COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
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I. FUNDAMENTAL RIGHTS

Judgment of the Court (Grand Chamber) of 2 February 2021

Case C-481/19
Consob

Reference for a preliminary ruling – Approximation of laws – Directive 2003/6/EC – Article 14(3) – Regulation (EU) No 596/2014 – Article 30(1)(b) – Market abuse – Administrative sanctions of a criminal nature – Failure to cooperate with the competent authorities – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – Right to remain silent and to avoid self-incrimination

On 2 May 2012, the Commissione Nazionale per le Società e la Borsa (Consob) (National Companies and Stock Exchange Commission, Italy) imposed on DB penalties totalling EUR 300 000 for an administrative offence of insider dealing committed in 2009.

It also imposed on him a penalty of EUR 50 000 for failure to cooperate. DB, after applying on several occasions for postponement of the date of the hearing to which he had been summoned in his capacity as a person aware of the facts, had declined to answer the questions put to him when he appeared at that hearing.

Following the dismissal of his appeal against those penalties, DB brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). On 16 February 2018, that court referred an interlocutory question of constitutionality to the Corte costituzionale (Constitutional Court, Italy) concerning the provision of Italian law [1] on the basis of which the penalty for failure to cooperate was imposed. That provision penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of that body's supervisory functions, including with regard to the person in respect of whom Consob alleges an offence of insider dealing.

The Corte costituzionale (Constitutional Court) pointed out that, under Italian law, insider dealing constitutes both an administrative offence and a criminal offence. It then noted that the provision concerned was adopted in performance of a specific obligation under Directive 2003/6 [2] and now implements a provision of Regulation No 596/2014. [3] Next, it asked the Court whether those measures are compatible with the Charter of Fundamental Rights of the European Union ('the Charter') and, in particular, the right to remain silent.

The Court, sitting as the Grand Chamber, recognises the existence, for natural persons, of a right to silence, protected by the Charter, [4] and holds that Directive 2003/6 and Regulation No 596/2014 allow

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1 Article 187*quindecies* of the Decreto legislativo n. 58 – Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No 58 consolidating all provisions in the field of financial intermediation, within the meaning of Articles 8 and 21 of Law of 6 February 1996, No 52) of 24 February 1998.

2 Pursuant to Article 14(3) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16), Member States are to determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12 of that directive. The latter article states that, in that context, the competent authority must be able to demand information from any person and, if necessary, to summon and hear any such person.

3 Article 30(1)(b) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6 and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1). This provision requires that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with inspection or with a request as referred to in Article 23(2) of that regulation, subparagraph (b) of which specifies that this includes questioning a person with a view to obtaining information.

4 Second paragraph of Article 47 and Article 48 of the Charter.

Member States to respect that right in an investigation carried out in respect of such persons and capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

Findings of the Court

In the light of the case-law of the European Court of Human Rights on the right to a fair trial, [5] the Court emphasises that the right to silence, which lies at the heart of the notion of a 'fair trial', precludes, inter alia, penalties being imposed on natural persons who are 'charged' for refusing to provide the competent authority, under Directive 2003/6 or Regulation No 596/2014, with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability. The Court states, in that regard, that the case-law relating to the obligation on undertakings to provide, in proceedings that may lead to the imposition of penalties for anticompetitive conduct, information which may subsequently be used to establish their liability for such conduct cannot apply by analogy to establish the scope of the right to silence of natural persons charged with insider dealing. The Court adds that the right to silence cannot, however, justify every failure to cooperate on the part of the person concerned with the competent authorities, such as refusing to appear at a hearing planned by those authorities or using delaying tactics designed to postpone it.

Finally, the Court notes that both Directive 2003/6 and Regulation No 596/2014 lend themselves to an interpretation which is consistent with the right to silence, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability. In those circumstances, the absence of an express prohibition against the imposition of a penalty for such a refusal cannot undermine the validity of those measures. It is for the Member States to ensure that natural persons cannot be penalised for refusing to provide such answers to the competent authority.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 24 February 2021

Case T-108/18
Universität Koblenz-Landau v EACEA

Arbitration clause – Tempus IV Programmes – Grant agreements – Contractual nature of the dispute – Reclassification of the action – Eligible costs – Systemic and recurrent irregularities – Full repayment of amounts paid – Proportionality – Right to be heard – Obligation to state reasons – Article 41 of the Charter of Fundamental Rights

Universität Koblenz-Landau (Germany) ('the applicant') is a German higher-education institution governed by public law.

In 2008 and 2010, within the framework of the European Union's cooperation with third countries for the modernisation of the higher-education systems of those countries, the applicant signed three grant agreements. The first one was signed between the applicant, as sole beneficiary, and the European Commission. The last two agreements were signed inter alia between the applicant, as coordinator and co-beneficiary, and the Education, Audiovisual and Culture Executive Agency (EACEA). The EACEA paid grants to the applicant under these three agreements.

5 This right to a fair trial is also enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

By two letters of 21 December 2017 and 7 February 2018, the EACEA informed the applicant that it had decided to recover the grants paid in whole or in part. The total sum claimed under the three agreements amounted to EUR 1 795 826.30.

In 2018, the applicant brought an action under Article 263 TFEU seeking annulment of the two letters of the EACEA relating to the amounts paid to the applicant in the context of the grant agreements.

In support of its action, the applicant relied in particular on three pleas in law, alleging (i) infringement of the right to be heard, (ii) 'misapplication of EU law' and (iii) failure to state reasons. By its judgment, the General Court, sitting in extended composition, dismisses the action by making, in particular, the availability of the right to be heard and the obligation to state reasons in the context of a dispute of a contractual nature clear and by examining the question whether the full recovery of a grant complies with the provisions of the applicable Financial Regulation.

Assessment of the General Court

After finding the claim in annulment inadmissible for lack of a challengeable act within the meaning of Article 263 TFEU and reclassifying the action seeking a declaration that the debts claimed under the grant agreements do not exist as being based on Article 272 TFEU, the General Court examines the first and the third pleas together.

In this respect, it rejects the EACEA's argument that the right to be heard and the obligation to state reasons cannot be usefully relied on in the context of a dispute of a contractual nature. Those rights have been enshrined in Article 41(2)(a) and (c) of the Charter of Fundamental Rights of the European Union ('the Charter'), which forms part of primary law. According to the case-law of the Court of Justice and the General Court, the fundamental rights of the Charter are designed to preside over the exercise of the powers conferred on the EU institutions, including in contractual matters, in particular during the execution of the contract. In addition, the General Court recalls that, if, as in the present case, an arbitration clause included in the contract confers jurisdiction on the EU judicature to hear disputes relating to that contract, that judicature will have jurisdiction, independently of the applicable law stipulated in that contract, to examine any infringement of the Charter or of the general principles of EU law.

As for the possible infringement of the right to be heard, the General Court determines whether the EACEA has allowed the applicant the opportunity to make its views usefully and effectively known before communicating the letters at issue and the debit note issued under the first grant agreement to it. The General Court recalls that, according to the settled case-law of the Court of Justice, EU institutions, bodies, offices and agencies are required, in accordance, in particular, with the requirements of the principle of good administration, to respect the principle of adversarial proceedings in the context of an audit procedure, such as that in the present case. Those entities must obtain all relevant information, in particular that which the other party to the contract is in a position to provide, before taking a decision to proceed with recovery.

The General Court points out, in that regard, that the EACEA communicated to the applicant the relevant documents and informed it of its intention to recover the grants at issue on the basis of the possibly systemic and recurrent nature and the seriousness of the irregularities found. Since it found that the applicant was requested to put forward its position concerning the auditors' findings, which it actually did in a detailed manner, the General Court rejects the plea alleging infringement of the right to be heard as unfounded.

As for the possible infringement of the obligation to state reasons, the General Court recalls that the reasons given for a measure are sufficient if that measure was adopted in a context which was known to the addressee concerned and which enables him or her to understand the scope of the measure concerning him or her. The General Court finds that the letters in question clearly identify the legal basis for the intended recovery and that the numerous written exchanges between the parties allowed the applicant to understand the reasons why the EACEA decided to claim the repayment in question and the manner in which the amounts to be repaid were determined. In this respect, the EACEA relied on the final audit report which took account of all of the applicant's observations and evidence submitted by it, examined them, and rejected them individually, explaining on each occasion the reasons why those observations or evidence did not call into question the findings reached by the auditors. Accordingly, the General Court also rejects that plea as unfounded.

In addition, the General Court rejects the plea alleging misapplication of EU law, under which the applicant claims that neither the contested agreements nor EU law allows the EACEA to recover in full the amounts paid to it under the contested agreements. After an assessment of the contractual provisions and the relevant provisions of the applicable Financial Regulations, as interpreted by the EU judicature, according to their respective wording, it finds that they do not, in principle, prevent the EACEA from recovering the full amounts paid to the applicant under the contested agreements.

II. FREEDOM OF MOVEMENT

1. FREEDOM OF MOVEMENT FOR WORKERS – FREEDOM OF ESTABLISHMENT – FREEDOM TO PROVIDE SERVICES

Judgment of the Court (Fourth Chamber) of 11 February 2021

Joined Cases C-407/19 and C-471/19
Katoen Natie Bulk Terminals and General Services Antwerp

Reference for a preliminary ruling – Article 45 TFEU – Freedom of movement for workers – Article 49 TFEU – Freedom of establishment – Article 56 TFEU – Freedom to provide services – Carrying out of port activities – Dockers – Access to the profession and recruitment – Arrangements for the recognition of dockers – Dockers not part of the quota of workers provided for in national legislation – Limitation of the duration of the work contract – Mobility of dockers between different port areas – Workers carrying out logistical work – Safety certificate – Overriding reasons in the public interest – Safety in port areas – Protection of workers – Proportionality

Under Belgian law, dock work is governed inter alia by the Law organising dock work, according to which dock work may be carried out only by recognised dockers. In 2014, the European Commission had sent Belgium a letter of formal notice, in which it informed it that its dock work legislation infringed the freedom of establishment (Article 49 TFEU). Following that letter, in 2016, that Member State had adopted a royal decree relating to the recognition of dockers in port areas, establishing the arrangements for the implementation of the Law organising dock work, which had led the Commission to close the infringement procedure against it.

In the case *Katoen Natie Bulk Terminals and General Services Antwerp* (C-407/19), the two eponymous companies, which carried out port operations in Belgium and abroad, requested the Raad van State (Council of State, Belgium) to annul that 2016 royal decree, being of the view that it impeded their freedom to engage dockers from Member States other than Belgium to work in Belgian port areas.

In the case *Middlegate Europe* (C-471/19), the company concerned had been ordered to pay a fine following the finding, by the Belgian police, of the infringement involving the carrying out of dock work by an unrecognised docker. In the context of proceedings brought before the referring court in that second case, namely the Grondwettelijk Hof (Constitutional Court, Belgium), that company was challenging the constitutionality of the Law organising dock work, being of the view that that legislation disregarded the freedom of trade and industry of undertakings. That court, noting that that freedom guaranteed by the Belgian Constitution was closely linked to a number of fundamental freedoms guaranteed by the FEU Treaty, such as the freedom to provide services (Article 56 TFEU) and the freedom of establishment (Article 49 TFEU), had decided to refer questions to the Court, just as the Raad van State (Council of State) had done in the first case, on the compatibility of those national rules, which maintain a special regime for the recruitment of dockers, with those two provisions. By those joined cases, in addition to the answer which it had to give to that question, the Court was

asked to identify additional criteria enabling the conformity of the docker regime with EU law requirements to be clarified.

Findings of the Court

The Court states first of all that the legislation at issue, which obliges non-resident undertakings wishing to establish themselves in Belgium in order to carry out port activities there or which, without establishing themselves there, wish to provide port services there to have recourse only to dockers recognised as such in accordance with that legislation, prevents such undertakings from using its own staff or from recruiting other non-recognised workers. Therefore, that legislation, which may render less attractive the establishment of those undertakings in Belgium or their provision of services in that Member State, constitutes a restriction on both the freedom of establishment and the freedom to provide services, guaranteed by Articles 49 and 56 TFEU, respectively. The Court then recalls that such a restriction may be justified by an overriding reason in the public interest, provided that it is suitable for securing the attaining of the objective pursued and does not go beyond what is necessary in order to attain it. In the case at hand, the Court notes that the legislation at issue cannot in itself be considered unsuitable or disproportionate for attaining the objective which it pursues, namely ensuring safety in port areas and preventing workplace accidents. Assessing the regime at issue globally, the Court finds that such legislation is compatible with Articles 49 and 56 TFEU, provided that the conditions and arrangements laid down pursuant to that legislation, first, are based on objective, non-discriminatory criteria known in advance and which allow dockers from other Member States to prove that they satisfy, in their State of origin, requirements equivalent to those applied to national dockers and, second, do not establish a limited quota of workers eligible for such recognition.

Next, examining the compatibility of the contested royal decree with the various freedoms of movement guaranteed by the FEU Treaty, the Court states that the national legislation at issue also constitutes a restriction on the freedom of movement for workers enshrined in Article 45 TFEU, in so far as it is liable to have a dissuasive effect on employers and workers from other Member States. The Court then assesses whether the various measures contained in that legislation are necessary and proportionate to the objective of ensuring safety in port areas and preventing workplace accidents.

In that regard, in the first place, the Court considers that the legislation at issue, according to which, in particular:

– the recognition of dockers is done by an administrative committee composed jointly of members designated by employers' organisations and by workers' organisations;

– that committee also decides, according to the need for labour, whether or not recognised workers must be included in a quota of dockers, it being understood that, for dockers not included in that quota, the duration of their recognition is limited to the duration of their employment contract, such that a fresh recognition procedure must be initiated for each new contract that they conclude;

– no maximum period within which that committee must act is prescribed,

in so far as it is neither necessary nor appropriate for attaining the objective pursued, is not compatible with the freedoms of movement enshrined in Articles 45, 49 and 56 TFEU.

In the second place, the Court examines the conditions for recognition of dockers. Under the legislation at issue, a worker must, unless he or she can show that he or she satisfies equivalent conditions in another Member State, meet requirements of medical fitness and successfully complete a psychological test and prior vocational training. According to the Court, those requirements are conditions appropriate for ensuring safety in port areas and proportionate to such an objective. Consequently, such measures are compatible with the freedoms of movement provided for in Articles 45, 49 and 56 TFEU. However, the Court considers that it is for the referring court to verify that the role conferred on the employers' organisation and, as the case may be, on the recognised dockers' unions in the designation of the bodies responsible for conducting those examinations or tests is not such as to call into question their transparent, objective and impartial nature.

In the third place, the Court finds that the legislation concerned, which provides for the maintenance of the recognition obtained by a docker under a previous statutory regime and for his or her inclusion in the quota of recognised dockers, does not appear to be inappropriate for attaining the objective

pursued or disproportionate to that objective, such that, in that respect, it is also compatible with the freedoms enshrined in Articles 45, 49 and 56 TFEU.

In the fourth place, the Court considers that the legislation at issue, under which the transfer of a docker to the quota of workers of a port area other than that in which he or she obtained his or her recognition is subject to conditions and arrangements laid down by a collective labour agreement, complies with the freedoms of movement provided for in Articles 45, 49 and 56 TFEU. It is nevertheless for the referring court to determine that those conditions and arrangements laid down are necessary and proportionate to the objective of ensuring security in each port area.

In the last place, the Court holds that legislation according to which logistics workers must hold a 'security certificate' whose issuance modalities are fixed by a collective labour agreement is not incompatible with the freedoms enshrined in Articles 45, 49 and 56 TFEU, provided that the conditions for the issue of such a certificate are necessary and proportionate to the objective of ensuring safety in port areas and the procedure prescribed for its obtainment does not impose unreasonable and disproportionate administrative burdens.

2. FREEDOM TO PROVIDE SERVICES

Judgment of the Court (Third Chamber) of 3 February 2021

Case C-555/19
Fussl Modestraße Mayr

Reference for a preliminary ruling – Directive 2010/13/EU – Provision of audiovisual media services – Article 4(1) – Freedom to provide services – Equal treatment – Article 56 TFEU – Articles 11 and 20 of the Charter of Fundamental Rights of the European Union – Audiovisual commercial communication – National legislation prohibiting television broadcasters from inserting in their programmes broadcast throughout the national territory television advertisements whose broadcasting is limited to a regional level

Fussl Modestraße Mayr GmbH, a company incorporated under Austrian law, operates a network of fashion shops in Austria and the Land of Bavaria (Germany). In 2018, it concluded a contract with SevenOne Media GmbH, the marketing company of the German television station ProSiebenSat.1. That contract concerned the broadcasting, solely in the Land of Bavaria, of advertising in the context of programmes of the national channel ProSieben.

However, SevenOne Media refused to perform that contract. Since 2016, a State Treaty concluded by the *Länder* has prohibited television broadcasters from inserting, in their national broadcasts, television advertisements whose broadcasting is limited to a regional level. That prohibition aims at reserving revenue from regional television advertising for regional and local television broadcasters, thus ensuring them a source of financing and thus their sustainability, in order to enable them to contribute to the pluralistic character of the offer of television programmes. The prohibition is accompanied by an 'opening clause', allowing the *Länder* to authorise regional advertising in the context of national broadcasts.

Under those circumstances, the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), ruling on a dispute relating to the performance of the contract in question, questions the conformity of that prohibition with EU law.

That case invites the Court, in particular, to apply certain principles enshrined in its case-law on the freedom to provide services and to interpret the Charter of Fundamental Rights of the European Union ('the Charter') in the particular context of a prohibition on regional advertising on national television channels. Such an analysis cannot disregard the existence of advertising services provided on internet platforms which may constitute competition for traditional media.

Findings of the Court

In the first place, as regards the Audiovisual Media Services Directive [6], the Court notes that Article 4(1) thereof, according to which Member States may, under certain conditions, provide for more detailed or stricter rules in the fields coordinated by that directive, for the purpose of ensuring the protection of the interests of viewers, does not apply in the present case. Although the prohibition at issue falls within a field covered by the directive, namely that of television advertising, it concerns however a specific matter which is not governed by any of the articles of that directive and does not, moreover, pursue the objective of protecting viewers. Therefore, it cannot be qualified as a 'more detailed' or 'stricter' rule within the meaning of Article 4(1) of that directive, so that that provision does not preclude such a prohibition.

In the second place, as regards the conformity of the prohibition at issue with the freedom to provide services guaranteed by Article 56 TFEU, the Court notes, first of all, that such a prohibition entails a restriction on that fundamental freedom to the detriment of both the providers of advertising services, namely, television broadcasters, and the recipients of those services, namely, advertisers, in particular those established in other Member States. Next, as regards the justification for that restriction, the Court notes that the preservation of the pluralistic nature of the offer of television programmes may constitute an overriding reason in the public interest. Finally, as regards the proportionality of the restriction, the Court notes that, admittedly, the objective of maintaining media pluralism, in so far as it is linked to the fundamental right to freedom of expression, gives the national authorities a wide discretion. However, the prohibition at issue must be such as to guarantee the attainment of that objective and may not go beyond what is necessary to attain it.

In that regard, the Court notes, first, that the prohibition at issue could be vitiated by an inconsistency, relating to the fact, to be verified by the national court, that it applies only to advertising services provided by national television broadcasters and not to advertising services, in particular linear advertising services, provided on the internet. At issue could be two competing types of services on the German advertising market which are likely to present the same risk to the financial health of regional and local television broadcasters and, hence, to the objective of protecting media pluralism [7]. Secondly, concerning the necessity for the prohibition, the Court considers that a less restrictive measure could result from the effective implementation of the authorisation system at the level of the *Länder* provided for by the 'opening clause'. However, it is for the national court to verify whether that a priori less restrictive measure can actually be adopted and implemented in such a way as to ensure that, in practice, the objective pursued can be achieved.

In the third place, as regards the freedom of expression and information guaranteed by Article 11 of the Charter, the Court notes that the latter does not preclude a prohibition of regional advertising on national television channels, such as that contained in the national measure at issue. That prohibition is essentially a balancing act between, on the one hand, the freedom of commercial expression of national television broadcasters and advertisers and, on the other hand, the protection of media pluralism at regional and local level. Therefore, the German legislature was entitled to consider, without exceeding the wide margin of appreciation which it is entitled to in that context, that safeguarding the public interest should prevail over the private interest of national television broadcasters and advertisers.

In the fourth and last place, the Court holds that the principle of equal treatment, enshrined in Article 20 of the Charter, also does not preclude the prohibition at issue, provided that it does not give rise to unequal treatment between national television broadcasters and providers of advertising, in

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6 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).

7 The circumstances of the case in the main proceedings are, in that regard, substantially comparable to those which gave rise to the judgment of 17 July 2008, Corporación Dermoestética (C-500/06, EU:C:2008:421).

particular linear advertising, on the internet as regards the broadcasting of advertising at regional level. In that regard, it is for the national court to ascertain whether the situation of national television broadcasters and that of providers of advertising services, in particular linear advertising services, on the internet, with respect to the provision of regional advertising services, is significantly different as regards the elements characterising their respective situations, namely, in particular, the usual ways in which advertising services are used, the manner in which they are provided or the legal framework within which they are provided.

III. BORDER CHECKS, ASYLUM AND IMMIGRATION

Judgment of the Court (Fifth Chamber) of 24 February 2021

Case C-673/19
M and Others (Transfert vers un État membre)

Reference for a preliminary ruling – Asylum and immigration – Directive 2008/115/EC – Articles 3, 4, 6 and 15 – Refugee staying illegally in the territory of a Member State – Detention for the purpose of transfer to another Member State – Refugee status in that other Member State – Principle of *non-refoulement* – No return decision – Applicability of Directive 2008/115

Three third-country nationals, M, A and T, lodged applications for international protection in the Netherlands although they already had refugee status in other Member States, namely Bulgaria, Spain and Germany respectively. For that reason, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) rejected their applications. Having established that they were staying illegally in the Netherlands, the State Secretary ordered them to return immediately to those Member States. Since the persons concerned did not comply, they were detained and then forcibly transferred to the Member States concerned.

M, A and T brought actions before the Rechtbank Den Haag (District Court, The Hague, Netherlands). They claim that without a return decision, within the meaning of the Return Directive, [8] being issued against them beforehand, their detention was unlawful. They therefore seek compensation for the harm suffered as a result of the latter. While the actions brought by M and A were dismissed, T was successful. M and A then lodged appeals before the Raad van State (Council of State, Netherlands), while the State Secretary for Justice and Security also appealed against the judgment upholding T's action.

It is in that context that the referring court decided to ask the Court whether the Return Directive [9] precludes a Member State from placing in detention a third-country national staying illegally on its territory in order to carry out the forced transfer of that national to another Member State in which he or she has refugee status, where that third-country national has refused to comply with the order given to him to go to that other Member State and it is not possible to adopt a return decision against him. In its judgment, the Court answered that question in the negative.

Findings of the Court

In order to arrive at that conclusion the Court recalled, in the first place, that pursuant to the Return Directive, any illegally staying third-country national must, in principle, be subject to a return decision. [10] The latter must identify the third country to which the person concerned is to be removed, namely his or her country of origin, a transit country or a third country to which he or she decides to return voluntarily and which is prepared to admit that person onto its territory. [11] By way of derogation, where an illegally staying third-country national holds a residence permit in another Member State, he or she must be allowed to return immediately to that Member State rather than

8 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98; 'the Return Directive').

9 See, more specifically, Articles 3, 4, 6 and 15 of the Return Directive.

10 See Article 6(1) of the Return Directive.

11 See Article 3(3) of the Return Directive.

issuing a return decision against him or her from the outset. [12] That being the case, where that national refuses to return to the Member State concerned, or where his or her immediate departure is required on grounds of public order or national security, the Member State in which the national concerned is staying illegally must then issue a return decision.

In the second place, the Court noted, however, that it was legally impossible in the present case for the Netherlands authorities to adopt a return decision against the persons concerned, following their refusal to go to the Member States which had granted them refugee status. None of the third countries covered by the Return Directive [13] could constitute a return destination in the present case. In particular, owing to their status as refugees, the persons concerned may not be returned to their country of origin without infringing the principle of *non-refoulement*. That principle, which is guaranteed by the Charter of Fundamental Rights of the European Union, [14] must be respected by the Member States in the implementation of the Return Directive. [15] Moreover, the Court found that, in such circumstances, none of the standards or procedures laid down in that directive allows the expulsion of those nationals, even though they are staying illegally on the territory of a Member State.

In the third place, the Court observed that the Return Directive is not intended to harmonise in their entirety the rules of the Member States relating to the stay of foreign nationals. In particular, it is not intended to determine the consequences of an illegal stay by a third-country national in respect of whom no return decision to a third country may be issued, in particular where, as in the present case, the application of the principle of *non-refoulement* renders such a decision impossible. Thus, in such a situation, the decision of a Member State to proceed with the forced transfer of that national to the Member State which has granted him or her refugee status is not governed by the common standards and procedures laid down by the Return Directive. It does not fall within the scope of that directive, but rather within that of the exercise of the sole competence of that Member State in matters of illegal immigration. Consequently, the same is true of the detention of that national, ordered for the purpose of transferring him or her to the Member State concerned. The Court stated, however, that that forced transfer and detention are subject to respect for fundamental rights, in particular those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, [16] and the Convention relating to the Status of Refugees. [17]

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12 See Article 6(2) of the Return Directive.

13 See Article 3(3) of the Return Directive.

14 See Article 18 and Article 19(2) of the Charter of Fundamental Rights of the European Union.

15 See Article 5 of the Return Directive.

16 Convention signed at Rome on 4 November 1950.

17 Convention signed in Geneva on 28 July 1951.

IV. COMPETITION : STATE AID

Judgment of the General Court (Tenth Chamber, Extended Composition) of 17 February 2021

Case T-259/20
Ryanair v Commission

State aid – French air transport market – Deferral of payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020 in the context of the Covid-19 pandemic – Decision not to raise any objections – Aid intended to make good the damage caused by an exceptional occurrence – Free provision of services – Equal treatment – Criterion of holding a licence issued by the French authorities – Proportionality – Article 107(2)(b) TFEU – Duty to state reasons

In March 2020, France notified the European Commission of an aid measure in the form of a deferral of the payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020 ('the deferral of the payment of the taxes'). That deferral, which benefits airlines holding a French licence, [18] involves postponing the payment of those taxes to 1 January 2021 and then spreading payments over a period of 24 months, that is to say until 31 December 2022. The precise amount of the taxes is determined by reference to the number of passengers carried and the number of flights operated from a French airport.

By decision of 31 March 2020, [19] the Commission classified the deferral of the payment of the taxes as State aid [20] compatible with the internal market, in accordance with Article 107(2)(b) TFEU. Pursuant to that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is to be compatible with the internal market.

The airline Ryanair brought an action for the annulment of that decision, which is dismissed by the General Court of the European Union in its judgment today. The General Court examines, for the first time, the legality of a State aid scheme adopted in order to address the consequences of the Covid-19 pandemic under Article 107(2)(b) TFEU. [21] The General Court also clarifies the relationship between the rules on State aid and the principle of non-discrimination on grounds of nationality laid down in Article 18(1) TFEU, on the one hand, and the principle of the free provision of services, on the other.

Assessment of the General Court

In the first place, the General Court carries out a review of the Commission's decision in the light of the first paragraph of Article 18 TFEU, which prohibits any discrimination on grounds of nationality within the scope of application of the Treaties, without prejudice to any special provisions contained therein. However, since Article 107(3)(b) TFEU is, according to the General Court, included in those special provisions, it examines whether the deferral of the payment of the taxes could be declared compatible with the internal market under that provision.

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18 A licence issued under Article 3 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008, L 293, p. 3).

19 Commission decision C(2020) 2097 final of 31 March 2020 concerning State aid SA.56765 (2020/N) – France – Covid- 19 – Deferral of the payment of airline taxes in favour of public air transport undertakings.

20 Within the meaning of Article 107(1) TFEU.

21 In its judgment of 17 February 2012, *Ryanair* v *Commission* (T-238/20), the General Court carries out an examination of the lawfulness under Article 107(3)(b) TFEU, of a State aid scheme adopted by Sweden to deal with the impact of the Covid-19 pandemic on the Swedish air transport market.

In that regard, the General Court confirms, first, that the Covid-19 pandemic and the travel restrictions and lockdown measures adopted by France to deal with it, taken together, constitute an exceptional occurrence within the meaning of Article 107(2)(b) TFEU, which has caused economic damage to the airlines operating in France. Nor can it be disputed, according to the General Court, that the objective of the deferral of the payment of the taxes is actually to make good the damage in question.

The General Court finds, secondly, that limiting the deferral of the payment of the taxes to airlines possessing a French licence is appropriate for achieving the objective of making good the damage caused by the exceptional occurrence in question. In that regard, the General Court notes that, under Regulation No 1008/2008, possession of a French licence means in practice that the principal place of business of the airlines is on French territory and that they are subject to financial and reputational monitoring by the French authorities. According to the General Court, the provisions of that regulation create reciprocal obligations between the airlines holding a French licence and the French authorities and, therefore, a, specific, stable link between them that adequately satisfies the conditions laid down in Article 107(2)(b) TFEU.

As regards the proportionality of the deferral of the payment of the taxes, the General Court notes, in addition, that the airlines eligible for the aid scheme are those most severely affected by the travel restrictions and lockdown measures adopted by France. The extension of that deferral to companies not established in France would not, by contrast, have made it possible to achieve the objective of making good the economic damage suffered by the airlines operating in France in so precise a manner and without a risk of overcompensation.

In the light of those findings, the General Court confirms that the objective of the deferral of the payment of the taxes satisfies the requirements of the derogation laid down in Article 107(2)(b) TFEU and that the conditions for granting that aid do not go beyond what is necessary to achieve that objective. Nor therefore does that scheme amount to discrimination prohibited under the first paragraph of Article 18 TFEU.

In the second place, the General Court examines the Commission's decision in the light of the free provision of services under Article 56 TFEU. In that respect, the General Court points out that that fundamental freedom does not apply as such to the air transport sector which is subject to a particular set of legal rules covered by Regulation No 1008/2008. The purpose of that regulation is precisely to define the conditions for applying the principle of the free provision of services within the air transport sector. However, Ryanair did not allege any infringement of that regulation.

In the third place, the General Court rejects the plea that the Commission committed a manifest error in the assessment of the value of the advantage accorded to the airlines benefiting from the deferral of the payment of the taxes. The General Court finds that the amount of damage suffered by the beneficiaries of the deferral of the payment of the taxes is, in all probability, higher, in nominal terms, than the total amount, in nominal terms, of the deferral, so that the spectre of possible overcompensation must evidently be ruled out. In addition, the General Court notes that the Commission took into account the commitments given by France to provide it with a detailed methodology of the way in which that Member State intended to quantify, ex post facto and for each beneficiary, the amount of the damage associated with the crisis caused by the pandemic, which is an additional safeguard for avoiding any risk of overcompensation.

Finally, the General Court rejects as unfounded the plea alleging an infringement of the duty to state reasons and finds that it is not necessary to examine the substance of the plea alleging an infringement of the procedural rights under Article 108(2) TFEU.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 17 February 2021

Case T-238/20
Ryanair v Commission

State aid – Air transport market in Sweden, from Sweden and to Sweden – Loan guarantees to support airlines amid the Covid-19 pandemic – Decision not to raise any objections – Temporary Framework for State aid measures – Measure intended to remedy a serious disturbance in the economy of a Member State – Free provision of services – Equal treatment – Proportionality – Criterion of holding a licence issued by the Swedish authorities – Failure to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition – Article 107(3)(b) TFEU – Ratio legis – Duty to state reasons

In April 2020, Sweden notified the European Commission of an aid measure in the form of a loan guarantee scheme aimed at supporting airlines holding a Swedish operating licence [22] amid the Covid-19 pandemic ('the loan guarantee scheme'). More particularly, that scheme is aimed at airlines which, on 1 January 2020, held a Swedish licence to conduct commercial activities in aviation, with the exception of airlines operating unscheduled flights. The maximum amount of the loans guaranteed under that scheme is five billion Swedish kronor (SEK), and the guarantee must be granted until 31 December 2020 for a maximum of six years.

After finding that the notified scheme constituted State aid within the meaning of Article 107(1) TFEU, the Commission assessed the aid in the light of its communication of 19 March 2020, entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [23] By decision of 11 April 2020, [24] the Commission declared the notified scheme compatible with the internal market in accordance with Article 107(3)(b) TFEU. Under that provision, aid intended to remedy a serious disturbance in the economy of a Member State may be regarded as compatible with the internal market.

The airline Ryanair brought an action to annul that decision, which is, however, dismissed by the Tenth Chamber (Extended Composition) of the General Court of the European Union. In that context, that Chamber examines for the first time the legality of a State aid scheme adopted in order to address the consequences of the Covid-19 pandemic in the light of Article 107(3)(b) TFEU. [25] The General Court also clarifies the relationship between the rules on State aid and, on the one hand, the principle of non-discrimination on grounds of nationality laid down in the first paragraph of Article 18 TFEU and, on the other, the principle of the free provision of services.

Assessment of the General Court

In the first place, the General Court carries out a review of the Commission's decision in the light of the first paragraph of Article 18 TFEU, which prohibits any discrimination on grounds of nationality within the scope of application of the Treaties, without prejudice to any special provisions contained

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22 Licence issued in accordance with Article 3 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

23 OJ 2020 C 91 I, p. 1, as amended by the Commission Communication, Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ O 2020 C 112 I, p. 1).

24 Commission Decision C(2020) 2366 final of 11 April 2020 on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines.

25 In its judgment of 17 February 2021, *Ryanair* v *Commission* (T-259/20), the General Court examines the legality under Article 107(2)(b) TFEU of a State aid scheme adopted by France with a view to addressing the consequences of the Covid-19 pandemic on the French air transport market.

therein. However, since Article 107(3)(b) TFEU is, according to the General Court, included in those special provisions, it examines whether the loan guarantee scheme could be declared compatible with the internal market under that provision.

In that regard, the General Court confirms, first, that the objective of the loan guarantee scheme satisfies the conditions laid down in Article 107(3)(b) TFEU in so far as it effectively seeks to remedy a serious disturbance in the Swedish economy caused by the Covid-19 pandemic, more particularly the significant adverse effects of the pandemic on the aviation sector in Sweden and therefore on the air services in the territory of that Member State.

Secondly, the General Court holds that the limitation of the loan guarantee scheme to airlines in possession of a Swedish licence is appropriate for achieving the objective of remedying the serious disturbance in Sweden's economy. In that respect, the General Court notes that, under Regulation No 1008/2008, possession of a Swedish licence in practice means that the principal place of business of the airlines is on Swedish territory and that they are subject to financial and reputational monitoring by the Swedish authorities. In the General Court's view, the provisions of the regulation establish reciprocal obligations between the airlines holding a Swedish licence and the Swedish authorities, and therefore a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(3)(b) TFEU.

With regard to the proportionate nature of the loan guarantee scheme, the General Court states further that the airlines eligible for the aid scheme contribute most to Sweden's regular air service, both as regards freight and passenger transport, which meets the objective of ensuring Sweden's connectivity. The extension of that aid scheme to airlines not established in Sweden, however, would not have made it possible to achieve that objective.

Taking into consideration the different situations at issue, the General Court also confirms that the Commission did not commit any error of assessment in considering that the aid scheme at issue did not go beyond what was necessary to achieve the stated objective of the Swedish authorities, which became crucial given that, at the end of March 2020, that State had recorded a drop of around 93% of the passenger air traffic in the three main airports.

In the light of those considerations, the General Court confirms that the objective of the loan guarantee scheme satisfies the requirements of the derogation laid down in Article 107(3)(b) TFEU and that the conditions for granting the aid do not go beyond what is necessary to achieve that objective. Nor therefore does that scheme amount to discrimination prohibited under the first paragraph of Article 18 TFEU.

In the second place, the General Court examines the Commission's decision in the light of the free provision of services under Article 56 TFEU. In that respect, the General Court points out that that fundamental freedom does not apply as such to the air transport sector which is subject to a particular set of legal rules covered by the above mentioned regulation laying down common rules for the operation of air services in the Community. The purpose of that regulation is precisely to define the conditions for applying the principle of the free provision of services within the air transport sector. However, Ryanair did not allege any infringement of that regulation.

In the third place, the General Court rejects the plea that the Commission infringed its obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. In that regard, the General Court points out that such a balancing exercise is not required under Article 107(3)(b) TFEU, in that the aid measures adopted to remedy a serious disturbance in the economy of a Member State, such as the loan guarantee scheme at issue, are accordingly presumed to be adopted in the interests of the European Union where they are necessary, appropriate and proportionate.

Finally, the General Court rejects as unfounded the plea alleging an infringement of the duty to state reasons and finds that it is not necessary to examine the substance of the plea alleging an infringement of the procedural rights under Article 108(2) TFEU.

V. APPROXIMATION OF LAWS

1. MUTUAL ASSISTANCE FOR THE RECOVERY OF CERTAIN CLAIMS

Judgment of the Court (Fifth Chamber) of 24 February 2021

Case C-95/19
Silcompa

Reference for a preliminary ruling – Directive 76/308/EEC – Articles 6 and 8 and Article 12(1) to (3) – Mutual assistance for the recovery of certain claims – Excise duty payable in two Member States for the same transactions – Directive 92/12/EC – Articles 6 and 20 – Release of products for consumption – Falsification of the accompanying administrative document – Offence or irregularity committed in the course of movement of products subject to excise duty under a duty suspension arrangement – Irregular departure of products from a suspension arrangement – 'Duplication of the tax claim' relating to the excise duties – Review carried out by the courts of the Member State in which the requested authority is situated – Refusal of the request for assistance made by the competent authorities of another Member State – Conditions

Between 1995 and 1996 Silcompa SpA, a company established in Italy which produces ethyl alcohol, sold ethyl alcohol to Greece under excise duty suspension arrangements. [26]

In 2000, following an inspection, it was established that the accompanying administrative documents ('AADs') relating to the consignments of alcohol dispatched by Silcompa had never been received by the Greek customs authorities in order for the official documents to be drawn up and that the stamps of the customs office shown on the AADs were false. Accordingly, the Italian customs authority ('the Agency') issued three payment notices for the collection of unpaid excise duties.

In 2004, the Agency was informed by the Greek customs authorities that the deliveries of the products sent by Silcompa to a Greek company should be considered irregular. Accordingly, an adjustment notice, covering both the Italian tax claims and an additional tax adjustment, was issued. The proceedings brought against that notice led to the conclusion, in 2017, of a settlement agreement between the Agency and Silcompa.

In 2005, the Greek customs authorities issued two excise duty payment notices in relation to the same export transactions within the European Union, on account of the unlawful release for consumption in Greek territory of the alcohol shipped by Silcompa. In addition, the Greek tax authorities submitted a request for assistance to the Agency for the recovery of the claims relating to the excise duties in question. The Agency, as the competent requested authority, accordingly notified Silcompa of two amicable payment notices.

The appeal brought by Silcompa, following the dismissal of its action against those payment notices, was upheld by the Commissione tributaria regionale del Lazio (Regional Tax Court, Lazio, Italy). Hearing an appeal on a point of law brought by the Agency, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) decided to refer questions to the Court for a preliminary ruling.

The Court ruled that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of

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26 Under that tax arrangement, excise duty on excise goods is not yet payable, despite the fact that the chargeable event for taxation purposes has already occurred. That arrangement postpones the chargeability of excise duty until one of the conditions of chargeability is met.

another Member State in respect of goods which irregularly departed from a suspension arrangement, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the Member State in which the requested authority is situated. [27]

Findings of the Court

The Court notes that the unlawful marketing in Greece of alcohol shipped by Silcompa may constitute an offence or irregularity in respect of the products in question or a consequence of the offence or irregularity previously committed in Italy. In relation to that determination, which is a matter for the referring court, there are two possibilities.

The first possibility is that there were a number offences or irregularities committed in the territory of several Member States and two or more of those States consider that they have the right to levy the excise duties. In that respect, where there is an irregular departure from the suspension arrangement in one Member State, followed by an actual release for consumption of products subject to excise duty in another Member State, the latter State may not also levy excise duty in so far as regards the same export transactions. That release for consumption may take place only once. It follows that, although several successive offences or irregularities may occur in different Member States, only the offence or irregularity which caused the products in the course of movement to leave the excise duty suspension arrangement must be taken into account for the purposes of recovering those duties, in so far as that offence or irregularity released the products for consumption. [28]

The second possibility is that the authorities of one Member State relied on one of the presumptions provided for the purpose of determining where the offence or irregularity was committed [29] and the authorities of another Member State ascertain that the offence or irregularity was actually committed in their Member State. [30] In such a situation, those authorities are to apply the corrective mechanism allowing that Member State to collect the excise duty within three years from the date on which the AAD was drawn up. [31] Once that period has passed, only the Member State which relied on one of those presumptions may legitimately collect the excise duty.

As regards the rules concerning mutual assistance for the recovery of claims relating to excise duties, the Court highlights, first, the division of powers between the authorities of the Member State in which the applicant authority is situated, which apply their national law to the claim and the instrument permitting its enforcement, and the authorities of the Member State in which the requested authority is situated, which apply their national law to the enforcement measures. [32] In accordance with the principle of mutual trust, the instrument permitting enforcement is to be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated. It follows that the authorities of the latter Member State cannot call into question the assessment of the requesting Member State's authorities relating to the place where the irregularity or offence was committed, since that assessment falls within its sole jurisdiction. Next, the Court declares that the instrument permitting enforcement cannot be enforced in the Member State in which the requested authority is situated if such

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27 Article 6(2) and Article 20 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such goods (OJ 1992 L 76, p. 1).

28 Articles 6 and 20 of Directive 92/12.

29 Article 20(2) and (3) of Directive 92/12.

30 Under Article 20(2) and (3) of Directive 92/12, those presumptions are provided for in two situations: the first concerns the situation in which it is not possible to establish the place where the offence or irregularity was committed and the second is where the products subject to excise duty do not arrive at their destination and it is not possible to establish where the offence or irregularity occurred.

31 Article 18(1) and Article 19(1) of Directive 92/12.

32 Article 12(1) and (3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18).

enforcement results in the double levying of excise duties on the same transactions relating to the same products. Consequently, it is necessary to allow the competent body of the same Member State to refuse to enforce that instrument in order to avoid the coexistence of two final decisions relating to the taxation of the same products, based, as regards one, on their unlawful departure from the suspension arrangement and, as regards the other, on their subsequent release for consumption. Lastly, the Court concludes that that interpretation cannot be called into question by its case-law, according to which the EU legislature has not established prevention of double taxation as an absolute principle, [33] since it forms part of the specific factual context of the case giving rise to that judgment, which concerned the situation of an unlawful departure from the suspension arrangement on account of the theft of products to which tax markings had already been affixed in the 'Member State of departure', those tax markings having an intrinsic value which distinguish them from straightforward documents representing the payment of a sum of money to the tax authorities in the Member State in which those markings were issued.

2. PUBLIC PROCUREMENT

Judgment of the Court (Fourth Chamber) of 3 February 2021

Joined Cases C-155/19 and C-156/19
FIGC and Consorzio Ge.Se.Av.

Reference for a preliminary ruling – Public procurement – Public procurement procedure – Directive 2014/24/EU – Article 2(1)(4) – Contracting authority – Bodies governed by public law – Concept – National sports federation – Meeting of needs in the general interest – Supervision of the federation's management by a body governed by public law

The Federazione Italiana Giuoco Calcio (Italian Football Federation; 'the FIGC') organised a negotiated procedure for the award of a contract for porterage services for accompanying the national football teams and for the purposes of the FIGC store for a period of three years. At the end of that procedure, one of the tenderers invited to participate in it, but to whom the contract was not awarded, brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) to challenge the detailed rules governing the conduct of that procedure. According to that tenderer, the FIGC must be regarded as a body governed by public law and should, therefore, have complied with the rules on publication laid down by the legislation on public procurement.

Since the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) upheld that action and annulled the award of the contract at issue, the FIGC and the entity to which it awarded the contract each brought an appeal against that court's judgment before the Consiglio di Stato (Council of State, Italy). Before that court, they disputed, inter alia, the premiss that the FIGC should be classified as a 'body governed by public law'.

It is in that context that the Consiglio di Stato (Council of State) decided to refer to the Court of Justice for a preliminary ruling two questions concerning the interpretation of the directive on public procurement. [34] That court wishes to clarify whether the FIGC fulfils certain conditions, laid down by

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33 Judgment of the Court of 13 December 2007, *BATIG* (C-374/06, EU:C:2007:788, paragraph 55).

34 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

that directive, in order to be classified as a 'body governed by public law' and therefore required to apply the rules relating to the award of public contracts. More specifically, the referring court asks the Court to interpret, first, the condition that a 'body governed by public law' must have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character [35] and, secondly, the condition that such a body must be subject to management supervision by a public authority. [36]

Findings of the Court

In the first place, the Court observes that, in Italy, the activity of general interest comprised by sport is pursued by each of the national sports federations within the framework of tasks of a public nature expressly assigned to those federations by national legislation, it being specified that several of those tasks appear not to be of an industrial or commercial character. The Court concludes from this that, if a national sports federation, such as the FIGC, does in fact carry out such tasks, that federation may be regarded as having been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

The Court states that that conclusion is not called into question by the fact that the FIGC, first, has the legal form of an association governed by private law and, secondly, pursues, alongside the activities of general interest exhaustively listed in the national rules, other activities which constitute a large part of its overall activities and are self-financed.

In the second place, as regards the question whether a national sports federation must be regarded as being subject to management supervision by a public authority such as, in the present case, the Comitato Olimpico Nazionale Italiano (Italian National Olympic Committee; 'the CONI'), the Court finds that a public authority responsible in essence for laying down sporting rules, verifying that they are properly applied and intervening only as regards the organisation of competitions and Olympic preparation, without regulating the day-to-day organisation and practice of the different sporting disciplines, cannot be regarded, prima facie, as a hierarchical body capable of controlling and directing the management of national sports federations. It adds that the management autonomy conferred on the national sports federations in Italy seems, a priori, to militate against active control on the part of the CONI to the extent that it would be in a position to influence the management of a national sports federation such as the FIGC, particularly in relation to the award of public contracts.

However, the Court makes clear that such a presumption may be rebutted if it is established that the various powers conferred on the CONI in relation to the FIGC have the effect of making the FIGC dependent on the CONI to such an extent that the CONI may influence its decisions with regard to public contracts.

While pointing out that it is for the referring court to ascertain whether there is dependency coupled with such a possibility of influence, the Court provides clarification to guide that court in its decision. In that context, the Court states, inter alia, that, in order to assess the existence of active control by the CONI over the management of the FIGC and of the possibility of influence over the FIGC's decisions with regard to public contracts, the analysis of the CONI's various powers in relation to the FIGC must be the subject of an overall assessment.

Furthermore, the Court finds that, if it were concluded that the CONI exercises supervision over the management of national sports federations, the fact that the latter may, on account of their majority participation in the CONI's main bodies, exert an influence over the CONI's activity, is relevant only if it can be established that each national sports federation, considered individually, is in a position to exert a significant influence over the management supervision exercised by the CONI over it with the

35 Article 2(1)(4)(a) of Directive 2014/24.

36 Article 2(1)(4)(c) of Directive 2014/24.

result that that supervision would be offset and such a federation would thus regain control over its management.

3. CHEMICALS

Judgment of the Court (First Chamber) of 25 February 2021

Case C-389/19 P
Commission v Sweden

Appeal – Regulation (EC) No 1907/2006 – Registration, evaluation, authorisation and restriction of chemicals – European Commission decision authorising certain uses of lead sulfochromate yellow and lead chromate molybdate sulfate red, substances listed in Annex XIV of that regulation – Substances of very high concern – Conditions of authorisation – Assessment of the lack of suitable alternatives

On 19 November 2013, DCC Maastricht BV submitted an application for authorisation to place on the market lead sulfochromate yellow and lead chromate molybdate sulfate red, pigments included in the list of substances of very high concern, for six identical uses of those two substances.

The Commission authorised the uses referred to in the application, attaching restrictions and requirements to that authorisation [37] ('the decision at issue'). Authorisation was subject to the condition, in particular, that users downstream of the authorisation holder must provide the European Chemicals Agency (ECHA) with information on the suitability and availability of alternatives for the uses concerned, giving detailed proof of the need to use the substances in question.

The Kingdom of Sweden brought an action before the General Court seeking annulment of the decision at issue. The General Court annulled that decision, on the ground that the Commission had erred in law in its examination of the lack of availability of alternative substances. That institution brought an appeal before the Court of Justice.

Findings of the Court

As to the substance, the Court of Justice finds that the General Court was correct to hold that the Commission had failed to fulfil its obligation to verify the lack of availability of alternative substances. It notes that the Commission was not entitled to take the view that an alternative substance could be allowed only if substitution did not entail any loss of performance. Such a restriction on acceptance of the alternative substance runs counter to the very purpose of the REACH Regulation, which seeks to promote the substitution of substances of very high concern by other appropriate substances. [38] However, to decide, as a matter of principle, that replacement must not entail any reduction in performance amounts not only to adding a condition not provided for in that regulation, but is likely to prevent that replacement and, consequently, to deprive that regulation of much of its effectiveness.

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37 Article 60(4) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1, and corrigendum OJ 2007 L 136, p. 3; 'the REACH Regulation'). Under that provision, the Commission may grant authorisation for a chemical substance only if it is shown that socio-economic benefits outweigh the risk to human health or the environment arising from the use of the substance and if there are no suitable alternative substances or technologies.

38 Article 55 and recitals 4, 12, 70 and 73 of the REACH Regulation.

By contrast, the Court of Justice criticises the judgment of the General Court in so far as it incorrectly assessed the effects of an immediate annulment of the decision at issue. The REACH Regulation allows the continued use of authorised uses after the expiry of their authorisation until a decision has been taken on the new application for authorisation. Consequently, the annulment of the contested decision with immediate effect recalled into force the previous authorisation for the substances at issue. However, the decision at issue restricted, in certain respects, the use of those substances of very high concern. That is why the General Court's rejection of the application to maintain the effects of the decision at issue increased the risk of serious and irreparable damage to human health and the environment. The Court of Justice therefore sets aside the judgment of the General Court on that point and orders the maintenance of the effects of that decision until the European Commission has adopted a fresh decision on the application for authorisation submitted by DCC Maastricht BV.

VI. COMMON FOREIGN AND SECURITY POLICY : RESTRICTIVE MEASURES

Judgment of the General Court (Fifth Chamber) of 3 February 2021

Case T-258/20
Klymenko v Council

Common foreign and security policy – Restrictive measures taken having regard to the situation in Ukraine – Freezing of funds – List of the persons, entities and bodies covered by the freezing of funds and economic resources – Maintenance of the applicant's name on the list – Obligation of the Council of the European Union to verify that that decision was taken in accordance with the rights of defence and the right to effective judicial protection

Following the suppression of demonstrations in Independence Square in Kiev (Ukraine) in February 2014, the Council of the European Union adopted, on 5 March 2014, Decision 2014/119/CFSP [39] and Regulation No 208/2014 [40] concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine. The purpose of those acts is, inter alia, to freeze the funds of persons identified as responsible for misappropriation of State funds. The applicant had been included on the list of persons and entities covered by those measures on 14 April 2014, on the ground that he was the subject of preliminary investigations in Ukraine for offences related to the misappropriation of State funds and their illegal transfer outside Ukraine. The Council had subsequently extended that listing on several occasions [41], on the ground that the applicant was the subject of criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.

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39 Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26).

40 Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 1).

41 See order of 10 June 2016, *Klymenko* v *Council* (T-494/14, EU:T:2016:360); judgments of 8 November 2017, *Klymenko* v *Council* (T-245/15, not published, EU:T:2017:792); of 11 July 2019, *Klymenko* v *Council* (T-274/18, EU:T:2019:509); of 26 September 2019, *Klymenko* v *Council* (C-11/18 P, not published, EU:C:2019:786); and of 25 June 2020, *Klymenko* v *Council* (T-295/19, EU:T:2020:287).

Following the adoption of Decision 2020/373 [42] and Regulation 2020/370 [43], by which the Council had extended the inclusion of his name on the list at issue on the same grounds against him, the appellant brought an action for annulment of those acts.

The General Court annuls those two acts in so far as they concern the applicant and recalls that it is for the Council, when it bases restrictive measures on decisions of a non-Member State, to ensure itself that, when adopting those decisions by the authorities of the non-Member State in question, it complies with the fundamental rights recognised by the Charter of Fundamental Rights of the European Union ('the Charter').

Findings of the General Court

The Court noted, first of all, that the Courts of the European Union must review the lawfulness of all Union acts in the light of fundamental rights. The Courts of the European Union must ensure in particular that the contested act has a sufficiently solid factual basis. In that regard, although the Council may base the adoption or the maintenance of restrictive measures on a decision of a non-Member State, it must verify that that decision was taken in accordance with the rights of the defence and the right to effective judicial protection in the State in question. The Court also clarified that, while the fact that a non-Member State is among the States which have acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') entails review, by the European Court of Human Rights ('the ECtHR'), of the fundamental rights guaranteed by the ECHR, that fact cannot render that verification requirement superfluous.

In the present case, although, with reference to its duty to state reasons, the Council has set out the reasons why it considered the decision of the Ukrainian authorities to initiate and conduct criminal proceedings for the misappropriation of public funds to have been adopted in accordance with the rights in question, the Court recalls, however, that the duty to state reasons must be distinguished from the examination of the merits of the statement of reasons, which goes to the substantive legality of the contested acts, of which the Court ensures the review.

In that regard, the Court observes, as a preliminary point, that the Council has failed to demonstrate how the judicial decisions mentioned showed that the applicant's rights of defence and right to effective judicial protection in the course of criminal proceedings had been observed. First of all, as regards the decision of the investigating judge of 19 August 2019, the Court notes that the Council should have sought clarification from the Ukrainian authorities as to the information on which the investigating judge based his or her view that the applicant was included on an 'international list of requested persons', in accordance with the Ukrainian Code of Criminal Procedure. Furthermore, as regards the decisions of the investigating judge of 1 March 2017 and 5 October 2018 and the decision of the investigating judge of 8 February 2017, the Court does not take them into account, and observes that they were taken, inter alia, before the adoption of the contested measures. The Court notes, finally and in any event, that not all the decisions referred to are, in themselves, capable of establishing that the decision of the Ukrainian authorities to conduct the criminal proceedings, on which the maintenance of the restrictive measures is based, was taken in accordance with the rights of the defence and the right to effective judicial protection. All the judicial decisions referred to by the Council were made in the context of criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list, and which are merely incidental in the light of those proceedings, since they are either restrictive or procedural in nature.

The Court considers, in the second place, that the Council has also failed to demonstrate to what extent the information available to it concerning, in particular, the process of familiarisation of the

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42 Council Decision (CFSP) 2020/373 of 5 March 2020 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2020 L 71, p. 10).

43 Council Implementing Regulation (EU) 2020/370 of 5 March 2020 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2020 L 71, p. 1).

defence in criminal proceedings and the judicial decisions relating thereto, led it to conclude that the protection of the rights in question was guaranteed, when the Ukrainian criminal proceedings were still at the preliminary investigation stage and that the cases in question, concerning acts allegedly committed between 2011 and 2014, had not yet been brought before a court on the merits. In that regard, the Court refers to the ECHR [44] and to the Charter of Fundamental Rights [45], according to which the principle of the right to effective judicial protection includes, inter alia, the right to a hearing within a reasonable time. The Court states that the ECtHR has already pointed out that infringement of that principle may be established, in particular, where the investigation phase of criminal proceedings is characterised by a certain number of stages of inactivity attributable to the authorities responsible for that investigation. The Court noted that, where a person has been subject to the restrictive measures at issue for several years, on account of the same criminal proceedings brought in the relevant non-Member State, the Council is required to explore in greater detail the question of a possible breach by the authorities of that person's fundamental rights. Therefore, the Council should, at the very least, have set out the reasons why it took the view that those rights had been observed with regard to whether the applicant's case had been heard within a reasonable time.

Consequently, the Court found that it had not been established that the Council had assured itself that the Ukrainian judicial authorities had complied with the applicant's rights of defence and his right to effective judicial protection in the criminal proceedings on which the Council had based its decision. Therefore, it concludes that the Council made an error of assessment in maintaining the applicant's name on the list at issue, such as to entail the annulment of Decision 2020/373 and Regulation 2020/370.

However, the General Court decides, in the light of the provisions of the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union and of Article 264 TFEU, to maintain the effects of Decision 2020/373, as regards the applicant, until the annulment of Implementing Regulation 2020/370 takes effect. In so far as those two acts impose identical measures on the applicant, the existence of a difference between the date of annulment of the implementing regulation and that of the decision could, if not, seriously jeopardise legal certainty.

Nota :

The summaries of the following cases are currently being finalised and will be published in the March 2020 issue of the Monthly Case Law Bulletin:

- Judgment 3 february 2021, T-17/19, EU:T:2021:51
- Judgment 24 february 2021, Braesch e.a./Commission, T-161/18, EU:T:2021:102

44 Article 6(1) of the ECHR.

45 Article 47 of the Charter.