COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

MONTHLY CASE-LAW DIGEST
March 2021

I. VALUES OF THE EUROPEAN UNION AND FUNDAMENTAL RIGHTS

Judgment of the Court (Grand Chamber) of 2 March 2021, A.B. and Others (Nomination des juges à la Cour suprême – Recours), Case C-824/18

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 2 and the second subparagraph of Article 19(1) TEU – Rule of law – Effective judicial protection – Principle of judicial independence – Procedure for appointment to a position as judge at the Sąd Najwyższy (Supreme Court, Poland) – Appointment by the President of the Republic of Poland on the basis of a resolution emanating from the National Council of the Judiciary – Lack of independence of that council – Lack of effectiveness of the judicial remedy available against such a resolution – Judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) repealing the provision on which the referring court's jurisdiction is based – Adoption of legislation declaring the discontinuance of pending cases by operation of law and precluding in the future any judicial remedy in such cases – Article 267 TFEU – Option and/or obligation for national courts to make a reference for a preliminary ruling and to maintain that reference – Article 4(3) TEU – Principle of sincere cooperation - Primacy of EU law – Power to disapply national provisions which do not comply with EU law

By resolutions adopted in August 2018, the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') decided not to present to the President of the Republic of Poland proposals for the appointment of five persons ('the appellants') to positions as judges at the Sąd Najwyższy (Supreme Court, Poland) and to put forward other candidates for those positions. The appellants lodged appeals against these resolutions before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court. Such appeals were governed at that time by the Law on the National Council of the Judiciary ('the Law on the KRS'), as amended by a law of July 2018. Under those rules, it was provided that unless all the participants in a procedure for appointment to a position as judge at the Supreme Court challenged the relevant resolution of the KRS, that resolution became final with respect to the candidate presented for that position, so that the latter could be appointed by the President of the Republic. Moreover, any annulment of such a resolution on appeal of a participant not put forward for appointment could not lead to a fresh assessment of that participant's situation for the purposes of any assignment of the position concerned. In addition, under those rules, such an appeal could not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made. In its initial request for a preliminary ruling, the referring court, taking the view that such rules preclude in practice any effectiveness of the appeal lodged by a participant who has not been put forward for appointment, decided to refer questions to the Court on whether those rules comply with EU law.

After that initial referral, the Law on the KRS was once again amended, in 2019. Pursuant to that reform, it became impossible to lodge appeals against decisions of the KRS concerning the proposal or non-proposal of candidates for appointment to judicial positions at the Supreme Court. Moreover, that reform declared such still pending appeals to be discontinued by operation of law, de facto depriving the referring court of its jurisdiction to rule on that type of appeal and of the possibility of obtaining an answer to the questions that it had referred to the Court for a preliminary ruling. Accordingly, in its complementary request for a preliminary ruling, the referring court referred a question to the Court for a preliminary ruling on whether those new rules are compatible with EU law.

Findings of the Court

In the first place, the Court, sitting as the Grand Chamber, holds, first of all, that both the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and the principle of sincere cooperation laid down in Article 4(3) TEU preclude legislative amendments, such as those, cited above, effected in 2019 in Poland, where it is apparent that they have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such

as those put by the referring court and of precluding any possibility of a national court repeating in the future questions similar to those questions. The Court states, in that regard, that it is for the referring court to assess, taking account of all the relevant factors and, in particular, the context in which the Polish legislature adopted those amendments, whether that is the case here.

Next, the Court considers that the Member States' obligation to provide remedies sufficient to ensure effective legal protection for individuals in the fields covered by EU law, provided for in the second subparagraph of Article 19(1) TEU, may also preclude that same type of legislative amendments. That is the case where it is apparent – which again it is for the referring to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them. Such amendments would then be liable to lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

In reaching that conclusion, the Court recalls that the guarantees of independence and impartiality required under EU law presuppose the existence of rules governing the appointment of judges. Moreover, the Court draws attention to the decisive role of the KRS in the process of appointment to a position as judge at the Supreme Court, since the proposal act that it adopts is an essential condition for a candidate to be appointed subsequently. Thus, the degree of independence enjoyed by the KRS in respect of the Polish legislature and the executive may be relevant in order to ascertain whether the judges which it selects will be capable of meeting the requirements of independence and impartiality. Furthermore, the Court states that the possible absence of any legal remedy in the context of a process of appointment to judicial positions at a national supreme court may prove to be problematic where all the relevant contextual factors characterising such an appointment process in the Member State concerned may give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process. In that regard, the Court specifies that if the referring court were, on the basis of all the relevant factors that it mentioned in its order for reference and, in particular, of the legislative amendments that have recently affected the process of appointing members of the KRS, to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent the doubts referred to above from arising.

Lastly, the Court holds that if the referring court reaches the conclusion that the 2019 legislative amendments were adopted in breach of EU law, the principle of the primacy of that law requires the referring court to disapply those amendments, whether they are of a legislative or constitutional origin, and to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.

In the second place, the Court takes the view that the second subparagraph of Article 19(1) TEU precludes legislative amendments, such as those, cited above, made in 2018 in Poland, where it is apparent that they are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed to external factors, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

It is ultimately for the referring court to rule on whether that is the case here. With regard to the considerations which the referring court will have to take into account in that regard, the Court states that the national provisions concerning the judicial remedy available in the context of a process of appointment to judicial positions at a national supreme court may prove to be problematic in the light of the requirements arising from EU law where they undermine the effectiveness which existed until then. The Court observes, first, that, following the 2018 legislative amendments, the appeal in question is devoid of any real effectiveness and offers no more than an appearance of a judicial remedy. Secondly, the Court states that, in this instance, the contextual factors associated with all the other reforms that have recently affected the Supreme Court and the KRS must also be taken into

account. In that regard, the Court notes, in addition to the doubts previously mentioned in relation to the independence of the KRS, the fact that the 2018 legislative amendments were made very shortly before the KRS in its new composition was called upon to decide on applications, such as the appellants', submitted in order to fill numerous judicial positions at the Supreme Court which have been declared vacant or newly created as a result of the entry into force of various amendments to the Law on the Supreme Court.

Lastly, the Court specifies that, if the referring court reaches the conclusion that the 2018 legislative amendments infringe EU law, it will be for that court, under the principle of the primacy of that law, to disapply those amendments and to apply instead the national provisions previously in force while itself exercising the review envisaged by those latter provisions.

II. INSTITUTIONAL PROVISIONS

Judgment of the Court (First Chamber) of 17 March 2021, An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne, Case C-64/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 288 TFEU – Directive 2001/82/EC – Community code relating to veterinary medicinal products – Articles 58, 59 and 61 – Information to be provided on outer packaging, immediate packaging and the package leaflet for veterinary medicinal products – Obligation to provide information in all the official languages of the Member State in which the product is marketed – National legislation providing that the information may be provided in one or other of the official languages of the Member State – National court hearing an action for a declaration that the Member State had failed correctly to transpose Directive 2001/82/EC and that the competent national authorities must amend the national legislation

UH, an Irish citizen and a native Irish speaker from the Galway Gaeltacht (the Irish-speaking region of Galway, Ireland), found that the information accompanying veterinary medicinal products was written exclusively in the English language. He takes the view that Directive 2001/82 [1] requires that that information be provided in the two official languages of Ireland, namely Irish and English. On 14 November 2016, UH requested that the Ard-Chúirt (High Court, Ireland) declare that Ireland had incorrectly transposed that directive and was under an obligation to amend its legislation accordingly.

The Ard-Chúirt (High Court) found that Irish legislation on the labelling and package leaflet of veterinary medicinal products does not comply with the language requirements laid down by the directive and is, therefore, in contravention of Article 288 TFEU. [2] Nevertheless, that court observed

---

1 Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJ 2001 L 311, p. 1), as amended by Directive 2004/28/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 58). Directive 2001/82 provides, inter alia, that outer packaging or containers of veterinary medicinal products must include mandatory particulars relating to medicinal products, for example the name, strength, form, constituents, manufacturer's batch number, authorisation number, species of animal and dose. Article 58(4) of the Directive provides that those particulars shall appear 'in the language or languages of the country in which they are placed on the market'.

2 Article 288(3) TFEU provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

that Regulation 2019/6, [3] which is due to come into force on 28 January 2022, does allow for the information to be provided on outer packaging, immediate packaging and the package leaflet for veterinary medicinal products to be drafted in Irish or in English. It therefore took the view that the applicant would derive only a limited and temporary benefit from an amendment to Irish law in order to comply with the directive, whereas suppliers and distributors of veterinary medicinal products would be faced with difficulties likely to have serious consequences for animal health and on economic and social circumstances in Ireland.

Having been requested to give a preliminary ruling by that court, the Court holds that Article 288 TFEU must be interpreted as precluding a national court – which, in the context of proceedings laid down in national law for that purpose, finds that the Member State to which it pertains has failed to fulfil its obligation correctly to transpose Directive 2001/82 – from refusing, on the ground that it regards the national legislation as consistent with Regulation 2019/6 which was adopted in order to repeal that directive and will be take effect from 28 January 2022, to make a judicial declaration that that Member State has not correctly transposed that directive and is required to take remedial steps in that regard.

Findings of the Court

The Court recalls that the Member States' obligation to achieve the result envisaged by a directive and their duty to take all the appropriate measures is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. [4] Moreover, the Court finds that Irish law allows individuals to obtain a judicial declaration that Ireland has not correctly transposed an EU directive and is required to transpose that directive, while leaving it open to the national courts to refuse to make such a declaration, on the grounds established by that law.

In the present case, the referring court found that Directive 2001/82 was incorrectly transposed. The Court observes in that regard that the fact that the Irish legislation is already compatible with Regulation 2019/6, which will apply with effect from 28 January 2022, cannot call into question the finding that that legislation is incompatible with EU law before that date or, a fortiori, justify such incompatibility. Until the time of the repeal of Directive 2001/82 by that regulation, its provisions preserve their binding nature. The Court alone may, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the effects of a rule of EU law with regard to a national law that is contrary to it.

Consequently, the Court holds that Article 288 TFEU precludes a national court of a Member State from disregarding the obligation imposed on that Member State to transpose a directive on the ground that that transposition is purportedly disproportionate as it might prove costly or serve no purpose in view of the forthcoming repeal of that directive. It is therefore for the referring court to take all the appropriate general and particular measures to ensure that the result prescribed by that directive is attained and to therefore make the declaration sought.

---

3 Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC (OJ 2019 L 4, p. 43). Article 7(1) of that regulation provides that the compulsory particulars are to be in 'an official language or languages of the Member State where the veterinary medicinal product is made available on the market'.

4 In that regard, it should be recalled that the second subparagraph of Article 4(3) TEU provides that 'the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

III. LITIGATION OF THE UNION

Order of the General Court (Second Chamber) of 5 March 2021, Aquind and Others v Commission, Case T-885/19

Link to the complete text of the judgment

Action for annulment – Energy – Trans-European energy infrastructure – Regulation (EU) No 347/2013 – Delegation of power to the Commission – Article 290 TFEU – Delegated act amending the list of projects of common interest of the Union – Nature of the act during the period within which the Parliament and the Council may express objections – Act not open to challenge – Manifest inadmissibility

The applicants, Aquind Ltd, Aquind Energy Sàrl and Aquind SAS are the promoters of a proposed electrical interconnector linking the electricity transmission systems of the United Kingdom and France which was included in the Union list of projects of common interest by Delegated Regulation 2018/540, [5] and was considered to be a fundamental project in infrastructure necessary for the completion of the internal energy market.

Since that Union list of projects of common interest must be drawn up every two years, the list established by Delegated Regulation 2018/540 was replaced by that established by Delegated Regulation 2020/389. [6] The new list in the annex to the contested regulation lists the proposed Aquind Interconnector as one of the projects which are no longer considered to be projects of common interest of the European Union. The applicants therefore brought an action seeking annulment of the contested regulation.

By its order, the General Court rules on whether, during the objections stage provided for in Article 290 TFEU, [7] the contested delegated regulation is an act open to challenge, and holds that that action is manifestly inadmissible.

Findings of the General Court

First of all, the Court recalls that the contested regulation was adopted by the Commission pursuant to a delegation of power granted to it by the legislature pursuant to Article 290 TFEU allowing it to adopt and revise, on the basis of the existing regional lists, [8] the Union list of projects of common interest in respect of trans-European strategic energy infrastructure. Furthermore, the Court points out that as soon as it adopts a delegated act, the Commission is to notify it simultaneously to the Parliament and the Council [9] so that it may enter into force once the objections stage, of a maximum duration of four months, has been observed. [10] In the present case, the Court finds that, at the time

---

5 Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2018 L 90, p. 38).

6 Commission Delegated Regulation (EU) 2020/389 of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2020 L 74, p. 1 ; 'the contested regulation').

7 Article 290(1) TFEU provides that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The same provision adds that the objectives, content, scope and duration of the delegation of power are to be explicitly defined in the legislative acts. Article 290(2) TFEU states that legislative acts are explicitly to lay down the conditions to which the delegation is subject, those conditions being that (i) the Parliament or the Council may decide to revoke the delegation and (ii) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

8 Article 3(3) and (4), second subparagraph, of Regulation No 347/2013.

9 Article 16(4) of Regulation No 347/2013.

10 Article 16(5) of Regulation No 347/2013.

when the action for annulment was brought, the objections stage during which the Parliament or the Council could oppose the entry into force of the contested regulation had not been completed.

The Court notes that, in Regulation No 347/2013, the legislature made use of the power provided for in Article 290(2) TFEU to make the delegation of power to the Commission subject to the condition that the objections stage, of a maximum duration of four months, be completed. Thus, the Commission's power to adopt, pursuant to that regulation, a delegated act forming part of the legal order and producing binding legal effects requires the completion of the entire procedure in order to ensure the proper implementation of the delegation of power and, therefore, the fulfilment of the condition laid down by that regulation.

Since that condition was not satisfied at the time when the action for annulment was brought, it follows, according to the Court, that the contested regulation could not be regarded as definitive at the date on which that action was brought and could not be regarded as an act producing binding legal effects capable of affecting the applicants' interests. Accordingly, the contested regulation did not constitute an act open to challenge on that date.

In that context, the Court, first, points out that to allow an action for annulment brought against the contested regulation would be incompatible with the systems of division of powers between the institutions of the European Union, such as the Parliament and the Council, on the one hand, and the EU Courts on the other, and with the requirements of the sound administration of justice and the proper conduct of the administrative procedure. Second, the Court finds that the absence of amendments to the initial act during the objections stage does not alter the nature of that act, and therefore does not allow it to be considered that that initial act corresponds to the definitive act that was adopted and entered into force at the end of the legislative process established by Regulation No 347/2013, pursuant to Article 290 TFEU.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 10 March 2021, ViaSat v Commission, Case T-245/17

Link to the complete text of the judgment

Action for failure to act and for annulment – Electronic communications networks and services – Harmonised use of the 2 GHz frequency spectrum – Pan-European systems providing mobile satellite services (MSS) – Decision 2007/98/EC – Harmonised operator selection procedure – Authorisations granted to the selected operators – Decision No 626/2008/EC – Request for action to be taken – No formal notice – Adoption of a position by the Commission – Inadmissibility – Refusal to take action – Measure not actionable – Inadmissibility – Powers of the Commission

By a call for applications, [11] the European Commission launched a procedure for selecting operators of pan-European systems providing mobile satellite services (MSS) [12] in the 2 GHz frequency band, for which the conditions for the use and availability were harmonised by a Commission Decision. [13] On completion of that procedure, two applicants were selected, namely Inmarsat Ventures Ltd ('Inmarsat') and Solaris Mobile Ltd (now EchoStar Mobile Ltd).

11 OJ 2008 C 201, p. 4.

12 Decision No 626/2008/EC of the European Parliament and of the Council of 30 June 2008 on the selection and authorisation of systems providing mobile satellite services (MSS) (OJ 2008 L 172, p. 15 ; 'the MSS Decision'), Title II.

13 Commission Decision 2007/98/EC of 14 February 2007 on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services (OJ 2007 L 43, p. 32).

Inmarsat applied for the necessary authorisations from the national regulatory authorities ('NRAs') to operate the European Aviation Network system (the 'EAN') using the frequency granted to it in the Selection Decision.

On 2 August 2016, the applicant, ViaSat, Inc., sent a letter to the Commission requesting that it take action to prevent the NRAs from granting the authorisations at issue to Inmarsat without a new call for applications under a joint selection procedure. The applicant, which did not participate in the selection procedure, wished to provide, inter alia, satellite connectivity services, through a joint venture set up in 2016 with Eutelsat SA, throughout the European Union and on the main air routes between North America and Europe.

On 31 October 2016, the Commission responded by email to the applicant's letter, stating that no decision had been taken on an application for authorisation of the use of the 2 GHz frequency band for MSS by one of the selected operators, since that question was, in any case, a matter to be dealt with by the competent national authorities.

Not satisfied with the Commission's reply, the applicant sent the Commission a letter on 22 December 2016 requesting that it define its position in response to the invitation referred to in its letter of 2 August 2016, in order to fulfil its obligation to act. [14]

The Commission replied to that letter by letters of 14 and 21 February 2017.

Still dissatisfied with the Commission's replies, the applicant asked the General Court to declare that the Commission had failed to act [15] and, in the alternative, to annul all or part of the Commission's decision contained in those letters.

Ruling in extended composition, the General Court dismissed the applicant's action in its entirety.

Findings of the General Court

As regards the admissibility of the application for a declaration of failure to act, the Court points out that it is clear from the Commission's letters that the latter took the view that, as it did not have the power to do so, it could not take any action following the applicant's request for action to be taken to prevent NRAs from granting authorisations to Inmarsat for the use of the 2 GHz frequency band for the operation of the EAN in order to preserve the internal market resulting from the harmonisation of the use of that frequency band for MSS. This is a refusal to act which constitutes the definition of a position which put an end to the alleged failure to act before the action was brought. Consequently, the Court dismisses the application for a declaration of failure to act as inadmissible.

As regards the admissibility of the application for annulment of the decision contained in the letters in question, the Court recalls that, in order to assess whether the application for annulment concerned is admissible, it is necessary to examine whether the act which the Commission was asked to adopt would constitute in itself an act the legality of which would be actionable in the General Court. That question is related to the question whether the Commission has any powers to adopt such a measure.

Whether the Commission has express powers

First, the Court notes that the regulatory framework for radio spectrum management [16] and MSS provides for a clear allocation of powers between the Commission and the Member States. In that

---

14 On the basis of Article 17 TFEU, the third subparagraph of Article 9(2) and recital 22 of the MSS Decision ; of recitals 24 and 35 and of Article 5(2) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21) ; of Article 19 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

15 On the basis of Article 265 TFEU.

16 Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European [Union] (Radio Spectrum Decision) (OJ 2002 L 108, p. 1).

regard, while the Commission has powers to determine the availability and purpose of using certain frequency bands, and to select MSS operators in the 2 GHz frequency band whose purpose of use for MSS has been harmonised, the NRAs have no discretion when granting authorisations, so that they cannot refuse authorisation if an application is lodged by an operator selected by the Commission. The Court also observes that the power to monitor compliance with the common conditions, to which authorisations are subject, [17] and with the commitments entered into by the operator in question in the context of the selection procedure, [18] as well as the power to impose penalties for any infringements were conferred on the Member States, with the Commission having only coordinating powers in that regard. [19]

As regards the Commission's powers in the context of the review and enforcement procedure, the Court points out that, whenever necessary, the Commission should be able to raise enforcement issues relating to the fulfilment by operators with the common conditions for authorisation by issuing a recommendation or an opinion to the competent national authorities. [20]

Consequently, the MSS Decision does not confer on the Commission express powers to assess the compatibility of the EAN with the Selection Decision or with the regulatory framework applicable to MSS, and confers no express powers thereafter to adopt an actionable measure preventing the NRAs from granting authorisations to Inmarsat or compelling them to withdraw the authorisations granted.

Secondly, as regards the Commission's powers under the Framework Directive, the Court notes that the nature of the decisions which the Commission has the power to adopt [21] and are binding in nature, is limited. Such decisions concern only the definition of a harmonised or coordinated approach for dealing with the issues set out in the relevant provision. [22] Those matters do not include that of a harmonised approach to the authorisations to be granted to an operator selected under the common procedure once the use of the frequency has been harmonised.

Third, as regards the powers of the Commission to change the purpose of use of the 2 GHz frequency band, the Court observes that the Commission could, on that basis of the Harmonisation Decision, [23] adopt a new decision providing for harmonisation of the conditions of use and availability of the 2 GHz frequency band for purposes other than the operation of systems providing MSS, thereby repealing the Harmonisation Decision now in force. Furthermore, the Harmonisation Decision [24] confers on the Commission powers to revise it. Although such an act of the Commission could produce the effects sought by the applicant, the latter is not, however, entitled to seek the annulment of such an act because it does not have standing to bring proceedings.

Finally, as regards the Commission's powers under the Authorisation Directive, the Court points out that the powers of the NRAs in relation to authorisations are principally those provided for by the MSS Decision, and not those provided for in the Authorisation Directive. Consequently, any Commission powers in respect of the NRAs' application of the system of authorisations thus provided for fall within

---

17 Article 7(2) and Article 8(3) of the MSS Decision.

18 Article 2(2)(a), Article 7(1) and (2)(a) and (c) and Article 8(3)(a) of the MSS Decision.

19 First and second subparagraphs of Article 9(2), and Article 10 of the MSS Decision.

20 Recital 22 and third subparagraph of Article 9(2) of the MSS Decision.

21 Article 19(1) of the Framework Directive.

22 Article 19(3) of the Framework Directive.

23 Commission Decision 2007/98/EC of 14 February 2007 on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services (OJ 2007 L 43, p. 32 ; 'the Harmonisation Decision').

24 Recital 12 and Article 4 of the Harmonisation Decision.

the scope of that decision and consist in the coordination of the procedures for monitoring and enforcement of the common conditions to which the authorisations are subject. [25]

Whether the Commission has implicit powers

In that connection, the Court considers that the existence of an implicit power, which constitutes a derogation from the principle of conferral of powers, [26] must be appraised strictly. Thus, it is only exceptionally that such implicit powers are recognised by the case-law and, in order to be so recognised, they must be necessary in order to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue. The Court points out that the Commission cannot regard itself as having been granted implicit powers in respect of authorisations without calling into question those expressly conferred by the legislature on the Member States, nor as having been granted implicit powers going beyond the coordinating powers expressly conferred on it in respect of the enforcement measures.

Consequently, the Court dismisses the present action in its entirety.

25 Article 9 of the MSS Decision.

26 Article 5(1) TEU.

IV. FREEDOM OF MOVEMENT – COMPANY LAW

Judgment of the Court (Fifth Chamber) of 24 March 2021, A, Case C-950/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Company law – Directive 2006/43/EC – Statutory audits of annual accounts and consolidated accounts – Article 22a(1)(a) – Recruitment of a statutory auditor by an audited entity – Waiting period – Prohibition on taking up a key management position within the audited entity – Infringement – Gravity and duration of the infringement – Expression 'taking up a position' – Scope – Conclusion of an employment contract with the audited entity – Independence of statutory auditors – External appearance

A, a statutory auditor approved by the Finnish Chamber of Commerce, carried out statutory audits of a company's accounts ('the audited company'), in his capacity as key audit partner, until 12 July 2018 on behalf of an audit firm. After completing, on 5 February 2018, the statutory audit of that company's accounts for the financial year 2017, on 12 July 2018 A concluded a contract of employment with the audited company. According to a stock exchange announcement published by the audited company, that company appointed A as Finance Director and member of the board of directors and that A would commence his employment in February 2019. On 31 August 2018, A ceased to hold office in the audit firm which employed him.

Under the Finnish provision transposing Article 22a(1) of Directive 2006/43, [27] which lays down a number of prohibitions in order to guarantee the independence of statutory auditors, an auditor or key audit partner who carries out the statutory audit of accounts on behalf of an audit firm is not permitted to take up a key management position in the audited entity before the expiry of a period of at least one year from the time of the statutory audit of accounts, or two years where the audited entity is a public-interest body.

The competent national authority [28] responsible for the statutory audit of accounts imposed a fine of EUR 50 000 on A for failure to comply with the two-year waiting period laid down by national law in relation to public-interest bodies. It submits that that period should be calculated from 12 July 2018, the date on which A ceased to hold office as a key audit partner in the context of the audit of the accounts of the audited company. For the sole reason that he had concluded a contract of employment, A ought to be regarded as having taken up a key management position in that company on the same day.

On 14 December 2018 another audit firm took over the statutory auditing of the accounts of the audited company. On 5 February 2019, after that other audit firm had completed the statutory audit of the latter's accounts for the financial year 2018, A began to perform his duties within that company as financial director and member of the board of directors.

A does not deny that he failed to comply with the two-year waiting period, but seeks to obtain a reduction of the fine imposed on him by the competent national authority on account of that infringement. He brought an action before the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) claiming that the authority's decision was based on a misinterpretation of the gravity

---

27 Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ 2006 L 157, p. 87), as amended by Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 158, p. 196) ('Directive 2006/43').

28 The Patentti- ja rekisterihallituksen tilintarkastuslautakunta (the Audit Committee of the Patent and Registration Office, Finland).

and duration of the offence. He argues that the expression 'taking up a position', referred to in Article 22a(1)(a) of Directive 2006/43, refers to the actual commencement of employment. A key factor in the assessment to be carried out should be the ability of the person concerned to influence the annual accounts of his or her new employer. Therefore, A considers that he took up the position in question only from the date on which he commenced his duties in the audited company as financial director, in February 2019.

In those circumstances, the national court stayed the proceedings in order to ask the Court to interpret Article 22a(1)(a) of Directive 2006/43. It asks, essentially, whether a statutory auditor, such as a key audit partner, appointed by an audit firm in the context of a statutory audit of accounts must be regarded as 'taking up a key management position' in an audited entity, within the meaning of that provision, where he or she concludes a contract of employment with the audited entity, or only from the time he or she actually starts to perform his or her duties.

Findings of the Court

Noting that there is no dispute as to the infringement of the waiting period during which it is not permitted to take up a key management position in the audited entity, the Court observes that, by its questions, the referring court wishes to determine the degree of gravity and duration of that infringement, by seeking clarifications as to the scope of the expression 'taking up a position', used in Article 22a(1)(a) of Directive 2006/43, in order to determine the time when that infringement must be regarded as having been committed.

Pointing out the existence of a disparity between the various language versions of Article 22a(1)(a) of Directive 2006/43, the Court examines the context of that provision, the objectives pursued by it and the legislation of which it forms part.

The Court thus observes that that provision is intended to strengthen the independence of statutory auditors in the performance of their duties. It points out, in that regard, that the requirement of independence has not only an internal aspect, in that it seeks to guarantee the reliability of the audit carried out by the auditor to the audited entity, but also an external aspect, in that it seeks to maintain third parties' confidence in the reliability of that audit, in particular with a view to ensuring the proper functioning of the markets for investors. The statutory audits of the accounts must therefore not only be reliable, but it must also be perceived as such by third parties.

It is from that perspective, in part external, that the EU legislature prohibited a statutory auditor from holding positions at the management level in an audited entity, not only during the period covered by the audit report, but also during an appropriate period after ceasing to hold office. The Court finds that the very existence of a contractual relationship between such an auditor and an audited entity may give rise to a conflict of interests or may give the appearance of such. Due to the proximity which it appears to create between the parties, that relationship may be perceived by third parties as being capable of influencing or having influenced the audit which was carried out and, therefore, undermine their confidence in the reliability of the result of that audit.

Even where an auditor has ceased to perform his or her duties in the context of a statutory audit of the accounts of a specific entity, the negotiation or conclusion of a contractual relationship between the auditor and that entity may be sufficient to give rise retrospectively to doubts in the mind of third parties as to the quality and integrity of the audit carried out before the cessation of such duties. Consequently, a statutory auditor must be regarded as taking up a management position in an audited entity as soon as he or she concludes a contract of employment with that entity, even if he or she has not yet begun actually to perform his or her duties.

V. TAX PROVISIONS

Judgment of the Court (Third Chamber) of 4 March 2021, Frenetikexito, Case C-581/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Supplies subject to VAT – Exemptions – Article 132(1)(c) – Provision of medical care in the exercise of the medical and paramedical professions – Nutrition monitoring and advice – Sport, physical well-being and fitness activities – Concepts of a single complex supply, a supply ancillary to the main supply, and independent supplies – Criteria

Frenetikexito is a commercial company which manages and operates sports facilities, in Portugal, in the management and operation of sports facilities, physical well-being and fitness activities and activities entailing nutrition monitoring and advice. In 2014 and 2015, it provided nutrition monitoring services on its premises by means of a qualified nutritionist certified for that purpose. Value added tax (VAT) was not invoiced for those services.

Frenetikexito offered various programmes in its establishments, some of which included only physical well-being and fitness services, while others also included nutrition monitoring. Each customer could choose the desired programme and make use, or not, of all the services made available in the context of the programme selected; the nutrition monitoring service was thus invoiced, irrespective of whether or not the customer had benefited from it. In addition, it was possible to sign up for that service separately from any other service, in return for payment of a certain amount.

In its invoices, Frenetikexito drew a distinction between amounts relating to physical well-being and fitness services and those relating to the nutrition monitoring service. There was no correspondence between the nutrition monitoring services invoiced and the nutrition consultations.

During an inspection, the tax authority found that, for the tax years in question, Frenetikexito's customers had paid for the nutrition monitoring service even where they did not benefit from it. Taking the view, therefore, that the supply of that service was ancillary to that of the physical well-being and fitness service, that authority applied the tax treatment of the principal supply to that supply and issued an additional VAT assessment together with the corresponding compensatory interest. Since those sums were not paid, enforcement procedures were initiated for their recovery. Nevertheless, considering that the nutrition monitoring services were independent of the physical well-being and fitness services, Frenetikexito brought an action before the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) seeking a declaration that the additional assessment in question was unlawful.

In those circumstances, the referring court decided to ask the Court about the interpretation of Article 132(1)(c) of Directive 2006/112, [29] read in conjunction with Article 2(1)(c) of that directive. Under that provision, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT. By way of exception to that principle, under Article 132(1)(c) the VAT directive, Member States are to exempt 'the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned'.

In its judgment, the Court examined whether a nutrition monitoring service, supplied in circumstances such as those at issue in the main proceedings, must be regarded as a 'supply ancillary to the main supply', subject to VAT, or whether, on the contrary, it constitutes a distinct and

29 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

independent supply of services and, if so, whether and under what conditions such a supply may be exempt from VAT.

Findings of the Court

Before answering the question whether a nutrition monitoring service supplied by a certified and authorised professional in sports facilities, and potentially in the context of programmes that also include physical well-being and fitness services, constitutes an independent supply of services, the Court examines, first of all, whether that service may fall within the scope of the exemption provided for in Article 132(1)(c) of the VAT Directive.

In that regard, the Court notes that 'the provision of medical care' within the meaning of that provision must necessarily have a therapeutic purpose, that is to say, it must be carried out with the aim of protecting, including maintaining or restoring, the health of persons. In order to be covered by the abovementioned exemption, a supply must therefore satisfy two conditions: it must have a therapeutic purpose and take place in the exercise of the medical and paramedical professions as defined by the Member State concerned.

As regards the second condition, it is necessary to determine whether a nutrition monitoring service, such as that at issue in the main proceedings, is defined by the law of the Member State concerned as being supplied in the exercise of a medical or paramedical profession. The Court observes that, in the present case, the service in question was carried out by a person qualified and authorised to carry out paramedical activities as defined by the Member State concerned.

If that is indeed the case, it is necessary to examine the purpose of the supply in question, which corresponds to the first condition laid down in Article 132(1)(c) of the VAT Directive. In so far as the exemptions provided for in Article 132 of that directive form part of a chapter entitled 'Exemptions for certain activities in the public interest', an activity cannot be exempted if it does not meet that objective in the public interest.

In that regard, a nutrition monitoring service provided in a sports facility may, like the sporting practice itself, help to prevent certain illnesses, such as obesity. Such a service therefore, in principle, has a health purpose, but not necessarily a therapeutic one. In the absence of any indication that it is supplied for that purpose, the nutrition monitoring in question does not therefore satisfy the criterion of activity in the public interest, which is common to all the exemptions provided for in Article 132 of the VAT Directive. Consequently, it does not fall within the exemption provided for in Article 132(1)(c) of that directive, with the result that it is, in principle, subject to VAT.

The Court then examines whether the nutrition monitoring service is independent of the physical well-being and fitness services, which is relevant for the purpose of determining the respective tax treatment of those services. It points out that, where an economic transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which that transaction takes place in order to determine whether it gives rise to one or more supplies. As a general rule, each supply must be regarded as a distinct and independent supply. By way of exception to that rule, acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split, are regarded as a single complex supply. There is another exception where certain elements are to be regarded as constituting the main supply, while other elements are to be regarded as ancillary supplies which share the tax treatment of the main supply. The relevant criteria in that regard are the absence of a distinct purpose of the supply from the perspective of the average consumer and the taking into account of the respective value of each of the supplies making up the economic transaction.

Subject to verification by the referring court, none of those exceptions is applicable in the present case. First, supplies such as those at issue in the main proceedings, which are not inextricably linked, do not constitute a single complex supply. Second, dietary monitoring has, for the average consumer, an autonomous purpose, of a health and aesthetic nature, compared with physical well-being and fitness services, the purpose of which relates to sport. Furthermore, the invoicing of those supplies, mentioned by the referring court, shows that 40% of the overall monthly fee is attributable to the nutrition advice service, with the result that dietary monitoring services such as those at issue in the main proceedings cannot be regarded as ancillary to the main services, consisting of physical well-

being and fitness services. Therefore, such supplies must be regarded as distinct and independent of one another for the purposes of the application of Article 2(1)(c) of the VAT Directive.

VI. TRANSPORT

Judgment of the Court (Grand Chamber) of 23 March 2021, Airhelp, Case C-28/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Article 5(3) – Common rules on compensation and assistance to passengers in the event of cancellation or long delay of flights – Exemption from the obligation to pay compensation – Concept of 'extraordinary circumstances' – Pilots' strike organised within a legal framework – Circumstances that are 'internal' and 'external' to the operating air carrier's activity – Articles 16, 17 and 28 of the Charter of Fundamental Rights of the European Union – No impairment of the air carrier's freedom to conduct a business, right to property and right of negotiation

A passenger had booked a seat on a flight from Malmö to Stockholm (Sweden) that was to be operated by Scandinavian Airlines System Denmark – Norway – Sweden ('SAS') on 29 April 2019. The flight was cancelled on the day of the flight because of a strike by SAS's pilots in Denmark, Sweden and Norway ('the strike at issue').

Following the failure of negotiations, conducted by the trade unions representing SAS pilots, that had the objective of concluding a new collective agreement with the airline, the trade unions had called on their members to strike. That strike lasted seven days and resulted in SAS cancelling a number of flights, including the flight booked by the passenger concerned.

Airhelp, to which that passenger assigned any rights that he had vis-à-vis SAS, brought proceedings before the Attunda tingsrätt (Attunda District Court, Sweden), claiming the compensation laid down by the Air Passenger Rights Regulation [30] for cancellation of a flight. In this instance, SAS had refused to pay the compensation, taking the view that the strike by its pilots constituted an 'extraordinary circumstance' within the meaning of that regulation [31] since it was not inherent in the normal exercise of its activity of providing air transport services and was beyond its actual control. Airhelp took the view that the strike did not constitute an 'extraordinary circumstance' of that kind since industrial action, such as strikes, which is liable to take place when collective agreements are negotiated and concluded, falls within the ordinary course of business of an airline.

The Attunda District Court expressed doubts as to whether the concept of 'extraordinary circumstances' within the meaning of the Air Passenger Rights Regulation encompasses a strike which is announced by workers' organisations following the giving of notice, is lawfully initiated and is

30 Article 5(1)(c), read in conjunction with Article 7(1)(a), of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1; 'the Air Passenger Rights Regulation').

31 Under Article 5(3) of the Air Passenger Rights Regulation, an operating air carrier is not to be obliged to pay compensation in accordance with Article 7 of the regulation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

intended in particular to secure pay increases. Under Swedish law, notice of a strike does not have to be lodged until one week before the strike begins.

Findings of the Court

By its judgment, delivered by the Grand Chamber, the Court holds that strike action which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the conditions laid down by national legislation, in particular the notice period imposed by it, which is intended to assert the demands of that carrier's workers and which is followed by a category of staff essential for operating a flight does not fall within the concept of an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

First of all, the Court points out that the concept of 'extraordinary circumstances' in the Air Passenger Rights Regulation refers to events which meet two cumulative conditions, the fulfilment of which must be assessed on a case-by-case basis, namely, first, they must not be inherent, by their nature or origin, in the normal exercise of an air carrier's activity and, second, they must be beyond its actual control. [32] It also explains that that concept must be interpreted strictly, in view of the fact that, first, the regulation has the objective of ensuring a high level of protection for air passengers and, second, the exemption from the obligation laid down by the regulation to pay compensation constitutes a derogation from the principle that air passengers have the right to compensation.

Next, the Court examines whether a strike which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the notice period imposed by national legislation, which is intended to assert the demands of that carrier's workers and which is followed by one or more categories of staff whose presence is necessary to operate a flight is capable of constituting an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

As regards, in the first place, the question whether the strike at issue might be categorised as an event which is not inherent in the normal exercise of an air carrier's activity, the Court observes that the right to take collective action, including strike action, is a fundamental right, laid down in Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'). In that regard, the Court states that a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity, irrespective of the particular features of the labour market concerned or of the national legislation applicable as regards implementation of that fundamental right. That interpretation must also apply where the employer is an operating air carrier, as measures relating to the working conditions and remuneration of the staff of such a carrier fall within the normal management of its activities. Therefore, a strike whose objective is limited to obtaining from an air transport undertaking an increase in the pilots' salary, a change in their work schedules and greater predictability as regards working hours constitutes an event that is inherent in the normal exercise of that undertaking's activity, in particular where such a strike is organised within a legal framework.

So far as concerns, in the second place, the question whether the strike at issue could be entirely beyond an air carrier's actual control, the Court points out, first, that, since the right to strike is a right of workers guaranteed by the Charter, a strike's launch is foreseeable for any employer, in particular where notice of the strike is given.

Second, since a strike is foreseeable for the employer, it retains control over events inasmuch as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences. In that respect, like any employer, an operating air carrier faced with a strike by its

---

32 See, to that effect, judgments of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 23); of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraph 36); of 17 April 2018, *Krüsemann and Others* (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraphs 32 and 34); and of 11 June 2020, *Transportes Aéros Portugueses* (C-74/19, EU:C:2020:460, paragraph 37).

staff that is founded on demands relating to working and remuneration conditions cannot claim that it does not have any control over that action.

Therefore, according to the Court, a strike by the staff of an operating air carrier that is connected to demands relating to the employment relationship between the carrier and its staff that are capable of being dealt with through management-labour dialogue within the undertaking, including pay negotiations, does not fall within the concept of an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

Third, the Court notes that, unlike events whose origin is 'internal' to the operating air carrier, events whose origin is 'external' are not controlled by that carrier, because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity. Thus, it points out that the reference in the Air Passenger Rights Regulation [33] to extraordinary circumstances that may, in particular, occur in the case of strikes that affect the operation of an operating air carrier must be understood as relating to strikes external to the activity of the air carrier concerned, such as strikes by air traffic controllers or airport staff. On the other hand, a strike set in motion and observed by members of the relevant air transport undertaking's own staff is an event 'internal' to that undertaking, including in the case of a strike set in motion upon a call by trade unions, since they are acting in the interest of that undertaking's workers. However, the Court states that, if such a strike originates from demands which only the public authorities can satisfy, it is capable of constituting an 'extraordinary circumstance' since it is beyond the air carrier's actual control.

Fourth, the Court holds that the air carrier's freedom to conduct a business, its property rights [34] and its right of negotiation [35] are not impaired by not categorising the strike at issue as an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation. As regards the right of negotiation, the fact that an air carrier, because of a strike by members of its staff that is organised within a legal framework, is faced with the risk of having to pay the compensation due to passengers for flight cancellation does not compel it to accept, without discussion, the strikers' demands in their entirety. The air carrier remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners. So far as concerns an air carrier's freedom to conduct a business and right to property, the Court points out that these are not absolute rights and that the importance of the objective of consumer protection, [36] including the protection of air passengers, may therefore justify even substantial negative economic consequences for certain economic operators.

33 Recital 14 of the Air Passenger Rights Regulation.

34 Guaranteed by Articles 16 and 17 of the Charter.

35 Guaranteed by Article 28 of the Charter.

36 As provided for by Article 169 TFEU and Article 38 of the Charter.

VII. COMPETITION

1. ABUSE OF DOMINANT POSITION

Judgment of the Court (Third Chamber) of 25 March 2021, Deutsche Telekom v Commission, Case C-152/19 P

Link to the complete text of the judgment

Appeal – Competition – Article 102 TFEU – Abuse of dominant position – Slovak market for broadband internet access services – Regulatory obligation on the part of operators with significant market power to grant access to the local loop – Conditions laid down by the incumbent operator for unbundled access by other operators to the local loop – Indispensability of the access – Imputability of a subsidiary's conduct to the parent company – Rights of the defence

and

Judgment of the Court (Third Chamber) of 25 March 2021, Slovak Telekom v Commission, Case C-165/19 P

Link to the complete text of the judgment

Appeal – Competition – Article 102 TFEU – Abuse of dominant position – Slovak market for broadband internet access services – Regulatory obligation on the part of operators with significant market power to grant access to the local loop – Conditions laid down by the incumbent operator for unbundled access by other operators to the local loop – Indispensability of the access – Margin squeeze – Costs – Competitor at least as efficient as the dominant undertaking – Rights of the defence

Slovak Telekom a.s. ('ST') offers, in its capacity as the incumbent telecommunications operator in Slovakia, broadband services on its fixed copper and fibre optic networks. ST's networks include also the 'local loop', namely, the physical lines which connect the subscriber's telephone jack with the main distribution frame of the fixed telephone network.

Following an analysis of its domestic market, the Slovak national regulatory authority for telecommunications adopted, on 8 March 2005, a decision designating ST as an operator with significant market power on the wholesale market for unbundled access to the local loop. Consequently, ST was obliged, under the EU regulatory framework, [37] to grant alternative operators access to the local loop owned by it, thus allowing new entrants to use that infrastructure with a view to offering their own services to end users.

On 15 October 2014, the Commission adopted a decision in which it found that ST, and its parent company Deutsche Telekom AG ('DT'), had abused its dominant position on the Slovak market for broadband internet services, by limiting the access of alternative operators to its local loop between 2005 and 2010 ('the decision at issue'). The Commission found, more specifically, that ST, and DT, had infringed Article 102 TFEU by setting unfair terms and conditions in its reference offer concerning

37 This includes Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33).

unbundled access to its local loop and by applying unfair tariffs which did not allow an equally efficient competitor to replicate the retail services offered by ST without incurring a loss. As a result, the Commission imposed a fine of EUR 38 838 000 on ST and DT, jointly and severally, and a fine of EUR 31 070 000 on DT.

By judgments of 13 December 2018, *Deutsche Telekom* v *Commission* [38] and *Slovak Telekom* v *Commission*, [39] the General Court partially annulled the decision at issue, setting the fine for which ST and DT had been found jointly and severally liable at EUR 38 061 963 and the fine for which DT alone had been found liable at EUR 19 030 981.

The appeals lodged by ST and DT are dismissed by the Court of Justice which clarifies, in that context, the scope of its judgment in *Bronner* [40] as regards the classification as abusive, for the purposes of Article 102 TFEU, of a refusal of access to infrastructures owned by a dominant undertaking. In that judgment, the Court of Justice had set a higher threshold for a finding that a practice consisting in a refusal, on the part of a dominant undertaking, to make available infrastructure it owns to competing undertakings, is abusive.

Assessment of the Court of Justice

The Court of Justice emphasises, first, that any undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the infrastructure that it has developed for its own needs. Imposing on a dominant undertaking, as a result of its abusive refusal to conclude a contract, an obligation to conclude a contract with a competing undertaking with a view to allowing that competing undertaking access to its own infrastructure is therefore especially detrimental to the freedom of contract and the right to property of the dominant undertaking. Thus, where a dominant undertaking refuses to give access to its infrastructure, the decision to oblige it to grant its competitors access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.

The Court notes, next, that the application of the conditions laid down by the Court of Justice in the judgment in *Bronner*, and in particular the third condition, allows it to be determined whether a dominant undertaking has a genuinely tight grip on the market by virtue of its infrastructure. In accordance with that judgment, a dominant undertaking may be forced to give access to an infrastructure that it has developed for the needs of its own business only where, first, refusing that access is likely to eliminate all competition on the part of the competing undertaking requesting access, second, that refusal cannot be objectively justified, and third, such access is indispensable to the business of the competing undertaking, that is to say, there is no actual or potential substitute for that infrastructure.

By contrast, where a dominant undertaking gives access to its infrastructure but makes that access subject to unfair conditions, the conditions laid down by the Court of Justice in the judgment in *Bronner* do not apply. While such practices can be abusive, in that they are able to give rise to anticompetitive effects on the markets concerned, they cannot be equated to a refusal by the dominant undertaking to give access to its infrastructure, since the competition authorities will not be able to force that undertaking to give access to its infrastructure, as that access has already been granted. The measures to be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved it for the needs of its own business.

In view of the EU regulatory framework, which requires ST to give competing undertakings access to its local loop, the Court of Justice recalls that that Slovak telecommunications operator could not and

---

38 T-827/14, EU:T:2018:930.

39 T-851/14, EU:T:2018:929.

40 Judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569).

did not actually refuse to give access to that local loop. On the contrary, it was pursuant to its decision-making autonomy in respect of the configuration of that access that ST set the terms and conditions for access called into question in the decision at issue. Since those terms and conditions did not constitute a refusal of access comparable to the one at issue in the judgment in *Bronner*, the conditions set out by the Court of Justice in that regard do not apply in the present case. Contrary to the arguments put forward by ST and DT, the Commission was therefore not required to demonstrate that access to ST's local loop was indispensable for competing undertakings to enter the market, in order to be able to classify the terms and conditions for access called into question as an abuse of dominant position.

Since the other grounds of appeal relied on by ST and DT, relating inter alia to the assessment of ST's tariff practice which resulted in a margin squeeze and to the imputability of the infringement to DT as the parent company, are also rejected, the Court of Justice dismisses the appeals in their entirety.

2. STATE AID

Judgment of the Court (Fifth Chamber) of 4 March 2021, Commission v Fútbol Club Barcelona, Case C-362/19 P

Link to the complete text of the judgment

Appeal – State aid – Aid granted to certain professional football clubs – Article 107(1) TFEU – Concept of 'advantage' – Aid scheme – Regulation (EU) 2015/1589 – Article 1(d) – Reduced tax rate – Non-profit entities – Less advantageous tax deduction – Effect – Cross-appeal – Articles 169 and 178 of the Rules of Procedure of the Court of Justice

A Spanish law adopted in 1990 obliged all Spanish professional sports clubs to convert into public limited sports companies, with the exception of professional sports clubs that had achieved a positive financial balance during the financial years preceding adoption of that law. Fútbol Club Barcelona (FCB), and three other professional football clubs which came within that exception – Club Atlético Osasuna (Pamplona), Athletic Club (Bilbao) and the Real Madrid Club de Fútbol (Madrid) – had thus chosen to continue operating in the form of non-profit legal persons and enjoyed, in that capacity, a special rate of income tax. As that specific tax rate remained, until 2016, below the rate applicable to public limited sports companies, the Commission took the view, by decision of 4 July 2016, 41 that that legislation, in introducing a preferential corporate tax rate for the four clubs concerned, constituted unlawful and incompatible State aid, and ordered Spain to discontinue it and to recover the individual aid provided to the beneficiaries of that scheme.

Hearing an action brought by FCB against the decision at issue, the General Court of the European Union, by judgment of 26 February 2019, 42 annulled that decision on the ground that the Commission had not proved to the requisite legal standard the existence of an economic advantage conferred on the beneficiaries of the measure at issue. In particular, the General Court found that the Commission had not sufficiently assessed whether the advantage resulting from the reduced tax rate could be offset by the less favourable deduction rate for reinvestment of extraordinary profits applicable to clubs operating in the form of non-profit legal persons compared to that applicable to entities operating in the form of public limited sports companies.

41 Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs (OJ 2016 L 357, p. 1).

42 Judgment of 26 February 2019, Fútbol Club Barcelona v Commission, T-865/16.

In its judgment of 4 March 2021, the Court of Justice, granting the form of order sought in the appeal brought by the Commission, sets aside the judgment under appeal. In support of its appeal, the Commission raised a single ground alleging infringement of Article 107(1) TFEU, so far as concerns, first, the concept of an 'advantage capable of constituting State aid', within the meaning of that provision, and, second, the Commission's duty of diligence in the context of the examination of the existence of aid, in particular from the point of view of the existence of an advantage. In that context, the Court specifies the evidentiary requirements incumbent on the Commission in the analysis of whether a tax regime confers an advantage on its beneficiaries and, therefore, whether it is capable of constituting 'State aid' within the meaning of Article 107(1) TFEU.

Findings of the Court

In its assessment of the merits of the single ground of appeal, the Court finds, in the first place, that the General Court erred in law when it found that the decision at issue was to be construed as a decision relating both to an aid scheme 43 and to individual aid, since the Commission also expressed its view, in its decision, on the aid individually granted to the four clubs named as beneficiaries. In the case of an aid scheme, a distinction must be drawn between the adoption of that scheme and the aid granted on the basis of it. Individual measures which merely implement an aid scheme constitute mere measures implementing the general scheme, which do not, in principle, have to be notified to the Commission.

In the present case, the Court observes that the measure at issue concerns such an aid scheme, since the specific tax provisions applicable to non-profit entities, in particular the reduced tax rate, are capable of benefitting, by virtue of that measure alone, each of the eligible football clubs, defined in a general and abstract manner, for an indefinite period of time and an indefinite amount, without further implementing measures being required and without those provisions being linked to the realisation of a specific project. Therefore, the mere fact that, in the present case, aid was granted individually to the clubs on the basis of the aid scheme at issue cannot have any bearing on the examination to be carried out by the Commission to determine the existence of an advantage. In those circumstances, therefore, the General Court was wrong to find such a fact to be relevant.

In the second place, the Court finds that the error in law thus committed by the General Court vitiates the conclusions which the General Court draws from it as to the extent of the obligations incumbent on the Commission as regards proof of the existence of an advantage. That erroneous premiss led the General Court to consider that the Commission ought to have taken into account, for the purpose of its analysis, not only the advantage resulting from the reduced tax rate, but also the other components of the tax regime at issue, which the General Court finds to be inseparable from that regime, such as the possibilities of deductions, in so far as capping those deductions could offset that advantage. The Court recalls that, admittedly, the Commission is required to carry out a global assessment of the aid scheme, taking into account all the components which constitute its specific features, both favourable to its beneficiaries and unfavourable to them. However, the examination of the existence of an advantage cannot depend on the financial situation of the beneficiaries at the time of the subsequent grant of individual aid on that basis. In particular, the impossibility of determining, at the time of the adoption of an aid scheme, the exact amount, per tax year, of the advantage actually conferred on each of its beneficiaries, cannot prevent the Commission from finding that that scheme was capable, from that moment, of conferring an advantage on those beneficiaries and cannot, accordingly, exempt the Member State concerned from its substantive requirement to notify such a scheme. If, as the General Court acknowledged in the judgment under appeal, the Commission were required to verify, in the context of the analysis of a tax regime, on the basis of updated data, whether the advantage has actually materialised in subsequent tax years, and, where relevant, whether the advantage has been offset by the disadvantages recorded in other tax

43 Within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

years, Member States which fail to comply with their obligation to notify such a scheme would be favoured by the approach in question. It is, therefore, only at the stage of the possible recovery of the individual aid granted on the basis of the aid scheme at issue that the Commission is required to look at the individual situation of each beneficiary, such a recovery requiring the exact amount of aid which those beneficiaries have actually obtained in each tax year to be determined.

In the present case, it is common ground that, from the time of its adoption, the aid scheme resulting from the measure at issue, in so far as it granted certain clubs eligible for that scheme – including FCB – the possibility of continuing to operate, by way of derogation, as a non-profit entity, allowed them to benefit from a reduced tax rate compared to that applicable to clubs operating as public limited sports companies. In so doing, the aid scheme at issue was, from the time of its adoption, liable to favour clubs operating as non-profit entities over clubs operating in the form of public limited sports companies, thereby conferring on them an advantage capable of falling within the scope of Article 107(1) TFEU. It follows that, to demonstrate to the requisite legal standard that the aid scheme at issue confers on its beneficiaries an advantage falling within the scope of Article 107(1) TFEU, the Commission was not required to examine, in the decision at issue, the effect of the deduction for reinvestment of extraordinary profits or that of the possibilities of deferral in the form of a tax credit and, in particular, whether that deduction or those possibilities would neutralise the advantage resulting from the reduced tax rate. Therefore, it must be held that the General Court erred in law in ruling that the Commission was obliged to carry out such an examination, if necessary, by requesting relevant information. Consequently, the Court sets aside the judgment under appeal on that point.

Lastly, as regards the consequences of setting aside the judgment under appeal, the Court finds, first of all, that, to uphold the action seeking annulment of the decision at issue, the General Court admittedly upheld, by the judgment under appeal, the second plea in law alleging, in essence, an incomplete analysis of the existence of an advantage, but first rejected the plea alleging infringement of Article 49 TFEU, in that the Commission ought, according to the FCB, to have found that the obligation imposed on professional sports clubs to convert themselves into public limited sports companies was contrary to the freedom of establishment guaranteed by that provision. In such circumstances, the Court finds that FCB or Spain, intervening in support of the form of order sought by the football club, were entitled to challenge, in the context of a cross-appeal, the merits of the grounds for rejecting the plea in question, even if the General Court had upheld their forms of order on other grounds. In the absence of such an appeal, the judgment under appeal therefore has the force of res judicata on that point.

That being stated, the Court considers that the state of the proceedings is such that it may give final judgment in the matter and, ruling, accordingly, on it, it rejects the four other pleas relied on at first instance, alleging, respectively, errors which the Commission committed in its examination of the advantage conferred by the measure at issue, infringement of the principles of the protection of legitimate expectations and of legal certainty, infringement of Article 107(1) TFEU, in that the Commission did not consider that the measure at issue was justified by the internal logic of the tax system at issue, and of the rules applicable to the recovery of existing aid. Consequently, the Court dismisses the action brought by FCB.

Judgment of the Court (Grand Chamber) of 16 March 2021, Commission v Poland, Case C-562/19 P

Link to the complete text of the judgment

Appeal – Article 107(1) TFEU – State aid – Polish tax on the retail sector – Article 108(2) TFEU – Decision to initiate the formal investigation procedure – Information used to determine the reference system – Progressivity of rates – Existence of a selective advantage – Burden of proof

and

Judgment of the Court (Grand Chamber) of 16 March 2021, Commission v Hungary, Case C-596/19 P

Link to the complete text of the judgment

Appeal – Article 107(1) TFEU – State aid – Hungarian tax on turnover linked to advertisements – Information used to determine the reference system – Progressivity of tax rates – Transitional measure for the partial deductibility of losses carried forward – Existence of a selective advantage – Burden of proof

By a law which entered into force on 1 September 2016, Poland introduced a tax on the retail sector. That tax was based on the monthly turnover of any retailer involved in the sale of goods to consumers, provided that that turnover exceeded 17 million Polish zlotys (PLN) (approximately € four million). That tax entailed two bands: a rate of 0.8% applied to turnover between PLN 17 and 170 million and a rate of 1.4% was charged for the part of the turnover exceeding that amount.

Following the formal investigation procedure in respect of that measure initiated by decision of 19 September 2016, [44] the European Commission considered, by decision of 30 June 2017, [45] that that progressive tax constituted State aid incompatible with the internal market and required Poland to cancel all the payments suspended in respect of that tax, with effect from the date of adoption of that decision.

By judgment of 16 May 2019, [46] the General Court of the European Union, hearing a case brought by Poland, annulled, first, the decision opening the formal investigation procedure and, second, the negative decision concerning Poland. It held that the Commission was wrong to consider that the establishment of a progressive tax on turnover generated by the retail sale of goods would lead to a selective advantage in favour of undertakings with low turnover linked to that activity and that, as regards the decision opening the formal investigation procedure, it was not entitled, on the basis of the case file at the time of the adoption of that decision, to provisionally classify the tax measure at issue as new aid without relying on the existence of legitimate doubts on that point.

For its part, Hungary had introduced, by a law that entered into force on 15 August 2014, a progressive tax on revenue linked to the publication and broadcasting of advertisements in that

---

44 Decision of 19 September 2016 on State aid SA.44351 (2016/C) (ex 2016/NN) – Polish tax on the retail sector – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2016 C 406, p. 76, 'the decision opening the formal investigation procedure').

45 Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector (OJ 2018 L 29, p. 38, 'the negative decision concerning Poland').

46 Judgment of the General Court of 16 May 2019, *Poland* v *Commission*, T-836/16 and T-624/17.

Member State. That tax, based on the net turnover of persons who broadcast or publish advertisements (print media, audiovisual media or billposters), operating in Hungary, initially included a scale of six progressive rates based on turnover, later adapted to include only two rates, accompanied by the option, for taxable persons whose profits before tax in 2013 were zero or negative, to deduct from their tax base 50% of the losses carried forward from previous years.

Following the formal investigation procedure in respect of that measure, initiated by decision of 12 March 2015, [47] the Commission considered, by decision of 4 November 2016, [48] that the tax measure adopted by Hungary, on account of both its progressive structure and the possibility of deducting the losses carried forward that it included, constituted State aid that was incompatible with the internal market and ordered the immediate and effective recovery of the aid paid to the beneficiaries thereof.

By judgment of 27 June 2019,, [49] the General Court, hearing a case brought by Hungary, annulled that decision, holding that the Commission had erred in finding that the tax measure at issue and the mechanism for the partial deductibility of losses carried forward constituted selective advantages.

In the two judgments delivered on 16 March 2021, the Court of Justice, sitting as the Grand Chamber, dismisses the appeals brought by the Commission against the judgments under appeal. In support of its appeals, the Commission claimed in particular that the General Court had infringed Article 107(1) TFEU, in holding that the progressive nature of the taxes on turnover respectively at issue did not lead to a selective advantage.

Rejecting, in its judgments, the Commission's objections, the Court of Justice reaffirms, in the sphere of State aid, the principle established concerning the fundamental freedoms of the internal market to the effect that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, so that the application of progressive taxation falls within the discretion of each Member State, [50] provided that the characteristics constituting the measure at issue do not entail any manifestly discriminatory element.

Findings of the Court of Justice

First, the Court of Justice notes that, for the purpose of classifying a measure that is of general scope as 'State aid', within the meaning of Article 107(1) TFEU, the condition relating to the selectivity of the advantage provided for by the measure at issue requires determination of whether it is such as to favour 'certain undertakings or the production of certain goods' over others, which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory. In particular, where it concerns a national tax measure, it is for the Commission, after having identified the reference system, namely the 'normal' tax regime applicable in the Member State concerned, to demonstrate that the tax measure in question derogates from that reference system, in so far as it differentiates as between operators who, in the light of the objective pursued by that measure, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

It is in the light of those considerations that the Court of Justice examines, first, whether, in the present cases, the General Court was right to find, in essence, that the Commission had not

---

47 Decision of 12 March 2015 on State aid SA.39235 (2015/C) (ex 2015/NN) – Hungary – Advertisement tax – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2015 C 136, p. 7).

48 Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36).

49 Judgment of the General Court of 27 June 2019, *Hungary* v *Commission*, T-20/17; (together with the judgment in *Poland* v *Commission* 'the judgments under appeal').

50 See, inter alia, to that effect, judgments of 3 March 2020, Vodafone Magyarország, C-75/18, paragraph 49 , and of 3 March 2020, Tesco-Global Áruházak, C-323/18, paragraph 69, and, as regards State aid, judgment of 26 April 2018, *ANGED*, C-233/16, paragraph 50.

demonstrated that the progressive nature of the tax measures at issue entailed conferring a selective advantage on 'certain undertakings or the production of certain goods'. With regard to that point, the Court of Justice upholds the General Court's analysis that the progressivity of the rates provided for by the tax measures respectively at issue formed an integral part of the reference system in the light of which it was necessary to assess whether the existence of a selective advantage could be established.

Taking into account the fiscal autonomy which the Member States are recognised as having outside the fields subject to harmonisation under EU law, they are free to establish the system of taxation which they deem most appropriate and to adopt, as required, progressive taxation. In particular, EU law on State aid does not preclude, in principle, Member States from deciding to opt for progressive tax rates, intended to take account of the ability to pay of taxable persons, while nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.

In those circumstances, the characteristics constituting the tax, which include progressive tax rates, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. It is for the Commission, where necessary, to demonstrate that the characteristics of a national tax measure were designed in a way that is manifestly discriminatory, with the result that they should be excluded from the reference system, which could in particular reveal a choice of taxation criteria in the light of the objective pursued by that measure. In that regard, the Court of Justice finds, however, in the present cases, that the Commission had not established that the characteristics of the measures adopted by the Polish and Hungarian legislatures respectively had been designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid. In those circumstances, the General Court was therefore justified in holding, in the judgments under appeal, that the Commission had incorrectly relied on a incomplete and notional system in considering that the progressive scale of tax measures respectively at issue did not form part of the reference system in the light of which the selective nature of those measures had to be assessed.

In the case (C-562/19 P) concerning the tax on the retail sector established in Poland, the Court of Justice then examines the grounds relied on by the Commission in order also to annul the decision opening the formal investigation procedure concerning the tax measure adopted by that Member State. In that instance, the General Court, in essence, held that the Commission had based the provisional classification of the tax measure at issue as new aid on a manifestly incorrect analysis of that measure, which was, consequently, not capable of substantiating to the requisite legal standard, the existence of legitimate doubts concerning the classification of that measure as new aid. In that regard, the Court of Justice notes that the EU Courts, when reviewing the validity of such a decision opening a formal investigation procedure, are called upon to carry out a limited review of the assessment made by the Commission as regards the classification of a measure as 'State aid', within the meaning of Article 107(1) TFEU. However, the Court of Justice finds that, in ruling as it has, the General Court merely carried out in respect of the Commission's provisional State aid classification in the decision opening the formal investigation procedure a review of the manifest error of assessment and notes in that regard that it did not, in any event, annul that decision following mere repetition of the grounds that led it to annul the negative decision concerning Poland. Consequently, the Court of Justice rejects the grounds of appeal concerning the judgment of the General Court in so far as it annulled the decision opening the formal investigation procedure and the accompanying suspension injunction.

Finally, in the case (C-596/19 P) concerning the tax on advertisements established in Hungary, the Court of Justice finds that the General Court did not err in considering that the transitional measure of the partial deductibility of losses carried forward did not lead to a selective advantage. The establishment of a transitional measure taking into account profits is not inconsistent in the light of the redistribution objective pursued by the Hungarian legislature, when establishing the tax on advertisements. The Court of Justice highlighted in that regard that, in that case, the criteria concerning the lack of profits recorded in the financial year preceding the entry into force of that tax was objective in nature, since the undertakings benefiting from the transitional measure of partial deductibility of the losses had, from that point of view, a lesser ability to pay than others.

On those grounds, the Court of Justice rejects all the appeals brought by the Commission against.

VIII. APPROXIMATION OF LAWS

1. COPYRIGHT

Judgment of the Court (Grand Chamber) of 9 March 2021, VG Bild-Kunst, Case C-392/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Intellectual property – Copyright and related rights in the information society – Directive 2001/29/EC – Article 3(1) – Concept of 'communication to the public' – Embedding, in a third party's website, of a copyright-protected work by means of the process of framing – Work freely accessible with the authorisation of the copyright holder on the licensee's website – Clause in the exploitation agreement requiring the licensee to introduce effective technological measures against framing – Lawfulness – Fundamental rights – Article 11 and Article 17(2) of the Charter of Fundamental Rights of the European Union

Stiftung Preußischer Kulturbesitz ('SPK'), a German foundation, is the operator of the Deutsche Digitale Bibliothek, a digital library devoted to culture and knowledge, which networks German cultural and scientific institutions. The website of that library contains links to digitised content stored on the internet portals of participating institutions. As a 'digital showcase', the Deutsche Digitale Bibliothek itself stores only thumbnails, that is to say smaller versions of original images.

VG Bild-Kunst, a visual arts copyright collecting society in Germany, maintains that the conclusion with SPK of a licence agreement for the use of its catalogue of works in the form of thumbnails should be subject to the condition that the agreement include a provision whereby SPK undertakes, when using the works covered by the agreement, to implement effective technological measures against the framing, [51] by third parties, of the thumbnails of such works on the website of the Deutsche Digitale Bibliothek.

SPK considers that such a term in the agreement is not reasonable in the light of copyright, and brought an action before the German courts seeking a declaration that VG Bild-Kunst is required to grant SPK that licence without any condition requiring the implementation of such measures to prevent framing. [52]

Against that background, the Bundesgerichtshof (Federal Court of Justice, Germany) asks the Court for a determination of whether that framing must be held to be a communication to the public within the meaning of Directive 2001/29, [53] which, if that is the case, would permit VG Bild-Kunst to require SPK to implement such measures.

---

51 The technique of framing consists in dividing a website page into several frames and posting within one of them, by means of a clickable link or an embedded internet link (inline linking), an element coming from another site in order to hide from the users of that site the original environment to which that element belongs.

52 Under German law, collecting societies are obliged to grant to any person who so requests, on reasonable terms, a licence to use the rights whose management is entrusted to them. However, according to German case-law, collecting societies could, exceptionally, depart from that obligation and refuse to grant a licence for the use of the rights whose management was entrusted to them, provided that that refusal was not an abuse of monopoly power and that the licence application was objectionable by reference to overriding legitimate interests.

53 Under Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

The Grand Chamber of the Court holds that the embedding by means of framing, in a website page of a third party, of works protected by copyright and made freely accessible to the public with the authorisation of the copyright holder on another website constitutes a communication to the public where that embedding circumvents protection measures against framing adopted or imposed by the copyright holder.

Findings of the Court

First, the Court states that the alteration in the size of the works in framing is not a factor in the assessment of whether there is an act of communication to the public, so long as the original elements of those works are perceptible.

Next, the Court states that the technique of framing constitutes an act of communication to a public, since the effect of that technique is to make the posted element available to all the potential users of a website. Further, the Court states that, provided that the technical means used by the technique of framing are the same as those previously used to communicate the protected work to the public on the original website, namely the Internet, that communication does not satisfy the condition of being made to a new public and that communication accordingly does not fall within the scope of a communication 'to the public', within the meaning of Directive 2001/29.

However, the Court adds that that consideration is applicable only in a situation where access to the works concerned on the original website is not subject to any restrictive measure. In that situation, the right holder has authorised from the outset the communication of his or her works to all internet users.

Conversely, the Court states that, where the right holder has established or imposed from the outset restrictive measures linked to the publication of his or her works, he or she has not agreed to third parties being able to communicate his or her works freely to the public. On the contrary, his or her intention was to restrict the public having access to his or her works solely to the users of a particular website.

Consequently, the Court holds that, where the copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in a website page of a third party, by means of the technique of framing, constitutes an act of 'making available that work to a new public'. That communication to the public must, therefore, be authorised by the right holders concerned.

The opposite approach would amount to creating a rule on exhaustion of the right of communication. Such a rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his or her work. Accordingly, the consequence of such an approach would be that the need to safeguard a fair balance in the digital environment, between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, and, on the other, the protection of the interests and fundamental rights of users of protected subject matter, would be disregarded.

Last, the Court makes clear that a copyright holder may not limit his or her consent to framing by means other than effective technological measures. In the absence of such measures, it might prove difficult to ascertain whether that right holder intended to oppose the framing of his or her works.

2. PLANT-PROTECTION PRODUCTS

Judgment of the General Court (Fifth Chamber) of 17 March 2021, FMC v Commission, Case T-719/17

Link to the complete text of the judgment

Plant-protection products – Active substance flupyrsulfuron-methyl – Non-renewal of inclusion in the Annex to Implementing Regulation (EU) No 540/2011 – Assessment procedure – Proposed classification of an active substance – Precautionary principle – Rights of defence – Legal certainty – Manifest error of

assessment – Proportionality – Principle of non-discrimination – Principle of sound administration – Legitimate expectations

The active substance DPX KE 459 (flupyrsulfuron-methyl) ('FPS') is used as a selective broad-spectrum herbicide on various cereal crops. The European Commission approved it for use in plant protection products in 2001. [54] Since that approval was due to expire on 30 June 2018, the German subsidiary of the industrial chemical group DuPont de Nemours, applied, in accordance with Regulation No 1107/2009, for its renewal in 2011. [55]

In the context of the renewal procedure, the European Food Safety Authority (EFSA) set up a peer review procedure. On the basis of the opinions of the majority of the experts involved in that review, EFSA proposed to classify FPS as a category 2 carcinogen. Subsequently, it also proposed that it be classified as a category 2 reproductive toxicant. EFSA maintained that position when it issued its scientific conclusion on FPS, which identified four critical areas of concern in relation to FPS.

On the basis of the EFSA conclusion, the Commission issued a draft review report on FPS, followed by a revised version of that report, in which it proposed to withdraw the approval of FPS.

By implementing regulation of 23 August 2017, [56] the Commission refused to renew the approval of FPS on the basis of two critical concerns. First, that it was not possible to exclude the possibility that certain FPS metabolites may have unacceptable or harmful effects on groundwater or human health. Secondly, that there was a high risk to aquatic organisms from exposure to FPS.

Twelve companies of DuPont de Nemours and FMC Corporation, a company governed by United States law to which DuPont's parent company had transferred the activities in relation to FPS, brought an action for annulment of the contested regulation. That action was, however, dismissed by the General Court.

This case has led the Court to provide clarifications regarding the content of an application for renewal of an active substance under Regulation No 1107/2009 and the conduct of that renewal procedure, the possibility for EFSA to propose the classification of an active substance under Regulation No 1272/2008 [57] and the legal value of such a proposal, and, more generally, the application on the part of the Commission of the precautionary principle when assessing an active substance under Regulation No 1107/2009. [58]

Findings of the Court

After recalling its case-law on the precautionary principle, the Court, first of all, addresses the scope of the assessment of the dossier. According to FMC, in the absence of any change in the state of scientific knowledge, EFSA was not entitled to reassess the previously accepted toxicity data. In that

---

54 FPS was included in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1) by Commission Directive 2001/49/EC of 28 June 2001 amending Annex I to Directive 91/414 to include DPX KE 459 (flupyrsulfuron-methyl) as an active substance (OJ 2001 L 176, p. 61). The substances listed in that annex were subsequently deemed approved under Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

55 That renewal application was made pursuant to Commission Regulation (EU) No 1141/2010 of 7 December 2010 laying down the procedure for the renewal of the inclusion of a second group of active substances in Annex I to Council Directive 91/414 and establishing the list of those substances (OJ 2010 L 322, p. 10).

56 Commission Implementing Regulation (EU) 2017/1496 of 23 August 2017 concerning the non-renewal of approval of the active substance DPX KE 459 (flupyrsulfuron-methyl), in accordance with Regulation No 1107/2009, and amending Commission Implementing Regulation No 540/2011 (OJ 2017 L 218, p. 7; 'the contested regulation').

57 Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

58 In relation, inter alia, to the judgment of 12 April 2013, *Du Pont de Nemours (France) and Others* v *Commission* (T-31/07, not published, EU:T:2013:167).

regard, the Court notes that, while it is true that, in the context of the assessment of a renewal application, particular attention must be paid to new data on the active substance and to new risk assessments, a full assessment of the safety of the substance must be carried out. Therefore, information that had already been assessed in the first assessment may be examined in order to carry out an assessment in the light of the latest scientific knowledge.

Next, the Court examines the assertion that, in the absence of a formal classification of FPS on the basis of human health hazards, [59] EFSA was not entitled to rely on its own classification to presume the toxicological relevance of three FPS groundwater metabolites.

In that regard, the Court notes that EFSA is not competent to propose or decide on the hazard classification for plant protection product substances and, accordingly, such a 'proposal' cannot, on its own, have any legal consequences. Nevertheless, in application of the precautionary principle, it is for the Commission to take protective measures where scientific uncertainties remain as to the existence or extent of risks to human health or to the environment. The Commission's concerns were not directly linked to the classification considered appropriate by EFSA, but rather to the intrinsic toxicological properties of the parent substance. Accordingly, since it had not been demonstrated that the three metabolites concerned did not have the same intrinsic properties as the parent substance, the Commission was fully entitled to conclude that it was impossible to establish that their presence in groundwater would not result in unacceptable effects on groundwater or in harmful effects on human health.

As regards the taking into account of additional documents or new scientific evidence submitted by an applicant for renewal at a late stage in the proceedings, the Court considers, in particular with regard to the rights of the defence, that the Commission was right to refuse to take into account an additional study submitted at a very late stage, namely after EFSA's scientific conclusions had been finalised and almost at the end of the renewal process.

The Court also states that the Commission cannot be criticised for refusing to examine additional data submitted after the end of the peer review. Although it is true that there is no provision expressly prohibiting account being taken of data that is submitted late, strict deadlines govern each step of the procedure, both for the approval procedure and for the renewal procedure. An indefinite extension of the time limit for evaluating an active substance would, in actual fact, be contrary to the objectives pursued by Regulation 1107/2009 of ensuring a high level of protection of the health of humans and animals and the environment.

As regards the argument that the Commission infringed the principle of proportionality, the Court finds that the contested regulation does not appear manifestly disproportionate and that less restrictive approaches than a non-renewal decision were excluded. In the first place, it was not possible to use the confirmatory data procedure [60] providing for approval subject to conditions and restrictions such as the submission of further confirmatory information or allowing the Commission, in certain exceptional cases, to approve an active substance, even though certain information is still to be submitted. That approach may not be used to fill data gaps detected during the approval process. In the second place, an examination of the ecotoxicology concerns at Member State level at the time of the evaluation of plant protection products with a view to specific restrictions was not an option since that solution is not conceivable where a high risk is concluded for all representative uses.

Lastly, the General Court also rejects the argument alleging infringement of the principle of non-discrimination. The Court finds that it has not been established that the differences in the manner in which the evaluation procedures subject to comparison took place were not objectively justified, in

---

59 As provided for in Regulation No 1272/2008.

60 Laid down in Article 6(f) and point 2.2 of Annex II to Regulation No 1107/2009.

particular in the light of the specific nature of each review procedure and the Commission's discretion as to how it conducts investigations of such a technical complex nature.

3. PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS

Judgment of the Court (Third Chamber) of 18 March 2021, Kuoni Travel, Case C-578/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 90/314/EEC – Article 5(2), third indent – Package travel, package holidays and package tours – Contract concerning package travel concluded between a travel organiser and a consumer – Liability of the travel organiser for the proper performance of obligations arising from the contract by other suppliers of services – Damage resulting from the acts of an employee of a supplier of services – Exemption from liability – Event that cannot be foreseen or forestalled by the travel organiser or the supplier of services – Concept of a 'supplier of services'

The applicant, X, and her husband entered into a package travel contract with Kuoni Travel Ltd ('Kuoni'), a travel organiser established in the United Kingdom. During her stay, X encountered N, an employee of the hotel who, on the pretext that he wished to accompany her to reception, raped and assaulted her.

X claimed damages against Kuoni in respect of the rape and assault suffered, on the ground that these were the result of the improper performance of the package travel contract as well as a breach of the 1992 Regulations. [61] Kuoni contested those claims, relying on a clause in that contract referring to the conditions under which it incurs liability for the proper performance of its contractual obligations, [62] together with a provision of the 1992 Regulations concerning its exemption from liability where the failure to perform or improper performance of the contract are due to an event which it or another supplier of services could not foresee or forestall. [63]

Following an appeal against the dismissal of X's claim for compensation, the Supreme Court of the United Kingdom referred questions to the Court of Justice for a preliminary ruling on the scope of the third indent of Article 5(2) of Directive 90/314, in so far as it provides for a ground for exemption from liability of the organiser of package travel from the proper performance of the obligations arising from a contract relating to such travel concluded between that organiser and a consumer and governed by that directive. In answer to those questions, the Court held that that provision must be interpreted as meaning that, in the event of the non-performance or improper performance of those obligations resulting from the actions of an employee of a supplier of services performing that contract, that employee cannot be regarded as a supplier of services for the purposes of the

---

61 The Package Travel, Package Holidays and Package Tours Regulations 1992 ('the 1992 Regulations') of 22 December 1992 transposed Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59; 'Directive 90/314') into United Kingdom law.

62 Under Clause 5.10 (b) of the contract, the travel organiser incurs liability where, owing to fault attributable to it or attributable to one of its agents or suppliers, any part of the holiday arrangements booked before departure from the United Kingdom is not as described in the brochure, unless the damage caused to the other contracting party or a member of his or her group is due to fault attributable to the other contracting party or has been caused by unforeseen circumstances which, even with all due care, the organiser, its agents or suppliers could not have anticipated or avoided.

63 Pursuant to Regulation 15(2)(c)(ii) of the 1992 Regulations, 'the other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because [of] an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall'.

application of that provision and that the organiser cannot be exempted from its liability arising from such non-performance or improper performance, pursuant to that provision.

Findings of the Court

The Court recalls, first, that Directive 90/314 establishes a system of contractual liability for package travel organisers in respect of consumers who have concluded a contract with them for such travel, from which there may be no exclusion by means of a contractual clause. [64] The only exemptions from such liability which are allowed are those exhaustively set out in Directive 90/314. [65] One of the special features of that liability of travel organisers is that it extends to the proper performance of the obligations arising under the package travel contract by suppliers of services.

Next, as regards the concept of 'supplier of services', the Court finds that it is not defined either by Directive 90/314 or by an express reference in that directive to the laws of the Member States, with the result that it must be given an autonomous and uniform interpretation. Given the usual meaning of that concept and the fact that the obligations arising under a package travel contract may be performed through persons other than the organiser, it must be understood as referring to a natural or legal person, who is distinct from the travel organiser and provides services for remuneration. However, the Court states that an employee of a supplier of services cannot himself or herself be a supplier of services within the meaning of Directive 90/314 since, unlike a supplier of services, he or she has not concluded any agreement with the package travel organiser and he or she performs his or her work in the context of a relationship of subordination with his or her employer and therefore under the latter's control. Nevertheless, the Court does not rule out the possibility that the acts or omissions of such an employee may, for the purposes of the system of liability laid down in Directive 90/314, be treated in the same way as those of the supplier of services which employs him or her. The Court finds that the non-performance or improper performance of the obligations arising from the package travel contract, despite having its origin in acts committed by employees of a supplier of services, is such as to render the organiser liable. That contractual liability is incurred where, first, there is a link between the act or omission which caused damage to that consumer and the organiser's obligations under that contract and, secondly, those obligations are performed by an employee of a supplier of services who is under the latter's control. In the absence of such liability, an unjustified distinction would be drawn between the liability of organisers for the acts committed by their suppliers of services and the liability arising from the same acts committed by employees of those suppliers of services performing the obligations arising from a package travel contract, which would enable an organiser to avoid its liability.

Lastly, the Court recalls that, while there may be a derogation from the rule laying down the liability of organisers, the ground for exemption from such liability which covers situations in which non-performance or improper performance of the contract is due to an event which the organiser or supplier of services could not foresee or forestall [66] must be interpreted strictly, autonomously and uniformly. The event which cannot be foreseen or forestalled to which that ground for exemption refers differs from the case of *force majeure,* and must, since the ground for exemption is based on the absence of fault on the part of the organiser or the supplier of services, be interpreted as referring to a fact or incident which does not fall within their sphere of control. As the acts or omissions of an employee of a supplier of services resulting in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer do fall within that sphere of control, they cannot be regarded as events which cannot be foreseen or forestalled. Accordingly, the organiser cannot be exempted from its liability arising from such non-performance or improper performance of the contract.

---

64 Article 5(3) of Directive 90/314.

65 Article 5(2) of Directive 90/314.

66 Article 5(2), third indent, of Directive 90/314.

4. TELECOMMUNICATIONS – PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 2 March 2021, Prokuratuur (Conditions d'accès aux données relatives aux communications électroniques), Case C-746/18

Link to the complete text of the judgment

Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Directive 2002/58/EC – Providers of electronic communications services – Confidentiality of the communications – Limitations – Article 15(1) – Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union – Legislation providing for the general and indiscriminate retention of traffic and location data by providers of electronic communications services – Access of national authorities to retained data for the purpose of investigations – Combating of crime in general – Authorisation given by the public prosecutor's office – Use of data in criminal proceedings as evidence – Admissibility

Criminal proceedings were brought in Estonia against H. K. on counts of theft, use of another person's bank card and violence against persons party to court proceedings. A court of first instance convicted H. K. of those offences and imposed a custodial sentence of two years. That judgment was then upheld on appeal.

The reports relied upon in order to find H. K. guilty of those offences were drawn up, inter alia, on the basis of personal data generated in the context of the provision of electronic communications services. The Riigikohus (Supreme Court, Estonia), before which H. K. lodged an appeal on a point of law, expressed doubts as to whether the conditions under which the investigating authority had access to those data were compatible with EU law. [67]

Those doubts concerned, first, whether the length of the period in respect of which the investigating authority has had access to the data is a criterion for assessing the seriousness of the interference, constituted by that access, with the fundamental rights of the persons concerned. Thus, the referring court raised the question whether, where that period is very short or the quantity of data gathered is very limited, the objective of combating crime in general, and not only combating serious crime, is capable of justifying such an interference. Second, the referring court had doubts as to whether it is possible to regard the Estonian public prosecutor's office, in the light of the various duties which are assigned to it by national legislation, as an 'independent' administrative authority, within the meaning of the judgment in *Tele2 Sverige and Watson and Others*, [68] that is capable of authorising access of the investigating authority to the data concerned.

By its judgment, delivered by the Grand Chamber, the Court holds that the directive on privacy and electronic communications, read in the light of the Charter, precludes national legislation that permits public authorities to have access to traffic or location data, that are liable to provide information regarding the communications made by a user of a means of electronic communication or regarding the location of the terminal equipment which he or she uses and to allow precise conclusions to be

---

67 To be more precise, with Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('the directive on privacy and electronic communications'), read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

68 Judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970, paragraph 120).

drawn concerning his or her private life, for the purposes of the prevention, investigation, detection and prosecution of criminal offences, without such access being confined to procedures and proceedings to combat serious crime or prevent serious threats to public security. According to the Court, the length of the period in respect of which access to those data is sought and the quantity or nature of the data available in respect of such a period are irrelevant in that regard. The Court further holds that that directive, read in the light of the Charter, precludes national legislation that confers upon the public prosecutor's office the power to authorise access of a public authority to traffic and location data for the purpose of conducting a criminal investigation.

Findings of the Court

As regards the circumstances in which access to traffic and location data retained by providers of electronic communications services may, for the purposes of the prevention, investigation, detection and prosecution of criminal offences, be granted to public authorities, pursuant to a measure adopted under the directive on privacy and electronic communications, [69] the Court recalls the content of its ruling in *La Quadrature du Net and Others*. [70] Thus, that directive authorises the Member States to adopt, for those purposes amongst others, legislative measures to restrict the scope of the rights and obligations provided for by the directive, inter alia the obligation to ensure the confidentiality of communications and traffic data, [71] only if the general principles of EU law – which include the principle of proportionality – and the fundamental rights guaranteed by the Charter [72] are observed. Within that framework, the directive precludes legislative measures which impose on providers of electronic communications services, as a preventive measure, an obligation requiring the general and indiscriminate retention of traffic and location data.

So far as concerns the objective of preventing, investigating, detecting and prosecuting criminal offences, which is pursued by the legislation at issue, in accordance with the principle of proportionality the Court holds that only the objectives of combating serious crime or preventing serious threats to public security are capable of justifying public authorities having access to a set of traffic or location data, that are liable to allow precise conclusions to be drawn concerning the private lives of the persons concerned, and other factors relating to the proportionality of a request for access, such as the length of the period in respect of which access to such data is sought, cannot have the effect that the objective of preventing, investigating, detecting and prosecuting criminal offences in general is capable of justifying such access.

As regards the power conferred upon the public prosecutor's office to authorise access of a public authority to traffic and location data for the purpose of conducting a criminal investigation, the Court points out that it is for national law to determine the conditions under which providers of electronic communications services must grant the competent national authorities access to the data in their possession. However, in order to satisfy the requirement of proportionality, such legislation must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose personal data are affected have sufficient guarantees that data will be effectively protected against the risk of abuse. That legislation must be legally binding under domestic law and must indicate in what circumstances and under which substantive and procedural conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary.

According to the Court, in order to ensure, in practice, that those conditions are fully observed, it is essential that access of the competent national authorities to retained data be subject to a prior

---

69 Article 15(1) of Directive 2002/58.

70 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraphs 166 to 169).

71 Article 5(1) of Directive 2002/58.

72 In particular, Articles 7, 8 and 11 and Article 52(1) of the Charter.

review carried out either by a court or by an independent administrative body, and that the decision of that court or body be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime. In cases of duly justified urgency, the review must take place within a short time.

In that regard, the Court states that one of the requirements for the prior review is that the court or body entrusted with carrying it out must have all the powers and provide all the guarantees necessary in order to reconcile the various interests and rights at issue. As regards a criminal investigation in particular, it is a requirement of such a review that that court or body must be able to strike a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access. Where that review is carried out not by a court but by an independent administrative body, that body must have a status enabling it to act objectively and impartially when carrying out its duties and must, for that purpose, be free from any external influence.

According to the Court, it follows that the requirement of independence that has to be satisfied by the authority entrusted with carrying out the prior review means that that authority must be a third party in relation to the authority which requests access to the data, in order that the former is able to carry out the review objectively and impartially and free from any external influence. In particular, in the criminal field the requirement of independence entails that the authority entrusted with the prior review, first, must not be involved in the conduct of the criminal investigation in question and, second, has a neutral stance vis-à-vis the parties to the criminal proceedings. That is not so in the case of a public prosecutor's office which, like the Estonian public prosecutor's office, directs the investigation procedure and, where appropriate, brings the public prosecution. It follows that the public prosecutor's office is not in a position to carry out the prior review.

IX. SOCIAL POLICY – ORGANISATION OF WORKING TIME

Judgment of the Court (Grand Chamber) of 9 March 2021, Radiotelevizija Slovenija (Période d'astreinte dans un lieu reculé), Case C-344/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 2 – Concept of 'working time' – Stand-by time according to a stand-by system – Specific work maintaining television transmitters situated far away from residential areas – Directive 89/391/EEC – Articles 5 and 6 – Psychosocial risks – Obligation to prevent

and

Judgment of the Court (Grand Chamber) of 9 March 2021, Stadt Offenbach am Main (Période d'astreinte d'un pompier), Case C-580/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 2 – Concept of 'working time' – Stand-by time according to a stand-by system – Professional firefighters – Directive 89/391/EEC – Articles 5 and 6 – Psychosocial risks – Obligation to prevent

In Case C-344/19, a specialist technician was responsible for ensuring the operation, for several consecutive days, of television transmission centres situated in the mountains in Slovenia. He provided, in addition to his twelve hours of normal work, services of stand-by time, of six hours per day, according to a stand-by system. During those periods, he was not obliged to remain at the transmission centre in question, but was required to be contactable by telephone and to be able to return there within a time limit of one hour, in case of need. On the facts, due to the geographical location of the transmission centres, to which access was difficult, he was obliged to stay there while carrying out his stand-by time services, in service accommodation placed at his disposal by his employer, without many opportunities for leisure pursuits.

In Case C-580/19, a public official carried out activities as a firefighter in the town of Offenbach am Main (Germany). To that end, in addition to his regular service hours, he regularly had to carry out periods of stand-by time according to a stand-by system. During those periods, he was not required to be present at a place determined by his employer, but had to be reachable and able to reach, if alerted, the city boundaries within a 20 minute period, with his uniform and the service vehicle made available to him.

The two claimants considered that, owing to the restrictions involved, their periods of stand-by time according to a stand-by system had to be recognised, in their entirety, as 'working time' and remunerated accordingly, irrespective of whether or not they had carried out any specific work during those periods. After his claim was rejected at first and second instance, the first claimant brought an appeal on a point of law before the Vrhovno sodišče (Supreme Court, Slovenia). For his part, the second claimant brought an action before the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) following the refusal of his employer to grant his request.

Ruling on requests for preliminary rulings from those respective courts, in two judgments the Court, sitting as the Grand Chamber, clarifies in particular the extent to which periods of stand-by time according to a stand-by system may be classified as 'working time' or, on the contrary, 'rest periods' with regard to Directive 2003/88. [73]

Findings of the Court

As a preliminary matter, the Court recalls that a period of stand-by time must be classified as either 'working time' or a 'rest period' within the meaning of Directive 2003/88, as those two concepts are mutually exclusive. In addition, a period during which no actual activity is carried out by the worker on behalf of his or her employer does not necessarily constitute a 'rest period'. Thus, it is clear from the Court's case-law that a period of stand-by time must automatically be classified as 'working time' when the worker is obliged, during that period, to remain at his or her workplace, distinct from his or her home, and at the disposal of his or her employer there.

Having made those observations, the Court held, in the first place, that periods of stand-by time, including stand-by time according to a stand-by system, also, in their entirety, fall within the concept of 'working time' where the constraints imposed on the worker during those periods objectively and very significantly affect his or her ability freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. Conversely, in the absence of such constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time'.

In that regard, the Court states that, in order to determine whether a period of stand-by time is 'working time', only the constraints that are imposed on the worker, whether by the law of the Member State concerned, by a collective agreement or by the employer, may be taken into consideration. By contrast, organisational difficulties that a period of stand-by time may entail for the worker and which are the result of natural factors or the free choice of that worker are not relevant.

---

73 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

That is the case, for example, where there are limited opportunities for leisure pursuits within the area that the worker is unable in practice to leave during a period of stand-by time according to a stand-by system.

Furthermore, the Court underlines that it is for the national courts to carry out an overall assessment of all the facts of the case in order to determine whether a period of stand-by time according to a stand-by system must be classified as 'working time', as that classification is not automatic in the absence of a requirement to remain at the workplace. For that purpose, first, it is necessary to take into account the reasonableness of the time limit within which the worker is required to resume his or her professional activities starting from the moment at which his or her employer requires his or her services, which, as a general rule, means that he or she must return to his or her workplace. However, the Court emphasises that the consequences of such a time limit must be specifically assessed, taking into account not only the other constraints imposed on the worker, such as the obligation to have specific equipment with him or her when returning to the workplace, but also the facilities that are made available to him or her. Such facilities may, for example, consist of the provision of a service vehicle that permits use of traffic regulations privileges. Second, the national courts must also have regard to the average frequency of the activities that the worker is actually called upon to undertake over the course of that period, where it is possible objectively to estimate it.

In the second place, the Court emphasises that the way in which workers are remunerated for periods of stand-by time is not covered by Directive 2003/88. Accordingly, that directive does not preclude a national law, collective labour agreement or a decision of an employer that, for the purpose of their remuneration, takes into account differently the periods during which work is in reality carried out and those periods during which no actual work is accomplished, even where those periods must be regarded, in their entirety, as 'working time'. As regards remuneration of periods of stand-by time which, conversely, cannot be classified as 'working time', Directive 2003/88 does not preclude payment of a sum intended to compensate workers for the inconvenience caused them.

In the third place, the Court observes that the fact that a period of stand-by time which cannot be classified as 'working time' must be regarded as a 'rest period' does not affect the specific obligations that are laid down by Directive 89/391 [74] and are binding on employers. In particular, employers may not establish periods of stand-by time which, due to their duration or frequency, constitute a risk to the safety or health of workers, irrespective of those periods being classified as 'rest periods' within the meaning of Directive 2003/88.

---

74 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

X. ECONOMIC AND MONETARY POLICY

Order of the General Court (Tenth Chamber) of 12 March 2021, PNB Banka v ECB, Case T-50/20

Link to the complete text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Insolvency proceedings – Refusal by the ECB to accede to a request from the board of directors of a credit institution that the insolvency administrator of that institution be instructed to grant the lawyer authorised by that board access to the premises, information, staff and resources of that institution – Competence of the author of the act – Action manifestly lacking any foundation in law

The applicant, PNB Banka AS, is a credit institution incorporated under Latvian law which, in 2019, was classified as a 'significant entity' and was on that basis placed under the direct supervision of the European Central Bank (ECB) within the framework of the single supervisory mechanism introduced by the Regulation on the Single Supervisory Mechanism [75] ('the SSM Regulation'). A few months later, the ECB concluded that the applicant was to be deemed to be failing or likely to fail within the meaning of the Regulation on the Single Resolution Mechanism [76] ('the SRM Regulation'). The resolution authority of the European Banking Union, the Single Resolution Board, did not adopt a resolution scheme within the meaning of the SRM Regulation. The national authority, the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia), had the applicant declared insolvent by a Latvian court, secured the appointment of an insolvency administrator, and requested that the ECB withdraw the applicant's authorisation as a credit institution.

The applicant wished to set out its views on the withdrawal of the authorisation. Represented by its board of directors, the applicant requested the ECB to instruct the insolvency administrator to grant access to the lawyer authorised by the board to the premises, information, members of staff and resources of that institution. The ECB refused to give the requested instruction.

By its order, the General Court dismisses the action seeking annulment of the ECB's refusal on the ground that the ECB manifestly lacked competence to accede to the request from the applicant's board of directors. This is thus the first time that the Court has ruled on the powers of the ECB in matters of prudential supervision regarding an insolvent credit institution.

The Court's assessment

First of all, the Court examines the wording of the provisions of the SSM Regulation, which lay down that the ECB is exclusively competent, [77] the purpose of those provisions [78] and the context of the request made by the applicant's board of directors. The Court notes that, under the SSM Regulation, the ECB is exclusively competent to carry out certain tasks for prudential supervisory purposes in relation to all credit institutions, whether 'significant' or 'less significant'. The objective of that prudential supervision is to contribute to the safety and soundness of credit institutions so as to help

---

75 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

76 Article 18(1)(a) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

77 Article 1, first paragraph, and Article 4(1)(e) of the SSM Regulation.

78 Article 127(6) TFEU, the legal basis of the SSM Regulation.

safeguard the stability of the EU financial system. Consequently, despite the ECB being exclusively competent and the fact that a request relates to a 'significant' institution, the scope of the prudential supervision laid down in the SSM Regulation does not include the ECB having the power to give instructions, which have no connection with that supervision, to an insolvency administrator appointed in accordance with national law in insolvency proceedings, to grant access to the lawyer of the board of directors of such an institution to the premises, information, staff and resources of that institution, where those instructions are not such as to be capable of contributing to the management of the risks that the SSM Regulation seeks to limit.

The Court also examines the wording and objectives of various provisions of Directive 2013/36. [79] Those provisions require robust governance arrangements in order to avoid excessive and imprudent risk-taking in the banking sector. The Court notes that the objectives of Article 74(1) of that directive are similar to those of the SSM Regulation. It concludes that, while the ECB is the authority with competence to secure compliance with that provision, that provision does not confer competence on the ECB to adopt measures such as the instruction requested by the applicant.

Lastly, the Court notes that neither the Latvian Law on Credit Institutions [80] nor Directive 2014/59 [81] confers competence on the ECB to adopt the enjoining measures requested by the applicant or to deal with 'normal insolvency proceedings', defined by that directive as 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those institutions or generally applicable to any natural or legal person'.

Although the ECB does not have competence to give the insolvency administrator the instruction requested by the applicant, the Court observes that the applicant is not deprived of effective judicial protection. While they retain the choice of the measures to be taken, the national authorities of a Member State must in particular ensure that the rights which individuals derive from EU law are given full effect, including the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

---

79 Article 67(1)(d) and Article 74(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

80 Kredītiestāžu likums (Law on Credit Institutions) of 5 October 1995 (*Latvijas Vēstnesis*, 1995, No 163).

81 Article 2(1)(47) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

XI. RESEARCH AND TECHNOLOGICAL DEVELOPMENT

Judgment of the Court (Fifth Chamber) of 10 March 2021, Ertico – ITS Europe v Commission, Case C-572/19 P

Link to the complete text of the judgment

Appeal – State aid – Seventh Framework Programme for research, technological development and demonstration activities – Recommendation 2003/361/EC – Decision of the Validation Panel of the European Commission on classification as a micro, small or medium-sized enterprise (SME) – Decision 2012/838/EU, Euratom – Annex – Sections 1.2.6 and 1.2.7 – Request for review – Regulation (EC) No 58/2003 – Article 22 – No administrative proceedings – Link between request for review and administrative proceedings – Refusal of SME status despite formal observance of the Recommendation 2003/361 criteria – Legal certainty – Legitimate expectations – Handicaps usually faced by SMEs – None

European Road Transport Telematics Implementation Coordination Organisation – Intelligent Transport Systems & Services Europe (Ertico – ITS Europe) is a cooperative company providing a multisectoral platform to both private and public stakeholders in the intelligent transport systems and services sector.

Since 31 December 2006, Ertico – ITS Europe had been regarded as being a micro, small or medium-sized enterprise (SME) within the meaning of the SME Recommendation. [82] That status enabled it to receive, for several years, additional grants from the European Union, in particular within the context of the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013).

In December 2013, during a review of the SME status of participants in existing research programmes, the Research Executive Agency ('the REA'), in its capacity as the validation service regarding the SME status of participants, requested that Ertico – ITS Europe provide information proving that it should still be entitled to that status. Following a series of emails, the REA decided, on 27 January 2014, that that company could no longer be regarded as an SME.

On 25 February 2014, Ertico – ITS Europe requested review of that decision before the Commission's Validation Panel. [83] Those review proceedings were rejected by decision of 15 April 2014 ('the first negative decision'). That decision was then withdrawn and the Validation Panel adopted, on 18 August 2015, a new decision in which it concluded that that enterprise was no longer entitled to SME status ('the decision at issue'). By its judgment in *Ertico – ITS Europe* v *Commission* (T-604/15), [84] the General Court dismissed Ertico – ITS Europe's action.

The Court of Justice dismisses the appeal brought against the judgment of the General Court and rules that Ertico – ITS Europe, which belongs de facto to a large economic group and does not have to contend with the handicaps usually faced by SMEs, is not entitled to SME status.

---

82 Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36) ('the SME Recommendation').

83 Under sections 1.2.6 and 1.2.7 of the Annex to Commission Decision 2012/838/EU, Euratom of 18 December 2012 on the adoption of the Rules to ensure consistent verification of the existence and legal status of participants, as well as their operational and financial capacities, in indirect actions supported through the form of a grant under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities and under the Seventh Framework Programme of the European Atomic Energy Community for nuclear research and training activities (OJ 2012 L 359, p. 45).

84 Judgment of 22 May 2019, *Ertico – ITS Europe* v *Commission* (T-604/15, EU:T:2019:348).

Findings of the Court

In the first place, the Court rejects as ineffective Ertico – ITS Europe's line of argument seeking to demonstrate that Article 22(1) of Regulation No 58/2003 [85] is applicable to the review proceedings before the Validation Panel. In that regard, the Court notes that the mere fact that the decision at issue was adopted after the expiry of the two-month period for the Commission to reply to proceedings instituted on the basis of that article cannot entail annulment of that decision. Indeed, it follows from that very article that the Commission may, upon expiry of the two-month period, confine itself to an implicit rejection of the administrative proceedings. The Court then considers that, even assuming that that article was applicable to the review proceedings, the result of the withdrawal of the first negative decision was a 'failure by the Commission to reply' within the prescribed period. That failure to reply is equivalent to an implicit rejection of the proceedings.

In the second place, the Court finds, first of all, that Ertico – ITS Europe is not an independent enterprise and that its members are enterprises that are not SMEs. The Court then emphasises that Ertico – ITS Europe cannot derive its SME status from the fact that it formally meets the staff headcount and financial ceilings criteria laid down by the SME Recommendation if, in fact, it does not have to contend with the handicaps usually faced by SMEs. In addition, those staff headcount and financial ceilings criteria cannot be determined on the basis of data relating solely to Ertico – ITS Europe. Next, the Court notes that whether the condition that an enterprise has access to funds and assistance not available to competitors of equal size is satisfied is not conditional on a finding that that enterprise intended to circumvent the SME definition. Lastly, the Court recalls that the independence criterion, as defined in the SME Recommendation, cannot be regarded as having been met if the economic reality tends to support the exclusion of the entity concerned from the advantages reserved for SMEs alone.

Consequently, the Court concludes that the Validation Panel did not infringe the SME Recommendation by noting that Ertico – ITS Europe belonged de facto to a large economic group and that, because of the organisational links between Ertico – ITS Europe and its partners or members, it could not be regarded as having to contend with the handicaps usually faced by SMEs.

Regarding the costs, although the General Court had ordered the Commission to pay half the costs incurred by Ertico – ITS Europe, the Court of Justice orders that enterprise to bear its own costs and to pay the costs incurred by the Commission.

---

85 Article 22(1) of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 2003 L 11, p. 1) specifies the procedure applicable to review of the legality of acts of the REA.

XII. ENVIRONMENT

Judgment of the Court (Second Chamber) of 4 March 2021, Föreningen Skydda Skogen, Joined Cases C-473/19 and C-474/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Environment – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Article 12(1) – Directive 2009/147/EC – Conservation of wild birds – Article 5 – Forestry – Prohibitions intended to ensure the conservation of protected species – Plan for final felling of trees – Site hosting protected species

After receiving a notification of tree felling relating to an area of forest in the municipality of Härryda (Sweden), the Skogsstyrelsen (Forest Agency, Sweden) issued guidance stating that, on condition that the recommended precautionary measures were complied with, the final felling of almost all the trees in the area concerned, which is the natural habitat of a number of protected species, would not be contrary to Swedish legislation on the protection of species.

Three environment protection associations, which regard the planned felling as being in breach of that legislation, which transposes the Birds Directive [86] and the Habitats Directive [87] into Swedish law, requested the Länsstyrelsen i Västra Götalands län (Regional Administrative Board of Västra Götaland, Sweden) to take action. The Regional Administrative Board nevertheless decided not to take any oversight measures, endorsing, in essence, the favourable guidance issued by the Forest Agency.

The associations challenged the Regional Administrative Board's decision in proceedings brought before the Vänersborgs tingsrätt, mark- och miljödomstolen (Vänersborg District Court, Land and Environment Court, Sweden). That court, which must therefore determine the impact of the forestry activity at issue on the protection of the species present in the area concerned, referred to the Court for a preliminary ruling several questions on the conditions for applying and the scope of the prohibitions laid down in that regard in the Birds and Habitats Directives.

The Court's assessment

First of all, so far as concerns the Birds Directive, the Court notes that that directive requires the Member States, in accordance with its Article 5, to take the requisite measures to establish a general system of protection of birds, including, in particular, prohibitions on the deliberate killing, capture or disturbance of birds and their eggs. [88]

The Court makes clear that the scope of those prohibitions covers all species of wild birds naturally occurring in the European territory of the Member States and, in contrast to Swedish practice, does not therefore cover only certain categories of species, namely those listed in Annex I to that directive, those which are at some level at risk or those which are suffering a long-term decline in population. That interpretation is supported by the object and purpose of the Birds Directive and by the context of Article 5 thereof. [89] In that regard, it is noted that the conservation of bird species is necessary in order to achieve a high level of protection of the environment and the European Union's objectives in

---

86 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7) ('the Birds Directive').

87 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

88 Article 5 of the Birds Directive.

89 Article 5 of the Birds Directive.

terms of sustainable development and improvement of living conditions. The Court states, in addition, that the Birds Directive makes a distinction between the system of general protection applicable to all species of bird and the specifically targeted and reinforced protection regime established for the species of birds listed in its Annex I.

Next, the Court notes that, like the Birds Directive, the Habitats Directive provides for the establishment of a system of strict protection for protected animal species, based on, among other things, the prohibitions set out in Article 12(1)(a) to (c) on the deliberate capture, killing or disturbance of specimens of those species, and the destruction or taking of their eggs. [90]

In that regard, the Court states that the condition as to deliberate action means that the author of the act at issue intended one of the types of harm referred to above or, at the very least, accepted the possibility of such a thing, such that the prohibitions listed in Article 12(1)(a) to (c) of the Habitats Directive are capable of being applied to an activity, such as forestry work, the purpose of which is manifestly different from the capture, killing or disturbance of animal species or the deliberate destruction or taking of eggs. Having regard to the objectives of the Habitats Directive, as well as to the wording and context of the aforementioned provision, [91] the applicability of those prohibitions is likewise not subject to the condition of a risk of an adverse effect caused by a given activity on the conservation status of the species concerned. An interpretation to the contrary would lead to a circumvention of the examination of the effect of an activity on the conservation status of an animal species which is, by contrast, necessary for the purposes of adopting derogations from those prohibitions. [92]

Furthermore, to the extent that the Habitats Directive seeks, for the purpose of preserving biodiversity, to ensure the restoration or maintenance of natural habitats and species of wild fauna and flora at a favourable conservation status, the prohibitions laid down in Article 12(1)(a) to (c) thereof apply even to species which have achieved such a conservation status, as those species must be protected against any deterioration of that status.

The Court then notes that, for the purpose of achieving the objectives of the Habitats Directive, the competent authorities must adopt preventive measures and anticipate what activities could harm protected species. It is thus a matter for the referring court to determine whether, in the main proceedings, the forestry work at issue is based on a preventive approach which has regard for the conservation needs of the species concerned, while taking into consideration the economic, social, cultural, regional and local requirements.

Lastly, as regards the prohibition on the deterioration or destruction of breeding sites or resting places, set out in Article 12(1)(d) of the Habitats Directive, [93] the Court states that the strict protection laid down in that provision is not dependent on the number of specimens of a species present in the area concerned. A fortiori, that protection cannot depend on the risk of an adverse effect on the conservation status of the species concerned where, in spite of precautionary measures, the continuous ecological functionality of the natural habitat of that species is lost.

---

90 Article 12(1)(a) to (c) of the Habitats Directive.

91 Article 12(1)(a) to (c) of the Habitats Directive.

92 Article 16 of the Habitats Directive.

93 Article 12(1)(d) of the Habitats Directive.

Judgment of the Court (First Chamber) of 17 March 2021, One Voice and Ligue pour la protection des oiseaux, Case C-900/19

Reference for a preliminary ruling – Environment – Directive 2009/147/EC – Conservation of wild birds – Articles 5 and 8 – Prohibition of the use of any method of capture of birds – Article 9(1) – Authorisation to use, by way of derogation, a traditional method of capture of birds – Conditions – No other satisfactory solution – Preservation of that traditional method as the sole justification for the absence of an 'other satisfactory solution' – Selectivity of catches – National legislation authorising the capture of birds using limes

The associations One Voice and the Ligue pour la protection des oiseaux (League for the Protection of Birds) oppose the use of limes for the purpose of capturing birds. They have challenged, before the Conseil d'État (Council of State, France), the legislation authorising the use of limes in certain French departments. [94] In support of their actions, the two associations have alleged infringement of provisions of the Birds Directive [95], in particular, Article 9 thereof, which lays down the requirements and conditions under which the competent authorities may derogate, inter alia, from the prohibition of hunting using limes, which is laid down in Article 8 and in point (a) of Annex IV to that directive.

In those circumstances, the Conseil d'État (Council of State) has referred questions to the Court of Justice about the interpretation of those provisions of the Birds Directive. In its judgment, the Court provides clarification on the possibility for the competent authorities to derogate from the prohibition, laid down in Article 8 of that directive, of certain methods of capture of protected birds in the context of hunting activities.

Findings of the Court

In the first place, the Court holds that Article 9(1) and (2) of the Birds Directive must be interpreted as meaning that the fact that a method of capture of birds is traditional is not, in itself, sufficient to establish that another satisfactory solution, within the meaning of that provision, cannot be substituted for that method.

In its judgment, it notes, first of all, that, when applying the derogating provisions, the Member States are required to ensure that all action affecting protected species is authorised solely on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Birds Directive. In that regard, it is stated that national legislation making use of a derogation does not fulfil the conditions relating to the obligation to state reasons where it merely states that there is no other satisfactory solution, that statement not being supported by a detailed statement of reasons based on the best relevant scientific knowledge.

Next, the Court notes that, although traditional methods of hunting may constitute 'judicious use' authorised by the Birds Directive, the preservation of traditional activities cannot, however, constitute an autonomous derogation from the system of protection established by that directive.

---

94 That legislation concerns five decrees of 24 September 2018 on the use of limes for the capture of thrushes and blackbirds intended for use as decoys during hunting seasons in certain French departments (JORF of 27 September 2018, texts Nos 10 to 13 and 15) and a decree of 17 August 1989 on the same subject matter (JORF of 13 September 1989, p. 11560).

95 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive').

Lastly, the Court notes that, when determining that there are no other satisfactory solutions, the competent authority must compare the various solutions that fulfil the conditions of the derogation in order to determine the solution that appears to be the most satisfactory. For that purpose, since, in formulating and implementing the European Union's policies in certain areas, the European Union and the Member States are, pursuant to Article 13 TFEU, to pay full regard to the welfare requirements of animals, the satisfactory nature of the alternative solutions must be assessed in the light of the reasonable options and the best available techniques. The Court points out that such solutions appear to exist. It has already held that the breeding and reproduction of protected species in captivity may, if they prove to be possible, constitute another satisfactory solution and that the transport of birds which have been lawfully captured or kept also constitutes judicious use. In that regard, the fact that the breeding and reproduction of the species concerned in captivity are not yet feasible on a large scale by reason of the national legislation is not, in itself, capable of calling into question the relevance of those solutions.

In the second place, the Court holds that Article 9(1)(c) of the Birds Directive must be interpreted as precluding national legislation which authorises, by way of derogation from Article 8 of that directive, a method of capture leading to by-catch where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.

The Court notes that the Member States may derogate from the prohibition of certain methods of hunting, provided, inter alia, that those methods permit the capture of certain birds on a selective basis. In that regard, it states that, for the purpose of assessing the selectivity of a method, it is necessary to consider not only the details of that method and the size of the catch that it entails for the non-target birds, but also its possible consequences for the species captured in terms of the harm caused to the birds captured.

Accordingly, in the context of a non-lethal method of capture leading to by-catch, the condition of selectivity cannot be satisfied unless that by-catch is limited in size, that is to say, it concerns only a very small number of specimens captured accidentally for a limited period, and they can be released without sustaining harm other than negligible harm. However, the Court states that it is highly likely, subject to the findings ultimately made by the Conseil d'État (Council of State), that, despite being cleaned, the birds captured sustain irreparable harm, since limes are capable, by their very nature, of damaging the feathers of any bird captured.

XIII. JUDICIAL COOPERATION IN CRIMINAL MATTERS : EUROPEAN ARREST WARRANT

Judgment of the Court (First Chamber) of 17 March 2021, Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE), Case C-488/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Scope – Article 8(1)(c) – Concept of 'enforceable judgment' – Offence giving rise to a conviction by a court of a third State – Kingdom of Norway – Judgment recognised and enforced by the issuing State by virtue of a bilateral agreement – Article 4(7)(b) – Grounds for optional non-execution of the European arrest warrant – Extra-territorial offence

In 2014 JR, a Lithuanian national, was sentenced in Norway to a term of imprisonment. Pursuant to a bilateral agreement between Norway and Lithuania, [96] that judgment was recognised and became enforceable in Lithuania and JR was transferred there so that the remaining sentence could be executed. In November 2016, he benefited from a conditional release measure, but it was subsequently revoked and the remainder of his sentence was then ordered to be executed. JR having absconded to Ireland, the Lithuanian authorities issued a European arrest warrant ('EAW') against him. In January 2019, JR was arrested in Ireland.

Before the High Court (Ireland), JR disputes his surrender to the Lithuanian authorities by relying, first, on the fact that only Norway could request his extradition and, second, on the ground for optional non-execution of an EAW relating to the extra-territorial nature of the offence. [97] In his view, since the offence giving rise to the EAW was committed in a State (Norway) other than the State issuing the EAW, Ireland must refuse to execute that EAW.

It was in that context that the High Court referred the matter to the Court of Justice. It asks whether an EAW may be issued with a view to executing a sentence imposed by a court of a third State but which, pursuant to a bilateral agreement, has been recognised and executed in part in the issuing Member State. If so, that court raises the question of the classification of the offence as an 'extraterritorial offence', in order to ascertain whether the ground for optional non-execution concerned is applicable in the present case.

Findings of the Court

In the first place, the Court notes that an EAW must be based on a national judicial decision that is separate from the decision issuing the EAW. From that point of view, a judgment delivered by a court of a third State imposing a custodial sentence cannot, as such, constitute the basis of an EAW. By contrast, the Court holds that an EAW may be based on an act of a court of the issuing Member State recognising such a judgment and rendering it enforceable, provided that the custodial sentence at issue is of at least four months.

---

96 Bilateral Agreement on the recognition and enforcement of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty concluded between the Kingdom of Norway and the Republic of Lithuania on 5 April 2011.

97 That ground is laid down in Article 4(7)(b) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the EAW Framework Decision').

In reaching that conclusion, the Court notes, first of all, that such acts of recognition and enforcement of a Member State constitute judicial decisions, for the purposes of the EAW Framework Decision, [98] where they have been adopted for the purpose of executing a sentence. Next, in so far as those acts allow a judgment to be enforced, in that Member State, it is appropriate to treat them, as the case may be, as an 'enforceable judgment' or an 'enforceable decision'. Finally, in accordance with the EAW Framework Decision, [99] such acts fall within its scope, provided that the sentence in question is a custodial sentence of at least four months. The sentence to be executed is not required to stem from a judgment delivered by the courts of the issuing Member State or by those of another Member State.

However, the Court adds that the judicial authorities of the issuing Member State are required to ensure compliance with the requirements inherent in the EAW system in relation to procedure and fundamental rights. More specifically, the law of the issuing Member State must make provision for judicial review to verify that, in the procedure leading to the adoption in the third State of the sentencing judgment, the fundamental rights of the person concerned have been complied with. This applies, in particular, to compliance with the obligations arising under Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and rights of defence) of the Charter of Fundamental Rights of the European Union.

In the second place, the Court holds that, in order to determine whether the offence giving rise to the sentence imposed in a third State and the subsequent issuing of an EAW was committed 'outside the territory of the issuing Member State', [100] it is necessary to take into consideration the criminal jurisdiction of that third State (in this instance, Norway), and not that of the issuing Member State.

In that regard, first, the Court notes that such an interpretation is compatible with the objective pursued by the ground for optional non-execution of an EAW relating to the extra-territorial nature of the offence. That ground makes it possible to refuse to grant an EAW seeking execution of a sentence imposed for an offence prosecuted under an international criminal jurisdiction that is broader than that recognised by the law of the executing State. Second, the Court notes that, by contrast, an interpretation to the contrary would jeopardise the attainment of the general objectives of the EAW Framework Decision. If the executing State could refuse surrender in a situation where the judgment delivered by the court of a third State has been recognised by the State issuing the EAW, that refusal not only would be liable to delay the execution of the sentence, but could also lead to the impunity of the requested person. Moreover, it might discourage Member States from requesting the recognition of judgments and, in a situation such as that in the present case, encourage the State enforcing a recognised judgment to limit the use of conditional release instruments.

---

98 See Article 1(1), Article 2(1) and Article 8(1)(c) of the EAW Framework Decision.

99 See Article 1(1) and Article 2(1) of the EAW Framework Decision.

100 See Article 4(7)(b) of the EAW Framework Decision.

XIV. JUDICIAL COOPERATION IN CIVIL MATTERS – JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

Judgment of the Court (Fifth Chamber) of 24 March 2021, MCP, Case C-603/20 PPU

Link to the complete text of the judgment

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Area of freedom, security and justice – Judicial cooperation in civil matters – Regulation (EC) No 2201/2003 – Article 10 – Jurisdiction in matters of parental responsibility – Abduction of a child – Jurisdiction of the courts of a Member State – Territorial scope – Removal of a child to a third State – Habitual residence acquired in that third State

SS and MCP, two Indian citizens who both have leave to remain in the United Kingdom, are parents of P, a citizen of the United Kingdom who was born in 2017. In October 2018, the mother went to India with the child, who has since lived there with her maternal grandmother and, therefore, no longer has her habitual residence in the United Kingdom. It is on that ground that the mother has challenged the jurisdiction of the courts of England and Wales, called upon to give a decision on the application of the father, who seeks the return of the child to the United Kingdom and, in the alternative, rights of access in the context of an action brought before the High Court of Justice (England & Wales), Family Division (United Kingdom).

The referring court considers that it is necessary to determine whether it has jurisdiction on the basis of the Brussels II bis Regulation. [101] In that regard, it indicates that, at the time when it was seised by the father, the child was habitually resident in India and was fully integrated into an Indian social and family environment, her concrete factual connections with the United Kingdom being non-existent, apart from citizenship.

The High Court of Justice notes that Article 10 of the Brussels II bis Regulation establishes the grounds of jurisdiction in cases of wrongful removal or retention of a child, while specifying that it harbours doubts, in particular, as to whether that provision can apply to a conflict of jurisdiction between the courts of a Member State and the courts of a third State. It, therefore, asks the Court of Justice whether that provision must be interpreted as meaning that, where a child has acquired his or her habitual residence in a third State following abduction to that State, the courts of the Member State where the child was habitually resident immediately before his or her abduction retain their jurisdiction indefinitely. This case thus enables the Court to give a ruling on the territorial scope of that provision.

Findings of the Court

The Court states, first, that, regarding jurisdiction in the event of child abduction, Article 10 of the Brussels II bis Regulation provides criteria relating to a situation which is confined to the territory of the Member States. The fact that that article uses the expression 'Member State' and not the words 'State' or 'third State' implies that it deals solely with jurisdiction in cases of child abductions from one Member State to another.

---

[101] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1; 'the Brussels II bis Regulation').

As regards, second, the context of that provision, the Court observes that Article 10 of the Brussels II bis Regulation constitutes a special ground of jurisdiction with respect to the general ground [102] which provides that the courts of the Member State where a child is habitually resident are, as a general rule, to have jurisdiction in matters of parental responsibility. That special ground of jurisdiction defeats what would otherwise be the effect of the application of the general ground of jurisdiction in the event of child abduction, namely the transfer of jurisdiction to the Member State where the child may have acquired a new habitual residence. However, where the child has acquired a habitual residence outside the European Union, there is no room for the application of the general rule of jurisdiction. Consequently, Article 10 of that regulation loses its *raison d'être* and there is not, therefore, any reason to apply it.

Furthermore, the Court observes that it is apparent from the *travaux préparatoires* of the Brussels II bis Regulation that the EU legislature did not intend to include within the scope of Article 10 the situation of child abductions to a third State, since such abductions were to be covered, inter alia, by international conventions such as the 1980 [103] and 1996 [104] Hague Conventions. Under certain conditions (such as acquiescence or inaction on the part of one of the persons concerned who holds a right of custody), the 1996 Hague Convention does make provision for the transfer of jurisdiction to the courts of the State where the child has acquired a new habitual residence. Such transfer of jurisdiction would be deprived of any effect if the courts of a Member State were to retain their jurisdiction indefinitely.

Third, the Court specifies that an indefinite retention of jurisdiction would not be compatible with one of the fundamental objectives pursued by the Brussels II bis Regulation, namely that of respecting the best interests of the child, by giving priority, for that purpose, to the criterion of proximity. The interpretation of Article 10 of the Brussels II bis Regulation in such a way would also disregard the logic of the mechanism of prompt return or non-return established by the 1980 Hague Convention.

The Court concludes that Article 10 of the Brussels II bis Regulation is not applicable to a situation where a finding is made that a child has, at the time when an application relating to parental responsibility is brought, acquired his or her habitual residence in a third State following abduction to that State. In that situation, the jurisdiction of the court seised will have to be determined in accordance with the applicable international conventions or, in the absence of any such international convention, in accordance with Article 14 of the Brussels II bis Regulation.

---

102 Laid down in Article 8(1) of that regulation.

103 Convention on the Civil Aspects of International Child Abduction, signed on 25 October 1980 in the framework of the Hague Conference on Private International Law.

104 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 (OJ 2008 L 151, pp. 39-48).

XV. CIVIL SERVICE

Judgment of the General Court (Seventh Chamber, Extended Composition) of 3 March 2021, Barata v Parliament, Case T-723/18

Link to the complete text of the judgment

Civil service – Officials – Promotion – Certification procedure – Exclusion of the applicant from the final list of officials entitled to take part in the training programme – Article 45a of the Staff Regulations – Action for annulment – Communication by registered letter – Article 26 of the Staff Regulations – Registered letter not collected by the person to whom it was addressed – Starting point of the period prescribed for instituting proceedings – Admissibility – Obligation to state reasons – Right to be heard – Principle of sound administration – Proportionality – Rules on the use of languages

On 22 September 2017, the European Parliament published a call for applications ('the notice of competition') for the 2017 certification exercise, in order to select officials in the AST function group who were suitable for appointment to a post in the AD function group pursuant to Article 45a of the Staff Regulations of Officials of the European Union ('the Staff Regulations'). The applicant, an official of the European Parliament, submitted an application in the procedure in question.

The appointing authority of the Parliament ('the appointing authority') rejected that application as inadmissible on the ground that it was not accompanied by a list of annexes, as required by the notice of competition. The appointing authority confirmed its rejection by two decisions taken following internal review procedures initiated by the applicant.

By decision of 23 July 2018, the appointing authority rejected the applicant's complaints against the decisions rejecting his requests, while confirming its previous decisions. The Parliament communicated that decision by registered letter with acknowledgement of receipt, sent to the applicant's home address. On 25 July 2018, the Belgian postal service delivered that letter to the applicant's home address and, in the applicant's absence, left a notice of attempted delivery. As that letter was not collected by the applicant, the Belgian postal service sent it back to the Parliament on 9 August 2018. In addition, on 28 August 2018, the Parliament sent an email to the applicant to which the decision of 23 July 2018 was annexed, which the applicant confirmed that he had become aware of that day.

On 7 December 2018, the applicant, claiming that the period for bringing an action had started to run from the date on which he became aware of the email, brought an action before the Court seeking annulment of the decisions not to admit his application and annulment of the notice of competition.

The Court, while finding that the action had been brought within the period prescribed for that purpose, nevertheless dismissed it as unfounded. In its judgment, the Court clarifies the case-law of the European Union as regards the determination of the starting point of the periods for bringing proceedings in disputes governed by the Staff Regulations where an individual decision is sent by registered letter with acknowledgment of receipt, but is not collected by the addressee.

Moreover, the judgment supplements the case-law concerning the application of Regulation No 1/58 on the rules on the use of languages [105] where there is a certification procedure, namely an internal competition reserved for certain officials.

---

[105] Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition Series I 1952-1958, p. 59), as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ 2013 L 158, p. 1).

Findings of the Court

The Court finds, first of all, that the administration is in principle free to choose the method which it considers most appropriate in the light of the circumstances of the case in order to notify a decision rejecting a complaint, since the Staff Regulations do not impose any order of priority between the various possible methods, such as electronic means or registered letter with acknowledgement of receipt.

The Court notes, in that regard, that a decision is properly notified if it is communicated to the person to whom it is addressed and the latter is put in a position to become acquainted with it. That last condition is satisfied where the addressee is put in a position to become acquainted with the content of the decision and of the grounds on which it is based.

The Court observes, moreover, that no provision in the Staff Regulations or in other EU regulatory instruments specifies that, in the event of unsuccessful notification of a registered letter, the point from which time starts to run for the calculation of the time limit for bringing proceedings is deferred until the expiry of the retention period for that letter by the postal service rather than the date on which the applicant actually became aware of the content of that letter.

The Court concludes that, where the relevant legislation currently in force is silent, legal certainty and the need to avoid any discrimination or arbitrary treatment in the interest of the proper administration of justice preclude the application, in the present case, of the presumption of notification. The Parliament is therefore wrong to claim that only notification by registered letter must be taken into account for the purposes of calculating the time limit for bringing proceedings, even though that letter was not collected within the time period given by the Belgian postal services. Consequently, as it was on 28 August 2018 that the applicant became fully aware of the decision of 23 July 2018, the period for bringing an action started to run from 28 August 2018.

As regards the alleged infringement of the EU rules on the use of languages, in so far as the Parliament failed to use, in the notice of competition and in the decision of 23 July 2018, the applicant's mother tongue, namely Portuguese, the Court notes that a derogation from those rules may be justified in the light of the internal nature of a competition reserved to officials and staff employed in an institution. The fact that documents sent by the administration to one of its officials are drafted in a language other than that official's mother tongue does not constitute any infringement of that official's rights if he or she has a command of the language used by the administration which enables that official to acquaint himself or herself effectively and easily with the content of the documents in question. The Court notes, in that regard, that the applicant indicated in his application form that he had a very good level of the language actually used in the competition notice and in the decision of 23 July 2018 and that he used that language himself to communicate with the administration during the pre-litigation procedure.

The Court concludes that the certification procedure at issue in the present case is not an external competition which has to be published in the *Official Journal of the European Union* in all the official languages and which is open to all citizens of the European Union, but an internal competition reserved for certain officials with more than six years' service. It is therefore without infringing the principles governing the EU rules on the use of languages that the Parliament was able to refrain from publishing the notice of competition in Portuguese. It was also without disregarding those principles that, in that notice, the Parliament requested the applicant to communicate with it in a language other than Portuguese and to have an adequate command of English or French.

Civil service – EIB staff – Remuneration – Admissibility – Time limit for submitting a request to initiate the conciliation procedure – Act adversely affecting an official – Geographical mobility allowance – Transfer to an external office – Refusal to grant the allowance – Action for annulment and for damages

The applicant, AM, was hired by the European Investment Bank (EIB) on 1 June 2014, on the basis of a one-year fixed-term contract, which was subsequently renewed twice. From the start of his first contract with the EIB and until 31 March 2017, he was assigned to the EIB's external office in Vienna (Austria). With effect from 1 April 2017 and until the end of the contract he had at that time, that is to say 31 May 2020, the applicant was transferred to the EIB's external office in Brussels (Belgium). On 30 June 2017, the EIB made a decision explaining that his transfer did not fall within the scope of the EIB's Staff Rules ('the Staff Rules') and that, therefore, he was not entitled to receive the geographical mobility allowance. The EIB reiterated its refusal to pay that allowance to the applicant by a decision adopted further to a request by the applicant that a conciliation procedure be opened (together, 'the contested decisions'). Furthermore, notwithstanding the fact that the EIB's Conciliation Board found that the applicant should have received the geographical mobility allowance from 1 April 2017, the President of the EIB decided not to adopt that board's findings, thus ending the conciliation procedure.

The Court, seised of an action for annulment and for damages, annuls the contested decisions and provides, for the first time, clarifications about the conditions for granting the geographical mobility allowance to EIB staff.

Assessment of the Court

First, with regard to the subject matter of the action, the Court observes that, for EIB staff who entered into service after 1 July 2013, the decision of the President of the EIB ending the conciliation procedure is merely a precondition for bringing the matter before the EU judicature. The Court takes the view, in that regard, that, like the case-law relating to disputes covered by the Staff Regulations of Officials of the European Union or by the European Central Bank's Staff Rules, claims for annulment formally directed against the decision of the President of the EIB ending a conciliation procedure have the effect of bringing before the EU judicature the act adversely affecting the applicant that forms the subject matter of that procedure, except where the scope of that decision differs from that of the act forming the subject matter of the conciliation procedure. Where that decision contains a re-examination of the applicant's situation in the light of new elements of law or of fact, or where it changes or adds to the original act, it is a measure subject to review by the EU judicature, which will take it into consideration when assessing the legality of the contested measure, or will even regard it as an act adversely affecting the applicant replacing the contested measure. Since that is not the case here, the Court concludes that there is therefore no need to rule specifically on that head of claim.

Next, with regard to the admissibility of the action, the Court rejects the EIB's argument that the period to challenge the non-payment of the geographical mobility allowance ran from the date on which the applicant received his first salary statement following his transfer to the external office in Brussels. The Court observes, in that regard, that although it is true that the applicant's salary statement for the month of April 2017 did convey, in financial terms, the effects of the decision to transfer him to the external office in Brussels, the fact remains that that decision, and still less that salary statement, did not clearly define the EIB's position vis-à-vis the grant of the geographical mobility allowance. The omission of an allowance from the salary statement of the person concerned does not necessarily imply that the administration denies his or her entitlement to it.

Taking the view that the decision of 30 June 2017 is the first to set out clearly the EIB's refusal to grant the geographical mobility allowance to the applicant, the Court concludes that that decision is the first act adversely affecting the applicant, which had the effect of setting time running for the purposes of the time limits for making a complaint and bringing an action.

Finally, with regard to the conditions for granting the geographical mobility allowance in the case of a transfer to an external office of the EIB within the European Union, the Court states that, under Article 1.4 of the Staff Rules, the grant of the geographical mobility allowance is subject to two cumulative conditions: first, the transfer to another place of employment within the European Union for a period of between one and five years and, second, the completion of at least twelve months' service at the previous place of assignment.

Accordingly, the Court finds that that article does not contain any explicit reference to the condition of temporary assignment to an external office within the European Union, in accordance with which the staff member must return to the EIB's headquarters at the end of the assignment in order to be eligible for the allowance at issue.

The Court explains, in that regard, that the return to the EIB's headquarters, as provided for in Article 2 of Annex VII to the Staff Rules, represents not a condition for granting the geographical mobility allowance but merely the logical corollary to the end of the temporary assignment to an external office for staff members whose contract has not expired and who must return to the EIB's headquarters at the end of that period.

In those circumstances, the Court states that not only can a transfer to an external office on the basis of the relevant Staff Rules not be considered, by definition, as permanent, since, from the outset, it is limited to the maximum duration provided for in those rules, but, even if a member of staff of the EIB is assigned to such an office for a period of time which ends at the same time as the end of his or her fixed-term contract, that member of staff is eligible for that allowance, provided that the satisfies the two cumulative conditions laid down in Article 1.4 of the Staff Rules.

Judgment of the General Court (First Chamber, Extended Composition) of 24 March 2021, Picard v Commission, Case T-769/16

Link to the complete text of the judgment

Civil service – Contract staff – Reform of the Staff Regulations 2014 – Transitional provisions relating to certain methods for calculating pension rights – Change in conditions after the signature of a new contract as a member of the contract staff – Definition of to 'be in service'

The applicant, Mr Maxime Picard, has been a member of the contract staff at the European Commission's Office for the Administration and Payment of Individual Entitlements (PMO) since 2008. He was initially engaged as a member of the contract staff in the first function group, under a contract signed in 2008 ('the 2008 contract') and renewed on three occasions for a fixed period, before being renewed for an indefinite period in 2011.

On 16 May 2014, the applicant signed a new contract as a member of the contract staff for an indefinite period with classification in the second function group, after demonstrating that he had performed tasks in that function group. That contract took effect on 1 June 2014 ('the 2014 contract').

In the meantime, the 2014 reform of the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants [106] introduced a new annual pension accrual rate of 1.8%, which is less favourable than the previous rate of 1.9%, and set the retirement age at 66, up

[106] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (OJ 2013 L 287, p. 15) entered into force on 1 November 2013 and is applicable, as regards the provisions relevant to the present case, from 1 January 2014.

from age 63 years. [107] However, according to the transitional regime provided for therein, an official 'who entered into service between 1 May 2004 and 31 December 2013' continues to acquire pension rights at the annual acquisition rate of 1.9%. [108] Furthermore, 'officials aged 35 years or more on 1 May 2014 and who entered the service before 1 January 2014 shall become entitled to a retirement pension at the age of 64 years and 8 months.' [109] Those transitional provisions apply by analogy to other staff in post on 31 December 2013. [110]

As he had signed his new contract after the reform of the Staff Regulations came into force, the applicant requested clarifications from the manager of the PMO's 'Pensions Sector' regarding its implications for his position. In his reply, the manager confirmed that, because of the change of contract, from 1 June 2014, the applicant was not covered by the transitional arrangements relating to the rate of acquisition of pension rights and retirement age.

Since the complaint lodged by the applicant against that reply was dismissed, he brought an action before the General Court for annulment of the manager's reply and the decision rejecting his complaint. In support of his action, the applicant submits that, for the purposes of applying the transitional provisions at issue, the administration should have used 1 July 2008 as the date of entry into service, the date when he was initially recruited as a member of the contract staff in the first function group, and not the date on which the new 2014 contract began.

However, the Eighth Chamber, Extended Composition, of the General Court dismisses that action. In its judgment, the General Court rules on the application of the transitional provisions concerning the accrual rate of pension rights and retirement age introduced by the reform of the Staff Regulations to contract staff who signed a new contract after that reform. [111]

Findings of the Court

First, the General Court considers the interpretation of Article 1(1) of the Annex to the Conditions of Employment of Other Servants, according to which the transitional provisions relating to the rate of acquisition of pension rights and the retirement age, introduced by the reform of the Staff Regulations for officials, 'shall apply by analogy to other servants in service on 31 December 2013'. [112] The General Court recalls, first of all, that the transitional provisions must be interpreted strictly and that their application by analogy to other servants requires consideration of the specific characteristics of officials and other servants. In that regard, the difference between those two categories of staff lies, in particular, in the nature of the tasks performed and the legal link between the official or other member of staff and the administration of the European Union. More specifically, an official enters and remains in the service of the Union administration by virtue of a statutory link, whereas a contract agent enters and remains in service by virtue of a contractual link. [113] Therefore, in order to be covered by the transitional rules, other staff must 'be in service on 31 December 2013', that is have a contract with the Union administration on that date.

---

107 Second and fifth paragraphs of Article 77 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), as amended by Regulation No 1023/2013.

108 Second paragraph of Article 21 of Annex XIII to the Staff Regulations.

109 Second subparagraph of Article 22(1) of Annex XIII to the Staff Regulations.

110 Article 1(1) of the Annex to the Conditions of Employment of Other Servants.

111 As regards officials, in the judgment of 14 December 2018, *Torné* v *Commission* (T-128/17, EU:T:2018:969), the Court interpreted the concept of 'entry into service' within the meaning of the transitional provisions concerning the rate of acquisition of pension rights and pensionable age laid down in Articles 21 and 22 of Annex XIII to the Staff Regulations.

112 Article 1(1) of the Annex to the Conditions of Employment of Other Servants of the European Union, as amended by Regulation No 1023/2013.

113 Staff Regulations of Officials and Conditions of Employment of Other Servants.

In the second place, the General Court clarifies the concept of 'to be in service on 31 December 2013'. According to the General Court, that situation can be established only where the contract staff member does not sign a new contract which entails the start of a new employment relationship with the EU administration, namely, where that contract does not substantially modify his duties, such as to call into question the functional continuity of that employment relationship. It follows that the transitional provisions apply by analogy to other staff serving on 31 December 2013 and who remain, after that date, pursuant to a contract that does not lead to a break in the employment relationship. That interpretation takes account of the legal value of the signing of a new contract while preserving the acquired rights and legitimate expectations of the staff.

In the present case, the General Court observes that the new contract signed by the applicant allowed him access to a higher function group, which called into question the functional continuity of the employment relationship which he had with the EU administration under the contract of 2008. Therefore, although the applicant was in service on 31 December 2013 under the original contract of 2008, the new contract of 2014 entailed termination of that employment relationship and the start of a new contract, with the result that the applicant cannot benefit from the transitional provisions concerning the accrual rate of pension rights and retirement age.

XVI. JUDGMENTS PUBLISHED IN FEBRUARY

Litigation of the Union : Judgment of the General Court (Third Chamber, Extended Composition) of 24 February 2021, Braesch and Others v Commission, Case T-161/18

Link to the complete text of the judgment

Action for annulment – State aid – Aid for the precautionary restructuring of Banca Monte dei Paschi di Siena – Preliminary examination stage – Decision declaring the aid compatible with the internal market – Plea of inadmissibility – Status as an interested party – Interest in bringing proceedings – *Locus standi* – Admissibility

In 2008, the Italian bank Banca Monte dei Paschi di Siena ('BMPS') undertook a capital increase of EUR 950 million underwritten in full by J.P. Morgan Securities Ltd ('JPM'), under the terms of contracts concluded between them ('the FRESH contracts'). JPM obtained the funds necessary to finance that transaction from Mitsubishi UFJ Investor Services & Banking (Luxembourg) SA ('MUFJ') which issued the bonds entitled FRESH in an amount of EUR one billion. The bondholders receive, for their part, fees in the form of coupons passed on to them by MUFJ.

At the end of 2016, BMPS requested extraordinary public financial support in the form of a precautionary recapitalisation under Italian legislation. In response to that request, the Italian authorities notified the European Commission of aid for the recapitalisation of BMPS in the amount of EUR 5.4 billion. That aid was to be added to EUR 15 billion of individual liquidity aid to BMPS, which the Commission had temporarily approved by decision of 29 December 2016.

By decision of 4 July 2017, the Commission approved, following the preliminary examination stage, both the EUR 15 billion of individual liquidity aid to BMPS and the aid for precautionary recapitalisation of BMPS in the amount of EUR 5.4 billion ('the decision not to raise objections'). Those

aid measures, accompanied by a restructuring plan and undertakings offered by the Italian authorities, were considered to constitute State aid compatible with the internal market [114] for reasons of financial stability.

Considering that the cancellation of the FRESH contracts arose from the restructuring plan accompanying the aid measures and that they had suffered a substantial economic loss on account of that cancellation, the FRESH bondholders ('the applicants') brought an action for annulment of the Commission's decision not to raise objections. The Commission raised a plea of inadmissibility on the grounds that the applicants do not have an interest in bringing proceedings or standing to bring proceedings for the purposes of Article 263 TFEU.

The plea of inadmissibility raised by the Commission is rejected by the Third Chamber, Extended Composition, of the General Court. In its judgment, the Court was called upon to apply, in this new factual context, the case-law establishing the conditions for admissibility of an action for annulment brought by interested parties against a Commission decision not to raise objections against notified aid.

Findings of the Court

Given that the action for annulment concerns a Commission decision not to raise objections within the meaning of Article 4(3) of the regulation laying down detailed rules for the application of Article 108 TFEU, [115] the Court finds first that both the applicants' interest in bringing proceedings and their standing to seek annulment of that decision depends on their being 'interested parties' who can take part in the State aid formal investigation procedure.

The regulation laying down detailed rules for the application of Article 108 TFEU [116] defines the concept of 'interested party', synonymous with that of 'party concerned' within the meaning of Article 108(2) TFEU, as, inter alia, any person, undertaking or association of undertakings whose interests might be affected by the granting of aid. Since that concept is interpreted broadly in the case-law, it may encompass any person capable of demonstrating that the grant of State aid is likely to have a specific effect on its situation.

Through this lens, the Court considers that the applicants have shown, to the requisite legal standard, that the grant of the aid measures at issue and, therefore, the adoption of the decision not to raise objections, are likely to have a specific effect on their situation, with the result that they must be categorised as interested parties. In that regard, the Court stresses that the commitments of the Italian authorities relating to the restructuring plan, which led, according to the applicants, to a significant economic loss for the FRESH bondholders, form an integral part of the aid measures notified, so that the decision not to raise objections concerns those measures and those commitments, taken as a whole. Since that decision authorised the implementation of those aid measures while making those commitments binding, the applicants' situation is inevitably affected by all those factors and they can defend their interests only by seeking the annulment of that decision in its entirety.

Next, the Court analyses the applicants' interest in bringing proceedings and standing to bring proceedings against the decision not to raise objections.

---

114 Under Article 107(3)(b) TFEU, concerning aid intended to remedy a serious disturbance in the economy of a Member State.

115 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9) ('the regulation laying down detailed rules for the application of Article 108 TFEU'). Article 4(3) of that regulation provides that where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market. That decision is called a 'decision not to raise objections'.

116 Article 1(h) of the regulation laying down detailed rules for the application of Article 108 TFEU.

In the first place, the Court states that, as interested parties, the applicants have an interest in bringing proceedings for the annulment of the decision not to raise objections, whose content is closely linked to the commitments of the Italian authorities relating to the BMPS restructuring plan. Its annulment is capable of procuring a benefit for them, since it would lead to the opening of the formal investigation procedure, in the context of which the applicants would be able to make comments and thus affect the Commission's assessment concerning the compatibility of the notified aid measures with the internal market. Moreover, the annulment of the decision not to raise objections could affect the outcome of the action brought by the applicants before the Luxembourgish courts against the cancellation of the FRESH contracts.

In the second place, the Court considers that the applicants also have standing to bring proceedings seeking annulment of the decision not to raise objections, in that it declares the aid measures in question compatible with the internal market, without opening the formal investigation procedure. In that regard, the Court notes that any interested party within the meaning of the regulation laying down detailed rules for the application of Article 108 TFEU [117] is directly and individually concerned by such a decision. The beneficiaries of the procedural rights provided for in Article 108(2) TFEU and in that regulation [118] can ensure that those safeguards are observed, only if it is possible for them to bring a challenge before the EU Courts against the decision not to raise objections. Consequently, the specific status of interested parties within the meaning of the regulation laying down detailed rules for the application of Article 108 TFEU, in conjunction with the specific subject matter of the action, is sufficient to distinguish individually, for the purposes of the fourth paragraph of Article 263 TFEU, the applicants contesting a decision not to raise objections. The applicants therefore have standing to bring proceedings.

Nota :

The summary of the following case is currently finalised and will be published in the April 2021 issue of the Monthly Case-Law Bulletin :

- Judgment of 2 March 2021, Commission v Italy and Others, Case C-425/19 P, EU:C:2021:154

[117] Article 1(h) of the regulation laying down detailed rules for the application of Article 108 TFEU.

[118] Article 6(1), of the regulation laying down detailed rules for the application of Article 108 TFEU.