

**Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la
Universidad de Alicante en PI y SI- <http://www.uaipit.com>.**

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 July 2012

Case C-26/11

**Belgische Petroleum Unie VZW and Others
v
Belgian State**

(Reference for a preliminary ruling from the Grondwettelijk Hof (Belgium))

(Fuels – Requirement to sell bioethanol – Directive 98/70/EC – Quality of petrol
and diesel fuels – Directive 2003/30/EC – Biofuels – Sustainability criteria –
Directive 98/34/EC – Notification procedure in the field of technical standards
and regulations and rules on Information Society services)

I – Introduction

1. Fuels made of agriculturally cultivated raw materials known as biofuels may protect the climate because when burnt they release only the carbon dioxide which the plants used to produce them have previously drawn from the atmosphere. Since the raw materials can be grown on European land, their use creates an additional source of revenue for European agriculture and reduces dependency on mineral oil. Accordingly, Directive 2003/30/EC (2) ('the Biofuels Directive') was intended to promote the increased use of biofuels.

2. However the European legislature has in the meantime recognised that there are also drawbacks to the use of biofuels. Whilst it therefore confirmed the goal of biofuel use in Directive 2009/28/EC (3) ('the Promotion Directive') and Directive 2009/30/EC, (4) it also linked such use to so-called sustainability criteria. These are intended to prevent certain kinds of damage to the environment in the production of biofuels, in particular damage to land with high biodiversity value or with high carbon stock.

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3. Shortly after the adoption of both of the abovementioned directives, Belgium introduced a so-called biofuels quota. This requires fuel companies to sell a particular quantity of biofuels, representing 4% of the overall quantity of conventional fuels sold. It must now be determined whether that rule is compatible with Directive 98/70/EC (5) on the quality of fuels ('the Fuel Directive'). That question is of interest not only to Belgium, the Member State concerned, but also to most of the other Member States which have similar rules. (6)

4. Furthermore, owing to the time when the biofuels quota was introduced in Belgium, questions arise over the temporal effects of directives. It must also be determined whether Belgium consulted sufficiently with the Commission on the contested Belgian provisions in accordance with Directive 98/34/EC. (7)

II – Legal background

A – Union law

1. The Fuel Directive

5. The first question relates, *inter alia*, to the Fuel Directive, which was amended by Directive 2009/30. According to Article 5 thereof, that Directive entered into force on the 20th day after it was published in the Official Journal, which is to say on 25 June 2009; pursuant to Article 4 thereof, the Directive was to be transposed by 31 December 2010.

6. Article 3 of the *new version* of the Fuel Directive governs the quality of petrol. The permissible ethanol content is governed by subparagraph 3:

'Member States shall require suppliers to ensure the placing on the market of petrol with a ... maximum ethanol content of 5% until 2013 They shall ensure the provision of appropriate information to consumers concerning the biofuel content of petrol and, in particular, on the appropriate use of different blends of petrol.'

7. An ethanol content of up to 5% was also allowed under Article 3(2)(b) and Annex I of the *old* version of the Fuel Directive. (8)

8. The quality of diesel fuel is governed by Article 4 of the new version of the Fuel Directive:

'(1) Member States shall ensure that diesel fuel may be placed on the market in their territory only if it complies with the specifications set out in Annex II.

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Notwithstanding the requirements of Annex II, Member States may permit the placing on the market of diesel with a fatty acid methyl ester (FAME) content greater than 7%.

Member States shall ensure the provision of appropriate information to consumers concerning the biofuel, in particular FAME, content of diesel fuel.

(2) ...’

9. In the version of the Fuel Directive applicable until 25 June 2009, there was no provision on the fatty acid methyl ester content in diesel.

10. Article 5 of Directive 2009/30, which was not amended by the Fuel Directive, provides for the free movement of fuels:

‘No Member State may prohibit, restrict or prevent the placing on the market of fuels which comply with the requirements of this Directive.’

11. Article 6 of the Fuel Directive, which is also unchanged, allows the Member States to adopt more stringent requirements for certain areas of their territory in certain circumstances if atmospheric pollution or ground water pollution constitutes or may reasonably be expected to constitute a serious and recurrent problem for human health. Such measures require the Commission’s permission. According to recital 20 in the preamble to the Fuel Directive, this procedure differs from the notification procedure in Directive 98/34.

12. When the Fuel Directive was amended by Directive 2009/30, additional provisions regarding the use of biofuels were introduced. Article 7a(2) of the Fuel Directive requires the Member States to reduce fuel emissions from greenhouse gases:

‘Member States shall require suppliers to reduce as gradually as possible life cycle greenhouse gas emissions per unit of energy from fuel and energy supplied by up to 10% by 31 December 2020, compared with the fuel baseline standard referred to in paragraph 5(b). This reduction shall consist of:

- (a) 6% by 31 December 2020. Member States may require suppliers, for this reduction, to comply with the following intermediate targets: 2% by 31 December 2014 and 4% by 31 December 2017;
- (b) an indicative additional target of 2% by 31 December 2020, subject to Article 9(1)(h), to be achieved through one or both of the following methods:
 - (i) the supply of energy for transport supplied for use in any type of road vehicle, non-road mobile machinery (including inland

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waterway vessels), agricultural or forestry tractor or recreational craft;

- (ii) the use of any technology (including carbon capture and storage) capable of reducing life cycle greenhouse gas emissions per unit of energy from fuel or energy supplied;
- (c) an indicative additional target of 2% by 31 December 2020, subject to Article 9(1)(i), to be achieved through the use of credits purchased through the Clean Development Mechanism of the Kyoto Protocol, under the conditions set out in Directive 2003/87/EC ... for reductions in the fuel supply sector.'

13. Article 7b of the Fuel Directive governs the use of biofuels when meeting these targets:

‘(1) Irrespective of whether the raw materials were cultivated inside or outside the territory of the Community, energy from biofuels shall be taken into account for the purposes of Article 7a only if they fulfil the sustainability criteria set out in paragraphs 2 to 6 of this Article.

...

(2) The greenhouse gas emission saving from the use of biofuels taken into account for the purposes referred to in paragraph 1 shall be at least 35%.

...’

14. Article 7b(3) to (5) of the Fuel Directive precludes account being taken of biofuels made of raw material obtained from land with high biodiversity value or with high carbon stock or on peat land drained for this purpose. Article 7b(6) sets out certain Union agricultural rules to be complied with.

2. Biofuels Directive

15. The 2003 Biofuels Directive was the first legislation to promote the use of biofuels. Article 3 contains the targets for the use of biofuels in the transport sector:

- ‘(1) (a) Member States should ensure that a minimum proportion of biofuels and other renewable fuels is placed on their markets, and, to that effect, shall set national indicative targets.
- (b) (i) A reference value for these targets shall be 2%, calculated on the basis of energy content, of all petrol and diesel for

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transport purposes placed on their markets by 31 December 2005.

- (ii) A reference value for these targets shall be 5.75%, calculated on the basis of energy content, of all petrol and diesel for transport purposes placed on their markets by 31 December 2010’.

3. Promotion Directive

16. The Biofuels Directive was replaced by the 2009 Promotion Directive. (9) It contains comprehensive rules on the promotion of energy from renewable sources and on taking account of such energy in the context of climate protection. Some of these rules correspond to the amendments to the Fuel Directive which were adopted at the same time.

17. Article 3(4), first sentence, of the Promotion Directive contains a binding quota for the use of renewable energies in the transport sector:

‘Each Member State shall ensure that the share of energy from renewable sources in all forms of transport in 2020 is at least 10% of the final consumption of energy in transport in that Member State.’

18. Article 17 of the Promotion Directive contains the same sustainability criteria as Article 7b of the Fuel Directive.

19. Further, Article 26(2) and (3) of the Promotion Directive repeals the Biofuels Directive in two stages:

‘(2) In Directive 2003/30/EC, Article 2, Article 3(2), (3) and (5), and Articles 5 and 6 shall be deleted with effect from 1 April 2010.

(3) Directives 2001/77/EC and 2003/30/EC shall be repealed with effect from 1 January 2012.’

20. Under Article 28, the Promotion Directive, like Directive 2009/30, came into force on 25 June 2009 and, pursuant to Article 27(1) thereof, was for the most part to be transposed by 5 December 2010.

4. Directive 98/34

21. According to Directive 98/34, the Member States must consult with the Commission before they adopt certain rules which could compromise the internal market.

22. Article 1 of Directive 98/34 contains the main definitions:

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‘For the purposes of this Directive, the following meanings shall apply:

1. “product”: any industrially manufactured product and any agricultural product, including fish products;

...

3. “technical specification”: a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

...

4. “other requirements”: a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

...

11. “technical regulation”: technical specifications and other requirements ..., as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product

...

...’

23. Article 8(1), subparagraph 1 of Directive 98/34 contains the duty to notify:

‘Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft’.

24. Article 10 of Directive 98/34 contains exceptions to the duty to notify. The exception under Article 10(1), first indent, states as follows:

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‘(1) Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:

- comply with binding Community acts which result in the adoption of technical specifications or rules on services’.

B – *Belgian law*

25. The biofuels quota in the main proceedings was laid down in the Law of 22 July 2009 on the obligation to blend fossil fuels released for consumption with biofuels . (10)

26. Article 2(5) to (8) of that Law defines the various biofuels as follows:

- ‘5. “FAME”: fatty acid methyl ester with CN-Codes 3824 90 99, which meets the specifications for norm NBN-EN 14214,
6. “Bioethanol”: Ethanol which is produced from the biomass and/or the biologically depletable part of waste in CN-Code 2207 10 00 with an alcohol content of at least 99% vol and meets the specifications in norm NBN-EN 15376,
7. “Bio-ETBE”: Ethyl-Tertiar-Butylether in CN-Code 2909 19 00, which is not of synthetic origin and contains 47% vol Bioethanol,
8. “sustainable biofuels”: Biofuels which are produced in the European Community (EC) and meet the following sustainability criteria:
 - Raw materials must be sourced from agriculture and must be cultivated with as little dung and pesticides as possible; their cultivation must at least meet the basic management requirements set out in the “Environment” Chapter at A 9 of Annex II of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003, and the basic requirements for maintaining in good agricultural and environmental condition laid down in Annex III of the same regulation;
 - Raw materials may not originate from agricultural land outside the EC which has recently been subject to deforestation;

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- Biofuels produced must have the effect of significantly lowering CO₂ emissions;
- The production of biofuels must meet the technical specifications laid down by the EU with a view to maintaining social and ecological provisions;

The King shall determine the type of evidence required and if appropriate the timetable and the procedure for assessing the aforementioned criteria in a Royal Decree proposed in the Council of Ministers’.

27. Articles 4 and 5 contain the biofuels quota to be attained by blending with conventional fuels:

‘Article 4. § 1. A registered petroleum company which releases petrol products and/or diesel products for consumption is also obliged in the same calendar year to make available for consumption a quantity of sustainable biofuels, as follows:

- FAME amounting to at least 4% vol/vol of the quantity of diesel products released for consumption;
- bio-ethanol, pure or in the form of bio-ETBE, amounting to at least 4% vol/vol of the quantity of petrol products released for consumption.

§ 2. ...

Article 5. The release for consumption of sustainable biofuels within the meaning of Article 4 occurs by blending with the petrol products and/or diesel products released for consumption, in conformity with the product standards NBN EN590 for diesel products and NBN EN228 for petrol products.’

28. Pursuant to Article 13, the Law applied initially from 1 July 2009 to 30 June 2011 but its applicability was extended by a Royal Decree of 23 June 2011 (11) to 30 June 2013.

III – Reference for a preliminary ruling

29. Various Belgian undertakings in the fuels sector (‘Belgische Petroleum Unie and Others’) brought an action challenging the biofuels quota before the Belgian Constitutional Court. In these proceedings the Constitutional Court is referring the following questions to the Court for a preliminary ruling:

1. Should Articles 3, 4 and 5 of [the Fuel Directive] as well as, where appropriate, Article 4(3) of the Treaty on European Union and Articles 26(2), 28 and 34 to 36 of the Treaty on the Functioning of the European Union be interpreted as precluding a statutory provision on the basis of which every

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registered petroleum company which releases petrol products and/or diesel products for consumption is also obliged in the same calendar year to make available for consumption a quantity of sustainable biofuels, namely bio-ethanol, pure or in the form of bio ETBE, amounting to at least 4% vol/vol of the quantity of petrol products released for consumption, and FAME amounting to at least 4% vol/vol of the quantity of diesel products released for consumption?

2. If the first question referred for a preliminary ruling is answered in the negative, should Article 8 of Directive 98/34, notwithstanding Article 10(1), first indent, of the same Directive, be interpreted as imposing an obligation that the Commission be notified of a draft standard on the basis of which every registered petroleum company which releases petrol products and/or diesel products for consumption is also obliged in the same calendar year to make available for consumption a quantity of sustainable biofuels, namely bio-ethanol, pure or in the form of bio-ETBE, amounting to at least 4% vol/vol of the quantity of petrol products released for consumption, and FAME amounting to at least 4% vol/vol of the quantity of diesel products released for consumption?

30. Belgische Petroleum Unie and Others, Belgian Bioethanol Association VZW and Others ('Belgian Bioethanol and Others'), the Kingdom of Belgium, the Kingdom of the Netherlands and the European Commission have submitted observations. With the exception of the Netherlands, those parties also made submissions at the hearing of 7 June 2012.

IV – Legal appraisal

A – Admissibility of the reference for a preliminary ruling

31. Belgian Bioethanol and Others raise doubts as to the admissibility of the reference since it has no connection to the legal proceedings before the Belgian Constitutional Court. The issue in the main proceedings is the claim of infringement of freedom of trade and industry under Belgian law. No plea of infringement of the provisions of Union law has been made.

32. However the questions on the interpretation of EU law referred by the national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred 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. (12)

33. The Constitutional Court takes the view that the freedom of trade and industry would be infringed if the Belgian biofuels quota infringed the

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aforementioned provisions of Union law. Consequently the reference for a preliminary ruling cannot be said to be plainly unconnected with the subject-matter of the main proceedings. It is therefore admissible.

B – *The Fuel Directive*

34. By its first question, the Constitutional Court is asking, *inter alia*, whether the biofuels quota is compatible with Articles 3, 4 and 5 of the Fuel Directive. The question only mentions the contested requirement laid down in Article 4 of the Belgian law to release a certain quota of biofuels but it must also be borne in mind that, pursuant to Article 5 of the law, this is achieved by blending with conventional fuels.

1. Articles 3 and 4 of the Fuel Directive

35. The Belgian biofuels quota would in any event be impermissible if the resulting fuel blends were incompatible with the specifications for petrol and diesel in Articles 3 and 4 of the Fuel Directive.

36. This is not a problem under the *new* version of the Fuel Directive. Articles 3(3) and 4(1)(2) refer in each case to the *maximum level* of ethanol in petrol (5%) and fatty acid methyl ester in diesel (7%). The Belgian requirement to sell 4% biofuels in each case by blending with conventional fuel does not inevitably cause that threshold to be exceeded. There is therefore no inconsistency.

37. The position would be different under the *old* version of the Fuel Directive. Although Article 3(2)(b) and Annex I also allowed an ethanol content of up to 5% in the case of petrol, there was no provision for blending fatty acid methyl ester with diesel.

38. It is true that when the Belgian biofuels quota entered into force on 1 July 2009, Directive 2009/30 amending the Fuel Directive had already modified the Fuel Directive and in particular Articles 3 and 4 which are of relevance here. Those amendments entered into force immediately with the new Directive regardless of the period for transposition. (13) There are no specific transitional provisions providing for the continued application of the old provision in particular circumstances. Articles 3 and 4 of the old version can therefore no longer be used as a benchmark for the Belgian biofuels quota.

39. It must therefore be held that, under the new version of the Fuel Directive, the biofuels quota is compatible with Articles 3 and 4 of the Fuel Directive.

2. Article 5 of the Fuel Directive

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40. However a more central matter between the parties is Article 5 of the Fuel Directive, which is not affected by the 2009 amendments to the Fuel Directive. According to that provision, no Member State may prohibit, restrict or prevent the placing on the market of fuels which comply with the requirements of the Directive. Belgische Petroleum Unie and Others take the view that the requirement to blend with biofuels restricts the sale of fuels. It constitutes an additional condition for placing on the market fuels which already meet the requirements of the Directive.

a) Interpretation of Article 5 of the Fuel Directive

41. This view is based on the prohibition on restricting the basic freedoms which apply where a provision is capable, directly or indirectly, actually or potentially, of hindering trade in the Union (14) or of preventing, hindering or rendering less attractive the exercise of the fundamental freedoms. (15) Indeed it does not at first sight seem implausible to take the view that it was the legislature's intention, in introducing the prohibition on the restriction in Article 5 of the Fuel Directive, to take its cue from those well-known prohibitions on restrictions. It is also plain that, as with other secondary law, in the event of doubt, this provision is to be interpreted in a manner compatible with the basic freedoms.

42. However it does not follow that Article 5 of the Fuel Directive is to be understood as a fundamental freedom, or, therefore, that it precludes any restriction on the sale of fuels that comply with the law, which on the wording of the provision would also apply to purely national situations. In fact, the goal underlying the freedoms which form the basis of Union law (16) is entirely different from that of the prohibition on restrictions in Article 5. That is clear, inter alia, from the context and the objectives of the Fuel Directive.

43. The Fuel Directive does not seek to achieve complete harmonisation of the fuel economy. According to the first recital in the preamble, it seeks rather to approximate specifications for fuels, that is to say the rules on the composition and characteristics of fuels, in order to prevent barriers to trade on the ground of differing standards. That suggests that the prohibition on restrictions only applies to rules which relate to fuel specifications.

44. The only exception expressly provided for – Article 6 of the Fuel Directive, which relates only to the adoption of more stringent environmental specifications – militates in favour of that view. If the legislature had wished to adopt a comprehensive prohibition on restrictions in Article 5, it would have established correspondingly comprehensive rules on exceptions. These would also have extended to potential restrictions which do not come within Article 6, such as pricing rules, rules on the safety of the sale of the fuel or rules on the advertising of fuels.

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45. Other rules in secondary law on, say, the taxation of mineral oil products, (17) confirm the limited scope of the prohibition on restrictions in the Fuel Directive. On a broad interpretation of the prohibition on restrictions, such a tax would also require justification, but the relationship between the tax and the prohibition on restrictions is not addressed anywhere.

46. In conclusion it may be stated that Article 5 of the Fuel Directive only precludes rules which directly establish fuel specifications.

b) Application of the prohibition on restrictions under Article 5 of the Fuel Directive

47. The contested Belgian biofuels quota does not, strictly speaking, contain any additional fuel specifications. Belgium, Belgian Bioethanol Association and the Commission also stress that the obligation to make available biofuels by blending does not apply to every individual litre of fuel. The producers may decide for themselves whether they blend every litre with 4% of biofuels or sell certain amounts without blending and add correspondingly larger quantities of biofuels to other amounts.

48. Ultimately, however, the Belgian rule does constitute an additional fuel specification, since the fuel undertakings must in any event blend substantial proportions of the quantities of fuel which they put on the market. The fact that they can blend particular quantities of fuel with differing proportions of biofuel, provided that they release sufficient amounts of biofuels overall and do not exceed the maximum proportions under the Fuel Directive, does not alter the nature of the obligation: substantial quantities of the fuel sold must be blended with biofuels.

49. The Netherlands suggest a number of other ways of placing the relevant quantities of biofuels onto the market, but they are not relevant to the main proceedings. Under Article 5 of the Belgian law, the biofuels must be released onto the market by blending with petrol or diesel.

50. Indeed the Belgian Constitutional Court came to a similar conclusion when – just like the Belgian Council of State in the earlier legislative procedure (18) – it held that the Belgian rule constituted a ‘product rule’ within the meaning of the provisions on national allocation of jurisdiction. (19)

51. This additional fuel specification restricts the sale of fuels that comply with the Fuel Directive. It is less attractive to market such fuels if the fuel company is required to sell 4% biofuels. Meeting those requirements may be associated with higher costs or additional risks.

52. For that reason the biofuels quota in principle limits the sale of fuels within the meaning of Article 5 of the Fuel Directive.

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c) Possible exceptions to the prohibition on restrictions under Article 5 of the Fuel Directive

53. However it remains to be considered whether the biofuels quota falls within an exception to the prohibition on restrictions under Article 5 of the Fuel Directive. There may be exceptions under the provisions of this or other Directives.

i) Articles 3 and 4 of the Fuel Directive

54. Article 3(3) and Article 4(1)(2) of the Fuel Directive cannot be regarded as exceptions to Article 5. Although under those provisions the Member States must permit blending in accordance with it, it is not clear that they are entitled to require the blending of biofuels.

ii) Article 6 of the Fuel Directive

55. Nor is it apparent that the exception for more stringent environmental fuel specifications in Article 6 of the Fuel Directive applies. The Commission has not given the permission required by that provision. The Commission's opinion of 15 August 2007 on an earlier proposed Belgian law, to which reference was repeatedly made in the proceedings, (20) was not adopted under Article 6, but under the procedure in Directive 98/34. Nor did it contain the Commission's consent to the Belgian biofuels quota.

iii) Articles 7a and 7b of the Fuel Directive

56. The biofuels quota could alternatively be based on Article 7a(2) of the Fuel Directive. Pursuant to that provision, the Member States are to require energy companies to reduce by certain percentages greenhouse gas emissions per unit of energy of fuel supplied. The recital 9 in the preamble to Directive 2009/30, which introduced this goal into the Fuel Directive, states that it is to be reached at least in part by the use of biofuels. Accordingly, Article 7b(2) of the Fuel Directive requires that the target for the reduction of greenhouse gas emissions through the use of biofuels be at least 35% initially, then 50% and ultimately 60%. To require fuel companies to use biofuels cannot therefore be said to infringe the Fuel Directive, and in particular Article 5 thereof.

57. The transition period for these provisions had not yet expired at the time when the Belgian biofuels quota was adopted. However the Directive becomes legally effective vis-à-vis the Member States from the time when it enters into force (21) and may of course also be transposed early. (22) Belgium may therefore rely on Article 7a(2) already before the expiry of the period for transposition.

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58. As however Belgische Petroleum Unie and Others correctly point out, biofuels may only be taken into account in fulfilling this obligation under Article 7b(1) of the Fuel Directive in so far as they were manufactured in compliance with the sustainability criteria laid down in Article 7b(3) to (6). Those criteria preclude, in particular, the use of certain environmentally valuable land and require – in the cultivation of biofuels or corresponding raw materials within the Union – that Union law on agriculture and the environment be observed.

59. The Belgian biofuels quota therefore only comes within Article 7a(2) of the Fuel Directive if it is ensured that the biofuels or raw materials used are produced in conformity with the sustainability criteria in Article 7b(3) to (6).

60. Whether the Belgian provisions ensure that this is the case does not form the subject-matter of this reference for a preliminary ruling, nor is it possible to determine the answer based on the information provided in the order for reference. That question therefore remains to be considered by the Constitutional Court. However it is not obvious that the definition of sustainable biofuels in Article 2(8) of the Belgian law of 22 July 2009 is sufficient in that regard.

iv) The Promotion Directive

61. The same applies in principle to the Promotion Directive as to Articles 7a and 7b of the Fuel Directive. The biofuels quota is a means of fulfilling the quota for the use of renewable energies in the transport sector under Article 3(4) of the Promotion Directive. However, only biofuel manufactured in compliance with the sustainability criteria can be considered. Therefore application of this directive cannot alter the outcome of the examination of the Fuel Directive.

v) Article 3 of the Biofuels Directive

62. Should observance of the sustainability criteria not be guaranteed, consideration could be given to basing the 2003 biofuels quota on Article 3(1) of the Biofuels Directive. Under that provision, in regard to the transport sector Member States were to ensure, by laying down national indicative targets, a minimum proportion of 5.75% biofuels for all petrol and diesel placed on their national markets for transport purposes by 31 December 2010.

63. As the Court has stated, the Biofuels Directive does not direct the Member States as to the means to be used for the attainment of those indicative targets but leaves them freedom of choice as to the measures to be adopted, with the result that the Member States enjoy a wide discretion. In that connection the determination of a mandatory biofuels quota for mineral oil undertakings is an appropriate means. (23) Therefore the prohibition on restrictions under Article 5 of the Fuel Directive does not in principle preclude such a quota.

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64. Recital 21 in the preamble to the Biofuels Directive, however, states that the national policies of the Member States to promote the use of biofuels should not lead to prohibition of the free movement of fuels which satisfy the Community's harmonised environmental provisions. The Biofuels Directive must therefore be interpreted in such a way that the measures for its implementation comply with the free movement of goods under Article 34 TFEU. (24) They may not therefore introduce any unlawful restrictions on trade in fuel.

65. As has been demonstrated, the biofuels quota renders trade in conventional fuels which satisfy the specifications of the Fuel Directive less attractive. (25) The request for a preliminary ruling accordingly appears to be proceeding on the basis that the Belgian provisions at issue restrict the free movement of goods, (26) that is to say that the quota catches imported fuels in the same way as those brought into circulation nationally. However even if only national fuel production were caught, the biofuels quota might at least indirectly limit the import of raw oil or other raw materials for fuel production for it would be less attractive to manufacture fuels for national use from such materials.

66. National measures capable of obstructing intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued. (27)

67. If the Union legislature has already adopted relevant provisions, they may be used in support of such justification but must also be observed. (28)

68. As the *Plantanol* (29) case on the Biofuels Directive shows, the Member States were at first entitled to assume that a biofuels quota was justified in the context of the threshold values, without further restrictions, by mandatory environmental protection requirements.

69. Article 7b(3) to (6) of the Fuel Directive and Article 17 of the Promotion Directive, however, show that the Union no longer recognises the use of biofuels automatically as an overriding environmental protection requirement. According to recital 11 to Directive 2009/30 and recital 69 to the Promotion Directive, biodiverse land must be protected from destruction by the production of raw materials for the manufacture of biofuels. Under recitals 12 and 14 to Directive 2009/30 and recitals 70 and 72 to the Promotion Directive, the same applies to land with a high carbon stock in the ground or vegetation since the disadvantageous consequences of the release of this carbon could outweigh the advantages of using biofuels.

70. These recent discoveries on the risks of the promotion of biofuels already carried weight before the adoption of the two 2009 directives, but the Member States must have been aware of them at least since that time. Therefore they must

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.

be taken into account in considering the justification of restrictions on the free movement of goods on environmental grounds.

71. None the less, the periods allowed for the transposition of the directives recognise that it takes time to align domestic law. Therefore when considering *existing* rules, the sustainability criteria are only meaningful as from the expiry of the period for transposition of those directives, that is to say from 30 December 2010, the end of the period for transposing the amendments to the Fuel Directive.

72. That is not, however, true of new restrictions such as the Belgian biofuels quota which was adopted only *after* the entry into force of the Promotion Directive and of Directive 2009/30.

73. Although the Member States were not then required to adopt measures to transpose the directives before expiry of the period provided for in that connection, it followed from Article 4(3) TEU, in conjunction with Article 288(3) TFEU and the Directives themselves, that during that period they must refrain from adopting provisions likely seriously to jeopardise the attainment of the aim laid down in that directive. (30)

74. It cannot be excluded that this ‘prohibition on frustration’ (31) precluded the new introduction of a biofuels quota without regard being had to the sustainability criteria. Possibly the increased demand for biofuels meant that the irremediable damage which the sustainability criteria were intended to prevent had already occurred when the raw materials were produced.

75. Whether the prohibition on frustration applies does not, however, need to be definitively determined. For the question being assessed here is not whether the Promotion Directive and Directive 2009/30 preclude the Belgian biofuels quota, but whether the restriction on the free movement of goods as a result of the Belgian biofuels quota may be justified by overriding requirements relating to environmental protection, and thus whether the Biofuels Directive permits a departure from the prohibition on restrictions in Article 5 of the Fuel Directive. When interpreting that justification the value judgments of the Union legislature contained in valid legal acts are to be taken into account. It is not necessary for recourse to the prohibition on frustration, nor is it necessary to await the expiry of the transposition period. (32)

76. It follows that Belgium can rely on justification through the Biofuels Directive only if the biofuels quota observes the sustainability criteria.

77. In the event that the Court does not share my opinion that the sustainability criteria are to be observed in the application of Article 3(1) of the Biofuels Directive, it should be pointed out that every justification by this directive was to

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.

terminate by 1 January 2012 because it was repealed on that date by Article 26(3) of the Promotion Directive.

vi) Article 193 TFEU

78. It is true that Belgium also invokes Article 193 TFEU, which permits the Member States to adopt enhanced measures to protect the environment. A biofuels quota which does not observe the sustainability criteria is, however, not an enhanced protection measure but weakens the protection of the environment by reference to the requisite level of protection in the Union.

79. Article 193 TFEU applies anyway only in relation to environmental protection measures of the Union which are founded on Article 192 TFEU. According to recital 95 to the Promotion Directive and recital 23 to Directive 2009/30, the sustainability criteria were expressed to be based on the internal market competence in Article 114 TFEU. In that eventuality more stringent protective measures are only permissible under the terms of Article 114(5) to (7) TFEU. However in the present case the prerequisites laid down in those provisions are not met because Belgium has made no relevant application to the Commission.

vii) Interim conclusion

80. The Belgian biofuels quota is therefore compatible with the Fuel Directive only if it complies with the sustainability criteria of Article 7b(3) to (6).

3. The provisions of primary law cited

81. It is not necessary to make a specific examination of the provisions of primary law relied on in the alternative by the Constitutional Court, that is, Article 4(3) TEU and Articles 26(2), 28 and 34 to 36 TFEU. If the Belgian biofuels quota complies with the sustainability criteria it is also compatible with the internal market, since it is intended to transpose an unchallenged requirement of secondary law. However if it does not comply with the sustainability criteria it is impermissible already against the benchmark of secondary law.

4. Reply to the first question

82. The reply to the first question is therefore that Articles 3, 4, 5, 7a and 7b of the Fuel Directive are to be interpreted as not precluding a provision of law adopted after 25 June 2009 on the basis of which registered mineral oil companies which release petrol and/or diesel products for consumption are required in the same calendar year, by blending with petrol or diesel, also to make available for consumption a certain quantity of sustainable biofuels in the form of bioethanol, either pure or as Bio-ETBE, in the amount of at least 4 vol percent of the quantity

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.

of petrol products released for consumption, or fatty acid methyl ester in the amount of 4 vol percent of the quantity of diesel products released for consumption, in so far as the sustainability criteria under Article 7b of that directive must be complied with in the production of those biofuels.

C – Consultation of the Commission

83. By its second question, the Constitutional Court wishes to clarify whether Belgium was required to consult the Commission under Article 8(1) of Directive 98/34 with regard to the contested rules on the introduction of the biofuels quota before those rules entered into force.

84. Article 8(1) of Directive 98/34 requires Member States to communicate immediately to the Commission any draft technical regulation.

85. It is settled case-law that Directive 98/34 is designed to protect, by means of preventive control, the free movement of goods, which is one of the foundations of the Community, and that this control serves a useful purpose in that technical regulations falling within the scope of that directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy overriding requirements which seek to achieve a public interest objective. (33)

86. As the obligation to notify referred to in the first subparagraph of Article 8(1) of Directive 98/34 is essential for achieving that Community control, the effectiveness of such control will be that much greater if the directive is interpreted as meaning that failure to observe the obligation to notify constitutes a substantive procedural defect such as to render the technical regulations in question inapplicable and therefore unenforceable against individuals. (34)

87. Accordingly the Constitutional Court is asking whether the Belgian biofuels quota is a notifiable technical provision within the meaning of Directive 98/34.

88. It follows from Article 1(11) of Directive 98/34 that the definition of ‘technical regulation’ is divided into three categories, namely, first, the ‘technical specification’ within the meaning of Article 1(3) of that directive, second, the ‘other requirement’ as defined in Article 1(4) of that directive and, third, the ‘provisions ... prohibiting the manufacture, importation, marketing or use of a product’ referred to in the first subparagraph of Article 1(11) of that directive. (35)

89. The biofuels quota does not contain a prohibition and it need not be decided here whether the fact that not every litre of fuel has to be sold with

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.

biofuel means that there is no technical provision, since there are in any event 'other requirements' within the meaning of Article 1(4) of Directive 98/34.

90. According to the case-law, in order to be classified as 'other requirements', the provisions at issue must be able to significantly affect the composition, nature or marketing of the relevant product. (36) Since the biofuels quota is met by blending biofuels with petrol or diesel, it influences the composition and marketing of those products.

91. Article 10(1), first indent, of Directive 98/34, to which the Constitutional Court refers, does not invalidate the obligation to consult. That exception only applies to measures by which the Member States meet mandatory Union legal acts which lay down technical specifications or provisions in regard to services.

92. The biofuels quota does not however correspond to any Union specification but rather transposes an obligation under Union law which allows the Member States a considerable degree of latitude in its implementation. In order to avoid mistakes in the exercise of that latitude it is in principle necessary to consult the Commission.

93. The Commission however correctly points out that it was none the less not necessary to consult in the main proceedings.

94. The Court has held that amendments made to a draft technical regulation already notified to the Commission pursuant to the first subparagraph of Article 8(1) of Directive 98/34, which merely contain, in relation to the notified draft, a relaxation of the conditions of use of the product in question and which, therefore, reduce the possible impact of the technical regulation on trade, are not a significant alteration of the draft in light of the objective of Directive 98/34 set out in point 85 above. Such amendments are not, therefore, subject to the obligation of prior notification. (37)

95. According to the order for reference, Belgium consulted the Commission on an earlier draft regulation on the basis of which petrol was to contain 7% ethanol and diesel 5% fatty acids. (38) The Commission took the view in that case that Article 3 of the Fuel Directive only allows a maximum of 5% ethanol for petrol and Article 4 allows no fatty acids in diesel and Article 5 prohibits rules which provide for a certain biofuels quota for each litre of fuel.

96. The contested Belgian biofuels quota was framed in light of those observations and the subsequent amendment of Article 3 and 4 of the Fuel Directive. The quotas remain below the maximum proportions of petrol and diesel. Nor do they necessarily relate to each litre of fuel.

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.

97. Consequently one is dealing merely with relaxations of the earlier rule which do not call for re-consultation of the Commission.

98. The answer to the second question is therefore that a draft standard on the basis of which registered mineral oil companies which release petrol and/or diesel products for consumption are required also to make available for consumption a certain quantity of sustainable biofuels in the same calendar year by blending them with petrol or diesel is in principle to be notified to the Commission as an ‘other requirement’ under Article 8 of Directive 98/34. However there is no requirement to notify if the proposal only represents a relaxation of a proposal which has already been notified.

V – Conclusion

99. I therefore propose that the Court answer the questions referred for a preliminary ruling as follows:

- (1) Articles 3, 4, 5, 7a and 7b of Directive 98/70/EC as amended by Directive 2009/30/EC are to be interpreted as not precluding a provision of law adopted after 25 June 2009 on the basis of which registered mineral oil companies which release petrol and/or diesel products for consumption are required in the same calendar year, by blending with petrol or diesel, also to make available for consumption a certain quantity of sustainable biofuels in the form of bioethanol, either pure or as Bio-ETBE, in the amount of at least 4 vol percent of the quantity of petrol products released for consumption, or fatty acid methyl ester in the amount of 4 vol percent of the quantity of diesel products released for consumption, in so far as the sustainability criteria under Article 7b of that directive must be complied with in the production of those biofuels.
- (2) A draft standard on the basis of which registered mineral oil companies which release petrol and/or diesel products for consumption are required also to make available for consumption a certain quantity of sustainable biofuels in the same calendar year by blending them with petrol or diesel is in principle to be notified to the Commission as an ‘other requirement’ under Article 8 of Directive 98/34/EC. However there is no requirement to notify if the proposal only represents a relaxation of a proposal which has already been notified.

1 – Original language: German.

2 – Directive 2003/30/EC of the European Parliament and of the Council on the promotion of the use of biofuels or other renewable fuels for transport (OJ 2003 L 123, p. 42).

Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la Universidad de Alicante en PI y SI- <http://www.uaipit.com>.

3 – Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).

4 – Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 of the European Parliament and of the Council amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions from the use of road transport fuels and amending Council Directive 1999/32/EC, as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC (OJ 2009 L 140, p. 88).

5 – Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC (OJ 1998 L 350, p. 58).

6 – According to the Communication from the European Parliament to the Commission and the Council ‘Renewable Energy: progressing towards the 2020 target’ of 31 January 2011 (COM (2011) 31, p. 12), 20 Member States had at that time introduced similar requirements.

7 – Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37) in the version in Council Directive 2006/96/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 81).

8 – Directive 98/70 in the version in Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty applies according to Decision 1999/468/EC of the Council (OJ 1999 L 284, p. 1) as it did until 25 June 2009.

9 – Cited in footnote 3.

**Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la
Universidad de Alicante en PI y SI- <http://www.uaipit.com>.**

10 – *Moniteur belge* of 3 August 2009, p. 51920.

11 – *Moniteur belge* of 30 June 2011, p. 37981.

12 – Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Cases C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 63; and C-145/10 *Painer* [2011] ECR I-0000, paragraph 59.

13 – See, on reliance on the new provisions prior to the expiry of the period for transposition, point 57 below.

14 – Case C-110/05 *Commission v Italy* [2009] ECR I-519, paragraph 33.

15 – See on the freedom of workers, Case C-379/09 *Casteels* [2011] ECR I-0000, paragraph 22; on the freedom to settle, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 43; on the free movement of services, Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10, and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 85; and on free movement of capital, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 184.

16 – See Cases 115/78 *Knoors* [1979] ECR 399, paragraph 17; C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and C-96/08 *CIBA* [2010] ECR I-2911, paragraph 45.

17 – Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

18 – DOC 52 2037/001 of the Belgian Parliament of 9 June 2009, p. 17, 20 et seq. (Nr. 5.2.).

19 – Judgment of the Constitutional Court of 22 December 2010, *Belgische Petroleum Unie and Others* (149/2010, Point B.5.2.).

20 – Annex 4 to the Commission's written statement.

**Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la
Universidad de Alicante en PI y SI- <http://www.uaipit.com>.**

21 – Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 119.

22 – See Cases C-320/03 *Commission v Austria* [2005] ECR I-9871, paragraph 80, and C-422/05 *Commission v Belgium* [2007] ECR I-4749, paragraph 52.

23 – C-201/08 *Plantanol* [2009] ECR I-8343, paragraphs 35 et seq.

24 – See Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 36.

25 – See point 51 above.

26 – Cited in footnote 19 point B11.

27 – See Cases 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8; C-2/90 *Commission v Belgium* [1992] ECR I-4431, paragraph 22 and *Radlberger Getränkegesellschaft and S. Spitz* (cited in footnote 24, point 75).

28 – *Commission v Austria*, cited in footnote 22 above, paragraph 74 et seq. See also Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 77 et seq.

29 – Cited in footnote 23.

30 – Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; *Adeneler and Others* (cited in footnote 21, paragraph 121), *Commission v Belgium* (cited in footnote 22, paragraph 62) and Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-0000, paragraph 78.

31 – See my Opinions of 18 May 2004 in Case C-313/02 *Wippel* [2004] ECR I-9483, point 60; of 27 October 2005 in Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, point 48, and of 16 December 2010 in Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-0000, point 83 et seq.

**Fuente: Texto original del fallo aportado por UAIPIT-Portal Internacional de la
Universidad de Alicante en PI y SI- <http://www.uaipit.com>.**

32 – See also the considerations on directive-compliant interpretation prior to expiry of the transposition period in my Opinions in *Wippel*, cited in footnote 31, points 58 to 63, and *Adeneler*, points 45 to 53.

33 – Case C-433/05 *Sandström* [2010] ECR I-2885, paragraph 42 and Case C-361/10 *Intercommunale Intermosane and Fédération de l'industrie et du gaz* [2011] ECR I-0000, paragraph 10, and the case-law therein cited.

34 – *Sandström* (cited in footnote 33), paragraph 43.

35 – Judgment in *Intercommunale Intermosane and Fédération de l'industrie et du gaz* (cited in footnote 33, paragraph 11), together with the case-law therein cited.

36 – *Intercommunale Intermosane and Fédération de l'industrie et du gaz* (cited in footnote 33, paragraph 20), and in the case-law therein cited.

37 – *Sandström* (cited in footnote 33), paragraph 47.

38 – Cited in footnote 19, point B.5.1.