

Dear Mr Lippold,

Thank you for your question related to the provisions of Council Directive 2009/119/EC (henceforward the Directive).

According to Article 3(1) of the Directive, emergency stocks have to be maintained within the Union. On the other hand, Article 5(1), subparagraph 2 of the Directive provides that Member States "*may set limits or additional conditions on the possibility of its emergency stocks and specific stocks being held outside its territory*". This indicates that Member States enjoy a certain margin of discretion with regard to limiting the amount of emergency stocks to be held outside the country. In order to determine the possible extent of these limits, Article 5 must be read in the light of Article 8(2), subparagraph 1, of the Directive. Pursuant to this provision, "*[e]ach Member State may restrict the delegation rights of the economic operators on which it imposes or has imposed stockholding obligations*". Article 8(2) further specifies in subparagraph 2 that it should be possible for an economic operator to delegate 10% of the obligation (increased to 30% by the end of 2017), unless the Member State sets up a CSE (that must be required to accept delegations up to 10%). From Article 8(1), letters b) and c), of the Directive it follows that this provision also applies to the delegation of stockholding obligations by an economic operator to CSEs or other economic operators outside the territory of the Member State.

On the other hand, as you rightly point out, Article 8(1), letters (b) and (c), of the Directive both provide that such delegation is subject to authorisation by the Member State on whose account the stocks are held. Restrictions in this regard on a case by case basis could therefore in principle be compatible with the Directive, if duly justified. However, arbitrary refusal to authorise such delegation to an entity in another Member State does not appear to be compatible with the Directive.

Accordingly, in the absence of a national CSE which accepts delegations from domestic economic operators, the Member State would be expected to ensure the effective exercise of economic operators' right of delegation to the CSEs of other Member States, to other economic operators within the Member State or economic operators abroad, at least within the minimum percentage limits set by Article 8(2), subparagraph 2, of the Directive. In order for the economic operators to benefit from this right in practice, of course the Member State have to set up procedures whereby such delegations are authorized (as required by Article 8(1) of the Directive in case of cross-border delegations) and registered.

As long as the restrictions on cross-border delegations remain within the limits set out in Article 8(2), subparagraph 2, of the Directive, this limitation appears to be justified on the grounds of public security as provided by Article 52 TFEU, which is applicable via Article 62 TFEU, and therefore can be regarded as proportional. In this context, the ruling of the European Court of Justice in Case C-72/83 (*Campus Oil*) is relevant. Even though this ruling refers to the free movement of goods, the Court's findings are, by analogy, applicable to the freedom to provide services. In this ruling, the Court stated that "*petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a*

country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security [...]" (para 34).

According to the case law of the Court, aims of purely economic nature cannot, indeed, constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom. However, as pointed out by the Court in the *Campus Oil* ruling "*the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and is thus capable of constituting an objective covered by the concept of public security*" (para 35). In the same way the Directive recognises that the "*availability of oil stocks and the safeguarding of energy supply are essential elements of public security for Member States and for the Community*" (recital 8).

This reply contains of course a non-binding guidance intended to assist you with the interpretation of the Directive 2009/119/EC. It reflects the views of the Commission services, and as such is not legally binding. The binding interpretation of EU legislation is the exclusive competence of the Court of Justice of the European Union.

Best regards,

Stefaan Vergote
Head of Unit
European Commission
DG Energy
Unit A4 Economic analysis and Financial instruments

From: Lippold Marcus

Sent: Friday, June 27, 2014 4:10 PM

To: VERGOTE Stefaan (ENER)

Subject: Delegation of stockholding obligation of companies in Romania

Dear Mr. Vergote,

The undersigned, MOL Hungarian Oil and Gas Public Limited Company ("MOL"), a leading integrated Central European oil and gas corporation with an extensive activity in the region, headquartered in Budapest, Hungary, is writing to you with respect to getting the Commission's interpretation of the delegation rules set out in Directive 2009/119. Our Romanian subsidiary MOL Romania Petroleum Products ("MOL Romania") operates a fuel distribution network in Romania. Currently, fuel supplier companies in Romania are obliged to keep crude oil and petroleum product stocks (emergency stocks). Romania implemented Directive 2009/119/EC (Directive) last year, but several key issues necessary for

implementation are still unresolved (pending the authorities' decision). Such uncertainty creates potential risk of damaging our company and other market participants in Romania.

At the end of last year, Romania transposed the new Directive to its national law. The new Law (360/2013) brought substantial changes and uncertainties with large financial burdens for fuel suppliers. Please find below the main elements and critical points:

- Romania defined two kind of stocks – emergency and specific stocks. These 2 types of stocks together have to reach the minimum stock level defined by the Directive.
- Based on this new Law 360, the specific stocks previously kept by the National Administration of State Reserves will from now on be maintained (financed) by the fuel suppliers. This decision potentially increases the stock related burden of the companies by about 30%.
- Companies importing crude oil and fuels or the ones producing fuels are obliged to maintain emergency stocks. The level of emergency stocks for each obliged party is defined annually in proportion to product sales of the companies.
- According to the Law 360/2013, the Competent Authority has the obligation to (i) set up a central stockholding entity and to (ii) accept the delegation of companies in line with Art. 8. 2. of the Directive. This entity hasn't been established yet and the delegation procedures (attesting the authorities acceptance over the means to delegate) were not yet adopted and published.
- On June 11th, 2014 the Romanian Government published a decision with the total quantity of crude oil and petroleum product stocks to be stored by the 12 obliged companies, individual company obligations are still under calculation. It seems that the total level of emergency stocks is equal to minimum stocks – 61 days consumption obligation of Romania: *“Art. 1. – In 2014, the minimum inventories of crude oil and/or oil products are exclusively established as emergency inventories.”* Consequently the burden to these companies (including MOL Romania) will increase by about 30% in general. It hasn't been declared, but we assume that in this case the companies will not need to finance any specific stocks.
- No information has been shared by Competent Authority about by-laws on detailed delegation rules, limitations regarding domestic and cross-border delegation.
- In order to reduce this extra burden our company is analysing different options including the delegation of our obligation to CSE or a company within Romania or in other Member States. However, the rules of delegation in the Romanian legal system haven't been developed and are limited to the text in Stockpiling Law no. 818 (21.12.2013) fully identical to Article 8. of the Directive. In spite of several meetings with Romanian authorities and letters sent by the national oil association and member companies including MOL Romania the government hasn't elaborated implementing by-laws to define conditions for delegation – authorisation, inspection, reporting, etc.

We understand that it is not the role of the Commission to interpret EU law, however it would be very much appreciated if you could share with us your opinion about our

interpretation below:

*In the internal market of the European Union restrictions on the freedom to provide services between MSs are to be eliminated (Art. 56. TFEU). Restrictions can only be justified by legitimate general interest objectives. In case of stockpiling services for security of supply purposes the Directive 2009/119/EC Art. 5. and 8. define harmonised rules for such services and enable the imposition of restrictions on the delegation of obligations. In questions not harmonised by the Directive and where MSs introduce concrete restrictions, the rules of the Treaty are applicable. Consequently those restrictions have to be proportional to the general interest objective – in this case as it is outlined in Recital (10) of the Directive “**preserving the availability and physical accessibility of the stocks**”.*

Based on these principles our understanding of the Romanian Law on Stockpiling is the following:

- *Companies having the obligation to keep stocks are allowed to delegate their stockholding obligation to any entity listed in point a) to d) in Art. 8. (1). In order to keep the stocks in another member state prior approval is required from the two relevant competent authorities in the member states (Ministry of Economy – Department of Energy in Romania).*
- *Romania hasn't declared or provided in the law any limitation for such a delegation so far and no central stockholding body has been established. If there is no limitation, Romania has no obligation to set a central stockholding entity to accept delegation from obliged companies.*
- *In case Romania would decide later on to limit cross-border delegation rights (it has the rights based on the Directive to use different, more restrictive criteria for cross-border delegation than for indigenous one) it should take into account the proportionality principle. Such an assessment may drive to defining the share of stocks to be held in domestic locations in order to ensure “the availability and physical accessibility of the stocks” in case of supply disruptions. This share can be any % and the only connection with the 10% requirement of the Directive is that in case delegation is limited below 10% Romania has to establish a CSE. Another conclusion to be drawn from the provisions of the Directive is that any restriction concerning stockholding abroad should be the result of case-by-case analysis of individual arrangements, strictly considering whether availability and physical accessibility of stocks is secured.*

We are kindly requesting you to share with us the Commission's understanding of delegation rules of the Directive and your opinion about our interpretation.

kind regards

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