohibited by the relevant annexes to the directive, and that the transport of such goods is to be authorised if the conditions in those annexes are complied with. As an exception to the general rule, the Member States’ discretion under Article 1(5) must be interpreted restrictively. That conclusion is clearly supported by the wording of Article 1(5), which requires that in order to be permissible under that provision regulations or prohibitions must have been put in place *strictly* for reasons other than safety during transport. Under the clear language of Article 1(5), regulations or prohibitions put in place partially for reasons of safety during transport cannot be covered by the exception provided for by that provision.

47. That understanding is supported by the arguments referred to in point 43, above. If Article 1(5) is intended primarily to give the Member States the discretion to prohibit or regulate the transport of dangerous goods through particularly sensitive areas, as could be argued based on recital 11 to Directive 2008/68,¹⁷ then the modifier ‘strictly’ would appear to be well placed. If a Member State decides to restrict the use of a particular route, for example through an environmentally protected area or a densely populated area, that prohibition would be ‘strictly’ for reasons other than safety during transport. The safety of the transport itself would not be affected just because it is required to take another route, but the environment may be protected from the risk inherent in any transport of dangerous goods. Those types of measures also do not distort or divide the internal market for the transport of dangerous goods.

48. It is for the referring court to determine whether the conditions in the environmental permit for the LPG service station in Purmerend were put in place ‘*strictly* for reasons other than safety during transport’. It is, however, hard to imagine a more emblematic case of transport safety regulations than LPG road tanker construction requirements intended to delay or prevent a Boiling Liquid Expanding Vapour Explosion in the case of an accident involving a fire.

¹⁶ In German: ‘Beförderung’.

¹⁷ Recital 11 to Directive 2008/68 states: ‘Each Member State should retain the right to regulate or prohibit the transport of dangerous goods within its territory, on grounds other than safety, such as grounds of national security or environmental protection.’

49. Similarly, it is difficult to imagine how the requirement that a *safer* filling hose should be used could be understood to be put in place *strictly* for reasons other than safety during transport, when ‘transport’ specifically includes the ‘activities of loading and unloading’ of the cargo.¹⁸ The stated purpose of the inclusion of the two conditions was to lower the risk of a catastrophic event in the context of activities – delivering LPG – that consist of driving road tankers to the location in question, unloading the LPG and leaving, activities that are all entirely within the ambit of ‘transport’, as that term is used for the purposes of Directive 2008/68.

50. The mere fact that the conditions in question were placed in an environmental permit aimed at protecting the surroundings of the LPG service station in Purmerend cannot, in my view, change the substance of what the conditions require. They only apply to the transport by road to the LPG service station and the unloading there of LPG by means of road tankers, and they are clearly aimed at preventing accidents or limiting the effects of such accidents, during transport, including during the unloading of cargo. That activity falls squarely within the scope of Directive 2008/68, and the labelling or placement of the restrictions cannot, in my view, change their nature.

51. The referring court has specifically asked whether the ‘Safety deal on heat-resistant lining on LPG automotive-fuel road tankers’ (the ‘Safety deal’), which the Netherlands government entered into with the LPG industry market participants, has an impact on the answer to Question 1(a).

52. The referring court, through its question, asks, in essence, whether the parallel existence of undertakings to the same or similar effect as the conditions attached to the environmental permit for the LPG service station in Purmerend, entered into by the LPG market participants in the Netherlands in the form of an agreement governed by private law, may somehow change the nature of the conditions imposed by the environmental permit. The parallel existence of duties under private law cannot, in my view, change the public law nature of the conditions attached to the environmental permit for the LPG service station, or the Netherlands authorities’ obligation to comply with Directive 2008/68.

53. For those reasons, in my opinion, Article 1(5) of Directive 2008/68 does not provide any discretion for the Member States to impose safety requirements, such as the heat shield and filling hose requirements contained in the additional conditions attached to the environmental permit, that go beyond what is required pursuant to Directive 2008/68.

7. Article 5(1) of Directive 2008/68

54. Article 5(1) of Directive 2008/68 allows the Member States to ‘apply more stringent provisions’ on grounds of transport safety in certain limited circumstances. The more stringent provisions must relate to ‘national transport’ of dangerous goods by vehicles ‘registered or put in circulation within their territory’, and those provisions must not be ‘construction requirements’.

55. It is clear that the conditions attached to the environmental permit for the LPG service station in Purmerend, as they are described in the order for reference, impose requirements not only on vehicles engaged in national transport, but also on vehicles engaged in cross-border transport delivering LPG to the LPG service station. The conditions apply equally to both. Likewise, those conditions apply not only to vehicles ‘registered or put in circulation’ in the Netherlands, but regardless of the vehicle’s country of registration. Already for those reasons, the conditions attached to the environmental permit concerning both the heat shield and the filling hose would appear not to be permissible pursuant to Article 5(1) of Directive 2008/68.

¹⁸ Article 1(1) of Directive 2008/68.

56. What the referring court focused on in its first question was, however, a different issue: whether the conditions in the environmental permit for the LPG service station in Purmerend are contrary to Directive 2008/68, because they are ‘construction requirements’ and therefore not ‘more stringent provisions’ that the Netherlands could validly impose under the exception provided by Article 5(1), if they were limited in their application to national transport by vehicles registered or put into circulation in the Netherlands. The referring court concluded that the filling hose requirement was not a ‘construction requirement’ in that sense, and it requested the Court’s guidance as to whether the heat shield requirement should be regarded as a ‘construction requirement’ under that provision.

57. Article 5(1) does not specify what is meant by ‘construction requirements’. That provision also does not specify or limit the kind of objects to which those ‘construction requirements’ should relate. It would appear from recital 16 to Directive 2008/68 that ‘construction requirements’ can concern both ‘means of transport’ and ‘equipment’, without any further clarification as to what ‘equipment’ may mean.

58. Logically, however, the prohibition on ‘more stringent’ construction requirements would at least cover the same kind of means of transport and equipment as those with respect to which the ADR imposes ‘construction requirements’ or ‘requirements’ concerning their ‘construction’.

59. A ‘construction requirement’ would – in respect of both the heat shield and the filling hose – appear to be a requirement as to the construction of the equipment, meaning requirements as to design, production of and specifications that the equipment must meet.¹⁹ As an example, point 6.7.2.2 of Annex A to the ADR provides ‘general design and construction requirements’ for shells, including requirements concerning any ‘lining’ of such shells.²⁰ A requirement that the shell of an LPG road tanker must be equipped with a heat shield or heat resistant liner that meets certain technical criteria clearly should be characterised as a ‘construction requirement’ in that sense.

60. As a further example, point 6.2.1.3.1 of Annex A to the ADR requires certain service equipment in the form of ‘valves, piping and other fittings subjected to pressure’ to be ‘designed and *constructed*’ to meet certain burst pressure requirements. Such requirements are ‘construction requirements’ within the natural meaning of that expression with respect to that ‘service equipment’, and so are additional technical specifications concerning both the LPG tank and the filling hose on an LPG road tanker.

61. It is consequently my view that construction requirements for LPG road tankers, such as the requirement of a heat shield or a special filling hose, in excess of what is required pursuant to Directive 2008/68, and put in place at least partially for reasons of safety during transport (including loading and unloading), are contrary to the obligations that the directive places on the Member States.

B. Question 2

62. By its second question, the referring court in essence seeks guidance on the consequences it must draw from the unlawfulness under EU law of the additional conditions concerning the construction of LPG tankers servicing the LPG service station in Purmerend. To the extent that not only the heat shield requirement but also the filling hose requirement are contrary to EU law, the second question equally applies in respect of that condition.

¹⁹ See for example the statement in Annex A to the ADR, point 4.3.2.3.2, concerning shell wall thickness requirements, that ‘tank-containers/MEGCs’ need not be protected in a particular way if they, ‘including the service equipment, are so constructed’ as to withstand impact or overturning.

²⁰ See for example points 6.7.2.2.4 and 6.7.2.2.5. Though the ADR speaks of ‘designed and constructed’, those two aspects of the piece of equipment in question are logically inseparable for this purpose. It is not possible to ‘construct’ without a ‘design’.

63. The referring court is faced with a situation where – under Netherlands law – X may be justified in demanding the retraction of the conditions in the environmental permit if those conditions are not enforceable, which in turn may mean that the environmental permit is no longer justified and may have to be withdrawn.²¹

64. Therefore, the question that the referring court seeks clarification on is *not* whether EU law requires the authorities of that Member State to reopen and reconsider the decision attaching the additional conditions to the environmental permit or the decision granting the environmental permit in the first place. Such an obligation to reopen an administrative decision that is contrary to EU law could arise under certain conditions, as clarified by the Court's case-law, *inter alia*, in *Kühne und Heitz*,²² *i-21 Germany and Arcor*²³ and *Kempter*.²⁴ However, the referring court specifically asks, in Question 2, how it should proceed when 'assess[ing] the lawfulness of an *enforcement decision*',²⁵ and *not* how it should proceed when evaluating the validity of the environmental permit itself.

65. The question that the referring court seeks guidance on is, thus, a different question: whether the additional conditions may be enforced, even though they are contrary to EU law, because the decision imposing them has ceased to be challengeable as a matter of national procedural law. Enforcement necessarily involves first a violation of the conditions in question, and then some new form of action or decision on behalf of the relevant authorities, that provides for some form of sanction or other consequence of an enforcing nature.

66. As the Court has already pointed out, *inter alia*, in *Ciola*, all administrative bodies, including decentralised authorities, are subject to the obligations following from the primacy of EU law, and specific individual administrative decisions are covered by those obligations.²⁶ On that basis, the Court concluded in *Ciola* that a prohibition laid down by a specific individual administrative decision that had become final, but which was contrary to EU law, had to be disregarded when assessing the validity of a fine imposed for failure to comply with the prohibition.

67. In the present case, it is – as in *Ciola* – not the fate of the administrative act itself that is at issue, but the question whether conditions in that act that are contrary to EU law may be relied upon in subsequent administrative acts or decisions of enforcement, or whether they must be disregarded when assessing the validity of a penalty – or possibly, enforcement action in the form of a 'remedy' – imposed for failure to comply with those conditions.²⁷ The Court in its ruling in *ED & F Man Sugar*²⁸ recalled that a penalty must rest on a clear and unambiguous legal basis, and held that in the context of export refunds the principles of legality and legal certainty require that national authorities and courts reviewing the legality of a decision imposing a sanction (that is to say, an enforcement decision) are able to examine the factual basis of the underlying reimbursement decision, even if that has become final.²⁹

21 I express no view on any of those issues of national law.

22 Judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17).

23 Judgment of 19 September 2006, *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586).

24 Judgment of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78).

25 Emphasis added.

26 Judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraphs 30 to 33).

27 Judgment of 29 April 1999, *Ciola*, (C-224/97, EU:C:1999:212, paragraph 25).

28 Judgment of 6 April 2006, *ED & F Man Sugar* (C-274/04, EU:C:2006:233, paragraph 15).

29 *Idem*, paragraph 18.

68. The referring court has specifically asked whether the enforcement decision's character as either 'remedy' or 'criminal charge' is relevant. I do not think it is or should be. Any new decision with a view to enforcing conditions that infringe EU law should be precluded, regardless of whether it is punitive in character or aims for restoration. In this respect, I believe that the Court's case-law in *E.B.*³⁰ and *Fallimento Olimpiclub*³¹ is instructive.

69. In *Fallimento Olimpiclub*, the Court held in the context of a VAT dispute that EU law 'does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of [EU] law'.³² However, national rules that conferred *res judicata* effects on the infringing decision as far as *other decisions* concerning *other tax years* with respect to a matter ruled upon in a non-EU law compliant manner was precluded by EU law.³³ In other words, the original decision could stand, but it could not be allowed to determine future decisions.

70. In *E.B.*, a police officer was by disciplinary administrative decision made the subject of compulsory retirement in 1975, after he had been convicted of an attempted offence of same-sex indecency. The decision also reduced the pension payments he would otherwise have been entitled to receive by 25%. On the basis that the original decision reducing E.B.'s pension payments would have been contrary to Directive 2000/78/EC,³⁴ had it applied, the Court ruled that the national court was not required to review the final disciplinary decision ordering E.B.'s early retirement, but that it was required to review the reduction in his pension entitlement, in order to calculate the amount he would have received in the absence of infringement of his rights under EU law (in this case, his right to be free of discrimination on the ground of sexual orientation).

71. In both of those cases, the original judicial or administrative decision was allowed to stand, but was not allowed to form the basis of subsequent judicial decisions (*Fallimento Olimpiclub*) or to determine the ongoing pension rights for a public employee who had been the subject of disciplinary action (*E.B.*). Thus, the Court distinguished between the need for legal certainty concerning the original, final decisions that were no longer open to challenge, and the need to safeguard the principle of legality in respect of the subsequent decisions or the ongoing consequences of the original decisions. I am therefore of the view that actions or decisions with a view to enforcing the conditions concerning the heat shield and the filling hose are impermissible as a matter of EU law.

IV. Conclusion

72. In light of the foregoing considerations, I propose that the Court should reply as follows to the referring court's questions:

- (1) Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods must be interpreted as meaning that construction requirements for LPG road tankers, such as the requirement of a heat shield or a special filling hose, which go beyond what is required pursuant to the directive, and put in place at least partially for reasons of safety during transport (including loading and unloading), are contrary to the obligations that the directive places on the Member States.

³⁰ Judgment of 15 January 2019, *E.B.* (C-258/17, EU:C:2019:17).

³¹ Judgment of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506).

³² *Idem*, paragraph 23.

³³ *Idem*, operative part.

³⁴ Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

- (2) EU law, and in particular the Court's case-law in *Ciola*, prevents a national court or administrative authority from enforcing conditions in an administrative decision granting an environmental permit, such as the heat shield requirement and the filling hose requirement, that are contrary to EU law, even if the decision itself may be allowed to stand.