Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

20 May 2021 *

(Reference for a preliminary ruling – Inland transport of dangerous goods – Directive 2008/68/EC – Article 5(1) – Concept of 'construction requirement' – Prohibition on laying down more stringent construction requirements – Authority of a Member State requiring a service station to be supplied with liquefied petroleum gas (LPG) only from road tankers fitted with a particular heat-resistant lining not provided for by the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) – Unlawfulness – Decision legally unchallengeable by a category of persons – Strictly limited possibility of obtaining the annulment of such a decision where there is clear conflict with EU law – Principle of legal certainty – Principle of effectiveness)

In Case C-120/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 30 January 2019, received at the Court on 15 February 2019, in the proceedings

X

v

College van burgemeester en wethouders van de gemeente Purmerend,

other party:

Tamoil Nederland BV,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, N. Wahl (Rapporteur), F. Biltgen, L.S. Rossi and J. Passer, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Dutch.

after considering the observations submitted on behalf of:

– the College van burgemeester en wethouders van de gemeente Purmerend, by J.R. van Angeren, advocaat,

– the Netherlands Government, by C.S. Schillemans, M.K. Bulterman and M.H.S. Gijzen, acting as Agents,

– the German Government, by D. Klebs and J. Möller, acting as Agents,

– the European Commission, by A. Nijenhuis and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(1) of Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (OJ 2008 L 260, p. 13), as amended by Commission Directive 2014/103/EU of 21 November 2014 (OJ 2014 L 335, p. 15) ('Directive 2008/68').

2 The request has been made in proceedings between X and the College van burgemeester en wethouders van de gemeente Purmerend (Board of the Mayor and Aldermen of the municipality of Purmerend, Netherlands) (the 'Board') concerning a decision by which the latter set requirements relating to the supply of liquefied petroleum gas (LPG) to a service station established in its territory.

Legal context

European Union law

3 Recitals 1, 5, 11 and 22 of Directive 2008/68 state:

'(1) The transport of dangerous goods by road, rail or inland waterway presents a considerable risk of accidents. Measures should therefore be taken to ensure that such transport is carried out under the best possible conditions of safety.

…

(5) The [European Agreement concerning the International Carriage of Dangerous Goods by Road, concluded at Geneva on 30 September 1957 (ADR)] … [lays] down uniform rules for the safe international transport of dangerous goods. Such rules should also be extended to national transport in order to harmonise across the Community the conditions under which dangerous goods are transported and to ensure the proper functioning of the common transport market.

…

(11) 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.

…

(22) Since the objectives of this Directive, namely to ensure the uniform application of harmonised safety rules throughout the Community and a high level of safety in national and international transport operations, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. …'

4 Article 1(1) and (5) of that directive provides:

'1. This Directive shall apply to the transport of dangerous goods by road, by rail or by inland waterway within or between Member States, including the activities of loading and unloading, the transfer to or from another mode of transport and the stops necessitated by the circumstances of the transport.

…

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

5 Article 3 of that directive 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, Annex II, Section II.1, or Annex III, Section III.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, Annex II, Section II.1, and Annex III, Section III.1.'

6 Under Article 5(1) of that directive:

'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.'

7 Article 6 of Directive 2008/68 provides that Member States may derogate, inter alia, from certain rules laid down in the annexes to that directive.

8 Annex I to that directive renders applicable Annexes A and B to the ADR, in the version in force on 1 January 2015 (the 'ADR 2015').

9 The sole recital of the ADR 2015 states that the contracting parties are 'desiring to increase the safety of international transport by road', while Article 3 of the ADR 2015 provides that the annexes to that agreement are to form an integral part thereof.

10 Annex A, Part 1, Chapter 1.2, point 1.2.1, to the ADR 2015 defines the shell for tanks as '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'.

11 Table A in Chapter 3.2 of Part 3 of the ADR 2015 contains the dangerous goods list and indicates, inter alia:

UN No.	Name and description	Class	…	ADR tank		…
				Tank code 4.3	Special provisions 4.3.5, 6.8.4	
(1)	(2)	(3a)	…	(12)	(13)	…
…	…	…	…	…	…	…
1075	PETRO-LEUM GASES, LIQUE-FIED	2	…	PxBN(M)	TA 4 TT 9 TT 11	…
…	…	…	…	…	…	…

12 Chapter 4.3 of Part 4 of Annex A to the ADR 2015 is entitled 'Use of fixed tanks (tank-vehicles), demountable tanks, tank-containers and tank swap bodies with shells made of metallic materials, and battery-vehicles and multiple-element gas containers (MEGCs)'. Paragraph 4.3.2.1.2 of that chapter states:

'The required type of tank, battery-vehicle and MEGC is given in code form in Column (12) of Table A in Chapter 3.2. … The explanations for reading the four parts of the code are given in [paragraph] 4.3.3.1.1 (when the substance to be carried belongs to Class 2) …'

13 Paragraph 4.3.3.1.1 of Chapter 4.3 of Part 4 of Annex A to the ADR 2015 contains the following table:

Part	Description	Tank Code
1	Types of tank, battery-vehicle or MEGC	… P = tank, battery-vehicle or MEGC for liquefied gases or dissolved gases; …
…	…	…

14 Chapter 6.8 of Part 6 of Annex A to the ADR 2015 is entitled 'Requirements for the construction, equipment, type approval, inspections and tests, and marking of fixed tanks (tank-vehicles), demountable tanks and tank-containers and tank swap bodies, with shells made of metallic

materials, and battery-vehicles and multiple element gas containers (MEGCs)'. Paragraph 6.8.2.1.9 of that chapter forms part of the 'construction' requirements laid down in paragraph 6.8.2.1 and is worded as follows:

'The materials of shells or of their protective linings which are in contact with the contents shall not contain substances liable to react dangerously … with the contents, to form dangerous compounds, or substantially to weaken the material.

…'

15 Paragraphs 6.8.2.1.24 to 6.8.2.1.26 of Chapter 6.8, preceded by the heading 'Other construction requirements', provide:

'6.8.2.1.24 The protective lining shall be so designed that its leakproofness remains intact, whatever the deformation liable to occur in normal conditions of carriage …

6.8.2.1.25 The thermal insulation shall be so designed as not to hinder access to, or the operation of, filling and discharge devices and safety valves.

6.8.2.1.26 If shells intended for the carriage of flammable liquids having a flash-point of not more than 60 °C are fitted with non-metallic protective linings (inner layers), the shells and the protective linings shall be so designed that no danger of ignition from electrostatic charges can occur.'

16 Paragraph 6.8.3 of Chapter 6.8 consists solely of the heading 'Special requirements applicable to Class 2', while paragraph 6.8.3.1 of that provision covers more specifically the 'construction of shells'. Paragraph 6.8.3.1.1 of that chapter states:

'Shells intended for the carriage of compressed or liquefied gases or dissolved gases shall be made of steel. …'

17 Paragraph 6.8.4 of Chapter 6.8 of Part 6 of Annex A to the ADR 2015 contains, inter alia, the 'special provisions' TA 4, TT 9 and TT 11 rendered applicable to tanks carrying LPG pursuant to Table A reproduced in paragraph 11 of the present judgment.

18 Paragraph 6.8.5.1.1 of Chapter 6.8 provides that, where fixed tanks are welded, shells intended for the carriage of compressed, liquefied or dissolved gases of Class 2 are to be made of steel, it being understood that they may also be made of aluminium, aluminium alloy, copper or copper alloy as regards the carriage of refrigerated liquefied gases of Class 2.

Netherlands law

19 Article 8:69a of the Algemene wet bestuursrecht (General Law on Administrative Law; the 'Awb') provides:

'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.'

20 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) issued by the Staatssecretaris van Infrastructuur en Milieu (Secretary of State for Infrastructure and the Environment) of 14 June 2016 (Stcrt. 2016, No 31453; the 'Circular of 14 June 2016') invites the competent authorities to take into account, when adopting land-use planning decisions, certain safety distances making it possible to prevent the effects of accidents liable to affect a service station when it is being supplied with LPG, with reference to the 'Safety Deal hittewerende bekleding op LPG-autogastankwagens' (Safety Deal on heat-resistant lining on LPG automotive-fuel road tankers) (Stcrt. 2016, No 31448; the 'Safety Deal'), on the assumption that, first, all Netherlands road tankers which supply such service stations are in practice fitted with a particular heat-resistant lining capable of delaying the 'boiling liquid expanding vapour explosion' scenario ('BLEVE scenario') by at least 75 minutes after the start of a fire (the 'particular heat-resistant lining at issue'), and, secondly, the service stations concerned are normally supplied by service lorries that are fitted with such lining.

21 The Safety Deal, concluded between the Secretary of State for Infrastructure and the Environment and the Vereniging Vloeibaar Gas (Liquefied Gas Association, Netherlands) and other organisations or associations active in the LPG industry, confirms, in essence, that the members of that association undertake to use, when supplying LPG to service stations, only road tankers that are fitted with the particular heat-resistant lining at issue, while the other organisations and associations undertake to endorse that objective by endeavouring to promote it among their members and to ensure its implementation. All the parties to the Safety Deal also approved the content of the Circular of 14 June 2016.

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 X lives at a distance of approximately 125 metres from a service station which, inter alia, has sold LPG since 1977. Wishing to put an end to the sale of LPG by that service station on account of the risks entailed by such sale for the safety of dwellings located in its vicinity, X requested that the Board withdraw the environmental licence issued to that service station to that effect.

23 Although it rejected that request by decision of 30 June 2015, the Board, by decision of 18 January 2016 (the 'decision of 18 January 2016'), imposed two additional requirements on that service station regarding the way it is supplied with LPG. It was provided therein that the service station would henceforth be supplied with LPG by means of road tankers that are fitted with the particular heat-resistant lining at issue and also with an improved filling hose. According to the Board, those two requirements made it possible to reduce to an acceptable level the risk of accidents while the service station concerned was being supplied with LPG.

24 As regards the requirement relating to the heat-resistant lining, the Netherlands authorities had, several months earlier, first, introduced the Safety Deal and, secondly, adopted the Circular of 14 June 2016 establishing an additional risk management policy for service stations offering LPG for sale, based on the notion that those service stations are supplied only by road tankers that are fitted with the particular heat-resistant lining at issue. The referring court states that that circular does not expressly state that the competent authorities must impose such a lining requirement in the environmental licences that they issue to service stations offering LPG for sale. It adds that the

Netherlands authorities preferred not to impose that requirement by means of a binding general provision, since they considered that such a provision was liable to infringe Article 5(1) of Directive 2008/68.

25 Taking the view that the two requirements imposed by the decision of 18 January 2016 should be annulled on the ground that they could not be enforced because they were incompatible, inter alia, with Directive 2008/68, X brought an action against that decision before the rechtbank Noord-Holland (District Court, North Holland, Netherlands). By decision of 8 June 2017, that court dismissed that action.

26 Hearing an appeal brought by X against that decision, the referring court considers that the requirement relating to the use of an improved filling hose does not infringe the provisions of Directive 2008/68, with the result that it may be maintained. On the other hand, it has doubts as to the compatibility of the requirement relating to the particular heat-resistant lining at issue with that directive.

27 After taking the view that the heat-resistant lining of a road tanker is an element of 'construction' for the purposes of Article 5(1) of Directive 2008/68, the referring court harbours doubts whether the requirement relating to the particular heat-resistant lining at issue may be regarded as a 'construction requirement', prohibited by that provision, given that, first, that requirement is addressed not directly to the owner or operator of the road tanker, but to the operator of the service station, and that, second, it is contained not in a binding provision of national law of a general nature but in an environmental licence issued to a specific service station. In that regard, the referring court asks whether account should be taken of the fact that, although the Netherlands authorities refrained from imposing the abovementioned requirement by means of a general binding provision because of the possibility that it might be incompatible with Article 5(1) of Directive 2008/68, they introduced the Safety Deal and adopted the Circular of 14 June 2016 in order to ensure that, throughout the national territory, service stations would be supplied with LPG only by road tankers fitted with the particular heat-resistant lining at issue.

28 Should the Court consider that the requirement relating to the particular heat-resistant lining at issue constitutes a 'construction requirement', prohibited by Article 5(1) of Directive 2008/68, the referring court observes that such a finding, by itself, would not enable it to annul the decision of 18 January 2016 imposing that requirement. Under Article 8:69a of the Awb, the administrative courts may not annul a decision which infringes a rule of law that is clearly not intended to protect the interest of the applicant in question. The aim of Article 5(1) of Directive 2008/68 is clearly not to protect X's interest in obtaining material protection for the residential area situated in the vicinity of the service station concerned.

29 That being so, the referring court notes that, under Netherlands law, the Board cannot include in a licence a requirement in respect of which it cannot ensure compliance by the addressee and which cannot therefore be enforced in the context of a subsequent decision. In the light of that argument, the referring court explains that, on the basis of the applicable Netherlands law, it could annul the requirement relating to the particular heat-resistant lining at issue on the ground that it could not subsequently be enforced because it is contrary to a rule of law such as Article 5(1) of Directive 2008/68, provided, however, that it is clear, on the basis of a summary examination leaving no room for doubt, that the requirement at issue could not be imposed (the 'clearness test'). The referring court is uncertain, however, whether the clearness test is consistent

with EU law and, in particular, with the principle of effectiveness, under which the relevant rules of national law must not render impossible in practice or excessively difficult the exercise of rights derived from EU law.

30 In that context, the referring court observes, on the one hand, that the effectiveness of EU law could be hindered by the application of the clearness test, in so far as that test is satisfied only in exceptional cases and thus imposes a high threshold on the individual, and the Court has held, in its judgments of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212), and of 6 April 2006, *ED & F Man Sugar* (C-274/04, EU:C:2006:233), that an obligation arising from a decision which is legally unchallengeable may be set aside, in the context of the review of a subsequent decision imposing a penalty, based on the first of those decisions, on the ground that that first decision is incompatible with EU law.

31 On the other hand, the referring court recalls the importance of the principle of legal certainty, which could justify the fact that a requirement that is legally unchallengeable, such as that at issue in the main proceedings, cannot be called into question, in the case of an individual such as X, at the stage of a decision intended to enforce it, except in the situation, provided for by Netherlands law, where it is clear that it could not be imposed because it was contrary to EU law. The high threshold imposed in that regard by the clearness test is thus justified by the significant weight given to the interests of legal certainty. In addition, that court asks whether the case-law of the Court referred to in the previous paragraph is applicable in the case in the main proceedings, in so far as the cases which gave rise to those judgments were based on a subsequent decision imposing a penalty on the individual, which is not the case here.

32 In those circumstances, the Raad van State (Council of State, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) (a) Must Article 5(1) of Directive [2008/68] 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] 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 [Circular of 14 June 2016], 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] 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] 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?'

Consideration of the questions referred

The first question

33 By its first question, the referring court asks, in essence, whether Article 5(1) of Directive 2008/68 must be interpreted as precluding a requirement, imposed by the authorities of a Member State on a service station pursuant to an administrative decision in the form of an environmental licence, to be supplied with LPG only from road tankers fitted with a particular heat-resistant lining such as that at issue in the main proceedings.

34 In that regard, it should be noted, in the first place, that, under Article 5(1) of Directive 2008/68, 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.

35 It is clear from that wording that, in the case of such national transport, Article 5(1) prohibits Member States from applying more stringent construction requirements on grounds of transport safety.

36 However, neither Article 5(1) nor any other provision of Directive 2008/68 define the concept of 'construction requirements' or mention the standard of requirements in relation to which the Member States must refrain from adopting more stringent provisions.

37 Nevertheless, it must be pointed out that Article 3(2) of Directive 2008/68 authorises the transport of dangerous goods only subject to compliance with the conditions laid down, inter alia, in Section I.1 of Annex I to that directive, which refers to Annexes A and B to the ADR in the version applicable at the material time, namely the ADR 2015.

38 Both Part 6 of Annex A and Part 9 of Annex B to the ADR 2015 contain 'construction requirements'. Therefore, the concept of 'construction requirements', referred to in Article 5(1) of Directive 2008/68, must be understood by reference to the corresponding requirements in those parts of those annexes, and the Member States are thus not entitled to lay down more stringent requirements.

39 As regards, more specifically, the road tankers intended for the carriage of LPG at issue in the main proceedings, it should be noted that, under the combined provisions of Annex A, Part 4, Chapter 4.3, paragraphs 4.3.2.1.2 and 4.3.3.1.1, and Chapter 6.8, paragraphs 6.8.3.1.1 and 6.8.5.1.1, of the ADR 2015, read in conjunction with Table A of Chapter 3.2 of Part 3 of that annex, the carriage of LPG, as a dangerous good of Class 2, is to be performed by tank-vehicles

with shells made of metallic materials. It should also be noted that Chapter 6.8 of Part 6 of Annex A, to the ADR 2015 contains, inter alia, 'construction requirements', applicable, inter alia, to tank-vehicles with shells made of metallic materials.

40 It follows that, with regard to tank-vehicles intended for the carriage of LPG, the concept of 'construction requirements' in Article 5(1) of Directive 2008/68 must be understood as corresponding to the 'construction requirements' set out in Chapter 6.8 of Part 6 of Annex A to the ADR 2015 and, in particular, to the subordinate rules contained in paragraphs 6.8.2.1, 6.8.3.1 and 6.8.5.1 of that chapter and the special provisions TA 4, TT 9 and TT 11 contained in paragraph 6.8.4 of that chapter, which are applicable to such tank-vehicles by virtue of Table A in Chapter 3.2 of Part 3 of Annex A to the ADR 2015.

41 In those circumstances, it must be held that it follows from Article 5(1) of Directive 2008/68 that, as regards the national transport of LPG carried out, inter alia, by road tankers registered or put into circulation within their territory, Member States may not on grounds of safety apply more stringent construction requirements than those expressly provided for in Chapter 6.8 of Part 6 of Annex A to the ADR 2015.

42 In the present case, while it is true that Chapter 6.8 of Part 6 of Annex A to the ADR 2015 contains a number of construction requirements relating to the protective lining or thermal insulation of the shell or tank, such as those set out in paragraphs 6.8.2.1.9 and 6.8.2.1.24 to 6.8.2.1.26 of that chapter, it must be stated that it contains no requirement for a heat-resistant lining such as that required in the main proceedings, namely a heat-resistant lining capable of delaying the BLEVE scenario by at least 75 minutes after the start of a fire.

43 It follows that Article 5(1) of Directive 2008/68 precludes, as regards the national transport of dangerous goods carried out, inter alia, by vehicles registered or put into circulation within their territory, Member States from requiring on grounds of transport safety that those vehicles be fitted with a heat-resistant lining which is not provided for by the ADR construction requirements, in so far as such a lining constitutes a more stringent construction requirement, prohibited by that provision of the directive.

44 That interpretation is not called into question by the fact that a requirement such as that at issue in the main proceedings, when it is laid down in breach of Article 5(1) of Directive 2008/68, was, first, imposed on a service station and not directly on the owners or operators of road tankers and, second, adopted in an individual case and not in the context of a general binding provision.

45 Article 5(1) of Directive 2008/68 imposes a clear, general and absolute prohibition on the Member States, which must ensure compliance with it in all circumstances and by any means, it being noted that, under Article 1(1) of Directive 2008/68, the concept of 'transport' also covers the unloading of dangerous goods, such as that carried out when a service station is supplied with LPG.

46 Thus, Article 5(1) of Directive 2008/68 precludes any measure taken by a Member State, including a measure adopted by a municipal authority in the form of an individual administrative decision, such as the environmental licence at issue in the main proceedings, which would run counter to the prohibition laid down in that provision, even if such a measure only indirectly imposed a construction requirement on the operators of road tankers concerned or responsible for ensuring the supply of LPG to the addressee of that measure.

47 Furthermore, the fact that the Netherlands authorities introduced the Safety Deal and adopted the Circular of 14 June 2016 in order to ensure at national level that the road tankers used to supply LPG to service stations located in the Netherlands are fitted with the particular heat-resistant lining at issue cannot have any bearing on the answer to be given to the first question, given that the use of such instruments cannot in any way justify an administrative decision, such as the environmental licence at issue in the main proceedings, which imposes a construction requirement prohibited by Article 5(1) of Directive 2008/68.

48 In the second place, it must be held that, contrary to what the Commission maintained, in essence, in its written observations, it cannot be inferred from Article 1(5) of Directive 2008/68 that Member States have the option of laying down, on grounds other than transport safety, more stringent requirements than those laid down by the ADR in respect of construction.

49 Article 1(5) of Directive 2008/68 provides that Member States may regulate or prohibit, strictly for reasons other than safety during transport, the transport of dangerous goods within their territory.

50 As the Advocate General observed, in essence, in points 45 and 46 of his Opinion, Article 1(5) and Article 5(1) of Directive 2008/68, both of which must be interpreted restrictively since they constitute exceptions to the general rule laid down in Article 3(1) and (2) of that directive, under which the transport of dangerous goods is subject to the prohibitions and authorisations set out in the relevant annexes to that directive, are logically interconnected in that they allow the Member States to derogate from that general rule on distinct grounds.

51 As regards Article 1(5) of Directive 2008/68, it should be noted, as the Advocate General stated in point 46 of his Opinion, that the use of the adverb ‘strictly’ in that provision means that Member States may regulate or prohibit the transport of goods in their territory only for reasons other than safety during transport, that is to say, for reasons which must have no connection with safety during transport.

52 That interpretation of the wording of Article 1(5) of Directive 2008/68 is supported by the objective pursued by that directive. It is apparent from recitals 1, 5 and 22 of that directive that it seeks to ensure that the cross-border and national transport of dangerous goods by road, rail or inland waterway within the European Union is carried out under the best possible conditions of safety, the EU legislature having decided to apply, inter alia, the safety rules contained in Annexes A and B to the ADR in such a way as to ensure the uniform application of harmonised safety rules throughout the European Union and to ensure the proper functioning of the common transport market.

53 In those circumstances and taking into account the fact that, according to the sole recital of the ADR, the rules contained in that agreement, of which the construction requirements form part, are intended to increase the safety of road transport, the Member States cannot, subject to the derogations expressly provided for in Article 6 of Directive 2008/68, lay down, pursuant to Article 1(5) of that directive, transport safety rules other than those laid down in that directive and in Annexes A and B to the ADR, otherwise they would risk jeopardising the dual objective of harmonising safety rules and ensuring the proper functioning of the common transport market, while also calling into question the assessment of the EU legislature that the transport safety rules laid down in that directive and in the annexes to the ADR are intended to ensure the best possible conditions of safety.

54 Therefore, where a Member State wishes to regulate or prohibit the transport of dangerous goods on its territory pursuant to Article 1(5) of Directive 2008/68, it may do so only for reasons unrelated to safety during transport, otherwise the objectives pursued by that directive would be undermined. Although such grounds may be linked, as is apparent from recital 11 of that directive, to national security or to environmental protection, it is important, for the purposes of safeguarding those objectives, that such grounds, when relied on, should not in fact be linked to safety during transport. In particular, a Member State cannot, under the guise of environmental protection, lay down construction requirements, when such requirements, set out in Annexes A and B to the ADR, are intended, as noted in the preceding paragraph, to increase transport safety. Such a ground may, on the other hand, be relied on, as the German Government noted, in essence, in its written observations, in order, for example, to regulate or prohibit the transport of dangerous goods through environmentally sensitive areas of the territory of the Member State concerned, since regulation to that effect does not in any way concern safety during transport as such.

55 In those circumstances, it must be held that the Member States cannot, either under Article 1(5) of Directive 2008/68 or Article 5(1) of that directive, lay down construction requirements such as the particular heat-resistant lining at issue.

56 In addition, it must be stated, irrespective of the fact that, according to the information provided by the Board in its written observations, the service station at issue in the main proceedings is supplied with LPG exclusively by the vehicles of a Netherlands supplier fitted with a heat-resistant lining, that, where a construction requirement such as that at issue in the main proceedings is imposed indirectly on operators of LPG road tankers by means of a licence issued to a service station, such a requirement is liable not only to infringe Article 5(1) of Directive 2008/68 as regards supplies of LPG made in the course of national transport by road tankers registered within the territory of the Member State concerned but also, as is apparent from paragraph 55 of this judgment, Article 1(5) of Directive 2008/68 as regards any supply of LPG which might be made, inter alia, in the course of cross-border transport by road tankers registered in another Member State.

57 In the light of the foregoing considerations, the answer to the first question is that Article 5(1) of Directive 2008/68 must be interpreted as precluding the laying down of construction requirements that are more stringent than those set out in Annexes A and B to the ADR, such as a requirement, imposed by the authorities of a Member State on a service station pursuant to an administrative decision in the form of an environmental licence, to be supplied with LPG only from road tankers fitted with a particular heat-resistant lining such as that at issue in the main proceedings.

The second question

58 By its second question, the referring court asks, in essence, whether EU law, in particular the principle of effectiveness, precludes a national procedural rule which provides that, in order for a requirement contrary to EU law, imposed by an administrative decision which in principle is legally unchallengeable by a category of persons, to be annulled on the ground that it would be unenforceable if it were implemented by a subsequent decision, the person must establish that the requirement at issue clearly could not, on the basis of a summary examination leaving no room for doubt, have been adopted in the light of EU law.

Admissibility

59 In its written observations, the Board contends that the second question bears no relation to the dispute and is theoretical, since the administrative decision at issue in the main proceedings is not legally unchallengeable and a subsequent decision implementing it has not been adopted. Without concluding that the second question is inadmissible, the Netherlands Government also made similar points in its written observations.

60 In that regard, it should be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 31).

61 Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 32).

62 Furthermore, it should be noted that, according to settled case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 194 and the case-law cited).

63 In the present case, it is true that the referring court concludes that, even if it were found, in the light of the Court's answer to the first question, that the applicant's argument that the requirement at issue in the main proceedings infringes Article 5(1) of Directive 2008/68 is well founded, such a finding, on its own, would not allow that court, on account of Article 8:69a of the Awb, to annul that requirement.

64 It is also true that, in the wording of the second question, the referring court does indeed refer to 'an enforcement decision aimed at enforcing compliance with a licensing condition that has become legally unchallengeable and is contrary to EU law', and nowhere in the order for reference does it indicate the existence of a decision which the Board adopted in order to implement the requirement laid down in its decision of 18 January 2016.

65 That being so, the referring court states that X relied, in her action, on the principle of Netherlands administrative law under which a licence cannot impose any requirement in respect of which the competent authority cannot enforce compliance by the addressee. The referring court, recognising that X may rely on that principle, concludes that the requirement at issue in the main proceedings could be annulled if it were to be considered that it could not be implemented because it is incompatible with Article 5(1) of Directive 2008/68. It also observes

that it is for it to assess that issue on the merits as of now and not in the context of any further proceedings seeking to ascertain the legality of a subsequent decision intended to enforce the requirement at issue in the main proceedings.

66 In those circumstances, it must be held that the referring court clearly states that it is for it, under national law, to deal with that question at the stage of the proceedings pending before it, even if a decision to enforce the requirement at issue in the main proceedings does not yet appear to have been adopted by the Board. Therefore, the second question is not hypothetical and is necessary for the effective resolution of the dispute in the main proceedings.

67 It follows that the second question is admissible.

Substance

68 As a preliminary point, it should be recalled, as stated in paragraphs 28 and 63 of the present judgment, that, despite the answer given to the first question in paragraph 57 of this judgment, the referring court cannot, on account of Article 8:69a of the Awb, annul, at the request of an individual such as X, the requirement in the environmental licence at issue in the main proceedings on the sole ground that it is contrary to Article 5(1) of Directive 2008/68, since, according to its own findings, that provision is not intended to protect X's interest in obtaining material protection for the residential area situated in the vicinity of the service station concerned, and that provision must consequently be regarded, at this stage, as being, in principle, legally unchallengeable by an individual such as X. That being so, the referring court states that, under the principle of Netherlands administrative law according to which a licence, even if it has become, in principle, unchallengeable by an individual such as X, may not impose any requirement in respect of which the competent authority cannot ensure compliance by the addressee by means of a subsequent decision enforcing that requirement, X may, ultimately, obtain the annulment of the requirement at issue in the context of her action brought against the licence imposing that requirement, which is also pending before the referring court, on condition of satisfying the clearness test, that is to say, as recalled in paragraph 29 of this judgment, the rule of Netherlands law according to which it must be clear, on the basis of a summary examination leaving no room for doubt, that the requirement in question could not be imposed owing to the infringement of higher-ranking rules of law.

69 In that regard, it should be noted that, in the absence of relevant EU rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under EU law are a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it in practice impossible or excessively difficult to exercise rights conferred by the EU legal order (principle of effectiveness) (judgment of 18 December 2014, *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 23 and the case-law cited).

70 In the present case, it is apparent from the findings of the referring court that the clearness test satisfies the principle of equivalence, in so far as, when applying that test, no distinction is made between conflict with higher-ranking rules of national law and conflict with rules of EU law.

71 On the other hand, the referring court expresses doubts as to whether that test is compatible with the principle of effectiveness.

72 In that context, it must be recalled that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its operation and its particular features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19 and C-259/19, EU:C:2020:578, paragraph 85 and the case-law cited).

73 The referring court states, in particular, that the clearness test as laid down by Netherlands administrative law is intended to safeguard the principle of legal certainty in such a way that the enforceability and, therefore, the legality of final decisions may be called into question only where it is clear that such decisions are contrary to rules of higher-ranking law, such as rules of EU law.

74 In that regard, it must be borne in mind that legal certainty is one of a number of general principles recognised in EU law. Thus, the Court has repeatedly held that the finality of an administrative decision contributes to legal certainty and that EU law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 45 and the case-law cited). However, the Court has stated that, in certain circumstances, account may be taken of the particular features of the situations and interests at issue in order to strike a balance between the requirement of legal certainty, on the one hand, and the requirement for legality under EU law, on the other (judgment of 4 October 2012, *Byankov*, C-249/11, EU:C:2012:608, paragraph 77 and the case-law cited).

75 In that context, it is apparent from the explanations provided by the referring court that the national procedural rule of the clearness test, in that it allows an individual such as X to obtain a finding that a requirement contained in a final decision cannot be enforced and to obtain, as a consequence, the annulment of that requirement only on condition that a clear conflict between that requirement and EU law is established, seeks to strike a fair balance between the principles of legal certainty and of legality under EU law by giving, as a general rule, predominant weight to the finality of the requirement in question in order to safeguard legal certainty, while allowing, under strict conditions, exceptions to that rule.

76 In the light of that objective, it must be held that the principle of effectiveness does not, in principle, preclude a national procedural rule such as the clearness test.

77 That being so, in order to ensure that that objective is actually achieved, that test should not be applied so strictly that the condition of clear incompatibility with EU law renders illusory in practice the possibility for an individual such as X of obtaining the effective annulment of the requirement at issue.

78 If that were the case, the principle of effectiveness, which requires, as recalled in paragraph 69 above, that a national procedural provision does not make the application of EU law impossible or excessively difficult, would clearly not be respected.

79 In addition, the referring court could take into account the fact, referred to in paragraph 24 of this judgment, that the Netherlands authorities preferred not to impose the requirement at issue in the main proceedings by means of a binding general provision, since they considered that such a provision was liable to infringe Article 5(1) of Directive 2008/68.

80 That conclusion is not invalidated by the judgments of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212), and of 6 April 2006, *ED & F Man Sugar* (C-274/04, EU:C:2006:233), to which the referring court refers. Those two judgments were delivered in a different context from that underlying the case in the main proceedings, so that the lesson to be learned from them is irrelevant to the present case.

81 As regards, first, the judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212), the Court ruled, in essence, that the principle of primacy of EU law requires a final administrative decision that is contrary to EU law to be set aside when assessing the merits of a subsequent decision based on the first of those decisions, the Court having also stated that the dispute at issue in the case which gave rise to that judgment did not concern the legality as such of that first decision. By contrast, the case in the main proceedings concerns, in essence, the question whether a rule of national procedural law, the application of which makes it possible precisely to set aside an administrative decision that is in principle final with regard to a category of persons in the event that that decision is clearly contrary to, inter alia, EU law, complies with the principle of effectiveness.

82 As regards, secondly, the judgment of 6 April 2006, *ED & F Man Sugar* (C-274/04, EU:C:2006:233), the Court held, in essence, that a decision imposing a penalty could not be based on the mere fact that a final decision to recover the refund had already been adopted on the basis of the same regulation. Such a situation does not correspond to that underlying the case in the main proceedings, which, as noted in the preceding paragraph, essentially concerns the compatibility with the principle of effectiveness of a national procedural rule allowing, in certain circumstances, a final administrative decision to be set aside.

83 In the light of the foregoing considerations, the answer to the second question is that EU law, in particular the principle of effectiveness, does not preclude a procedural rule of national administrative law which provides that, in order for a requirement contrary to EU law, imposed by an administrative decision which in principle is legally unchallengeable by a category of persons, to be annulled on the ground that it would be unenforceable if it were implemented by a subsequent decision, the person must establish that the requirement at issue clearly could not, on the basis of a summary examination leaving no room for doubt, have been adopted in the light of EU law, subject, however, to the proviso, which it is for the referring court to verify, that that rule is not applied so strictly that in practice the possibility for an individual of obtaining the effective annulment of the requirement at issue would be illusory.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 5(1) of Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the internal transport of dangerous goods, as amended by Commission Directive 2014/103/EU of 21 November 2014, must be interpreted as precluding the laying down of construction requirements that are more stringent than those set out in Annexes A and B to the European Agreement concerning the International Carriage of Dangerous Goods by Road, concluded at Geneva on 30 September 1957, in the version in force on 1 January 2015, such as a requirement, imposed by the authorities of a Member State on a service station pursuant to an administrative decision in the form of an environmental licence, to be supplied with LPG only from road tankers fitted with a particular heat-resistant lining such as that at issue in the main proceedings.**

2. **EU law, in particular the principle of effectiveness, does not preclude a procedural rule of national administrative law which provides that, in order for a requirement contrary to EU law, imposed by an administrative decision which in principle is legally unchallengeable by a category of persons, to be annulled on the ground that it would be unenforceable if it were implemented by a subsequent decision, the person must establish that the requirement at issue clearly could not, on the basis of a summary examination leaving no room for doubt, have been adopted in the light of EU law, subject, however, to the proviso, which it is for the referring court to verify, that that rule is not applied so strictly that in practice the possibility for an individual of obtaining the effective annulment of the requirement at issue would be illusory.**

[Signatures]