COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. VALUES OF THE UNION

Judgment of the Court (Grand Chamber) of 3 June 2021, Hungary v Parliament, C-650/18

Link to the complete text of the judgment

Action for annulment – Article 7(1) TEU – European Parliament resolution on a proposal calling on the Council of the European Union to determine the existence of a clear risk of a serious breach of the values on which the European Union is founded – Articles 263 and 269 TFEU – Jurisdiction of the Court – Admissibility of the appeal – Challengeable act – Article 354 TFEU – Rules for counting votes in the Parliament – Rules of Procedure of the Parliament – Rule 178(3) – Concept of 'votes cast' – Abstentions – Principles of legal certainty, equal treatment, democracy and sincere cooperation

On 12 September 2018, the European Parliament adopted a resolution [1] on a proposal calling on the Council of the European Union to determine, pursuant to Article 7(1) TEU, [2] the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. That declaration triggered the procedure laid down in Article 7 TEU, capable of leading to the suspension of certain rights resulting from EU membership.

Under the fourth paragraph of Article 354 TFEU, which sets out the voting arrangements for the purposes of applying Article 7 TEU, the adoption by the Parliament of the resolution at issue required a two-thirds majority of votes cast, representing the majority of its component Members. In applying its Rules of Procedure which provide that, in calculating whether a text has been adopted or rejected, account is to be taken only of votes cast 'for' and 'against', except in those cases for which the Treaties lay down a specific majority, [3] the Parliament only took into consideration, in calculating the votes on the resolution at issue, the votes in favour and against cast by its Members and excluded abstentions. [4]

Taking the view that, when calculating the votes cast, the Parliament should have taken account of the abstentions, Hungary brought an action under Article 263 TFEU for annulment of that resolution.

The Court, sitting as the Grand Chamber dismisses that action. It finds, in the first place, that the contested resolution may be subject to judicial review under Article 263 TFEU. In the second place, it considers that MEPs' abstentions do not have to be counted in order to determine whether the majority of two thirds of the votes cast, referred to in Article 354 TFEU, has been reached.

Findings of the Court

In the first place, the Court first rules on its jurisdiction to rule on the present action, and then on the admissibility of that action.

First of all, it states that Article 269 TFEU, which provides for a limited possibility of bringing an action for annulment against acts adopted by the European Council or the Council under the procedure

1 Resolution [2017/2131(INL)] (OJ 2019 C 433, p. 66).

2 Article 7(1) TEU provides as follows: 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.'

3 Rule 178(3) of the Rules of Procedure of the Parliament.

4 The resolution was adopted with 448 votes cast in favour and 197 cast against; 48 MEPs present abstained.

referred to in Article 7 TEU, does not exclude the Court's jurisdiction to hear and determine the present action. By making that right of action subject to stricter conditions than those imposed by Article 263 TFEU, Article 269 TFEU entails a limitation on the general jurisdiction of the Court of Justice of the European Union to review the legality of acts of the EU institutions and must, therefore, be interpreted narrowly. Furthermore, resolutions of the Parliament, adopted under Article 7(1) TEU, are not referred to in Article 269 TFEU. Thus, the authors of the Treaties did not intend to exclude an act such as the contested resolution from the general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU. Such an interpretation contributes to the observance of the principle that the European Union is a union based on the rule of law which has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union to review the legality of acts of the EU institutions.

Next, the Court considers that the contested resolution constitutes a challengeable act. It produces binding legal effects from the time of its adoption since, until the Council takes a decision on the action to be taken on it, that resolution has the immediate effect of lifting the prohibition which is imposed on the Member States on taking into consideration or declaring admissible to be examined an asylum application made by a Hungarian national. [5]

Moreover, the contested resolution does not constitute an intermediate measure the legality of which can be challenged only in the event of a dispute concerning definitive act for which it represents a preparatory step. First, in adopting that resolution, the Parliament did not express a provisional position, even though a subsequent determination by the Council of the existence of a clear risk of a serious breach by a Member State of EU values is subject to the prior approval of the Parliament. Secondly, the resolution at issue produces independent legal effects in so far as, even though the Member State concerned can rely the unlawfulness of that resolution in support of any action for annulment against the Council's subsequent determination, the potential success of that action would not, in any event, make it possible to eliminate all the binding effects of that resolution.

The Court notes, however, that certain specific conditions, laid down in Article 269 TFEU, to which the bringing of an action for annulment against a determination made by the Council, which may be adopted following a reasoned proposal by the Parliament such as the contested resolution, must also apply to an action for annulment brought, pursuant to Article 263 TFEU, against such a reasoned proposal, failing which Article 269 TFEU would be deprived of its practical effect. Thus, the latter action may be brought only by the Member State which is the subject of the reasoned proposal and the grounds for annulment relied on in support of such an action can only be based on infringement of the procedural rules referred to in Article 7 TEU.

In the second place, ruling on the substance, the Court observes that the concept of 'votes cast', contained in the fourth paragraph of Article 354 TFEU is not defined in the Treaties and that that autonomous concept of EU law must be interpreted in accordance with its usual meaning in everyday language. That concept, in its usual sense, covers only the casting of a positive or negative vote on a given proposal, whereas abstention, understood as a refusal to adopt a position, cannot be treated in the same way as a 'vote cast'. Consequently, the rule laid down in the fourth paragraph of Article 354 TFEU, which requires a majority of votes cast, must be interpreted as precluding the taking into account of abstentions.

That being so, after recalling that the fourth paragraph of Article 354 TFEU lays down a dual requirement for a majority, that is to say that acts adopted by the Parliament under Article 7(1) TEU must obtain, on the one hand, agreement from two thirds of the votes cast and, on the other hand, the agreement of the majority of MEPs, the Court observes that, in any event, abstentions are taken into account in order to ascertain that the votes in favour represent the majority of MEPs.

5 In accordance with the sole article of Protocol N° (24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305).

Lastly, the Court considers that the exclusion of abstentions in the calculation of votes cast, within the meaning of the fourth paragraph of Article 354 TFEU, is not contrary either to the principle of democracy or to the principle of equal treatment in the light, in particular, of the fact that the MEPs who abstained on the occasion of the vote acted with full knowledge of the facts, since they had been informed in advance that abstentions would not be counted as votes cast.

II. CITIZENSHIP OF THE UNION

Judgment of the Court (Grand Chamber) of 22 June 2021, Ordre des barreaux francophones and germanophone and Others (Mesures preventives en vue d'éloignement), C-718/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Articles 20 and 21 TFEU – Directive 2004/38/EC – Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – Decision to terminate a person's residence on grounds of public policy – Preventive measures to avoid any risk of the person concerned absconding during the period allowed for that person to leave the territory of the host Member State – National provisions similar to those applicable to third-country nationals under Article 7(3) of Directive 2008/115/EC – Maximum period of detention for the purpose of removal – National provision identical to that applicable to third-country nationals

Two actions for annulment were brought before the Cour constitutionnelle (Constitutional Court, Belgium) in respect of the Law of 24 February 2017 amending the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals in order to enhance protection of public policy and national security, [6] the first by Ordre des barreaux francophones et germanophone, and the second by four non-profit associations involved in the defence of migrants' rights and protection of human rights.

The national legislation provides, first, for the possibility of imposing on Union citizens and their family members, during the period allowed for them to leave the territory of Belgium following the adoption of an expulsion decision taken against them on grounds of public policy or during an extension of that period, preventive measures aimed at avoiding any risk of absconding, such as house arrest. Second, it allows Union citizens and their family members who have not complied with such an expulsion decision to be kept in detention, for a maximum period of eight months, in order to ensure that that decision is enforced. Those provisions are similar or identical to those which are applicable to illegally staying third-country nationals and which are intended to transpose the Return Directive [7] into Belgian law.

6 Moniteur Belge of 19 April 2017, p. 51890.

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

In those circumstances, the referring court asked the Court of Justice about the compatibility of that Belgian legislation with the freedom of movement guaranteed to Union citizens and their family members by Articles 20 and 21 TFEU and by the Residence Directive. [8]

Findings of the Court

The Grand Chamber of the Court finds, as a preliminary point, that, in the absence of EU rules on the enforcement of a decision to expel Union citizens and their family members, the mere existence of rules provided for by the host Member State in the context of such enforcement that are based on those applicable to the return of third-country nationals is not, in itself, contrary to EU law. However, such rules must comply with EU law, in particular concerning the freedom of movement and residence of Union citizens and their family members. The Court goes on to determine whether those rules constitute restrictions on that freedom and, if so, whether those rules are justified.

Thus, the Court finds, in the first place, that, in so far as the national provisions concerned limit the movements of the person concerned, they constitute restrictions on the freedom of movement and residence.

In the second place, as to whether there is any justification for such restrictions, the Court recalls first of all that the measures at issue are aimed at enforcing expulsion decisions adopted on grounds of public policy or public security and must therefore be assessed in the light of the requirements laid down in Article 27 of the Residence Directive. [9]

First, as regards the preventive measures aimed at avoiding the risk of absconding, the Court rules that Articles 20 and 21 TFEU and the Residence Directive do not preclude the application to Union citizens and their family members, during the period allowed for them to leave the territory of the host Member State following the adoption of such an expulsion decision, of provisions that are similar to provisions whose purpose is, as regards third-country nationals, to transpose the Return Directive into national law, [10] provided that the former provisions respect the general principles relating to the restriction on the right of entry and the right of residence on grounds of public policy, public security or public health laid down in the Residence Directive [11] and are no less favourable than the latter provisions.

Such preventive measures necessarily contribute to the protection of public policy, in so far as their purpose is to ensure that a person who represents a threat to public policy in the host Member State is expelled from the territory of that State. Those measures must therefore be regarded as restricting the freedom of movement and residence of that person 'on grounds of public policy' within the meaning of the Residence Directive, [12] and are therefore capable, in principle, of being justified under that directive.

Furthermore, those measures cannot be considered contrary to the Residence Directive solely on the ground that they are similar to the measures which are intended to transpose the Return Directive into national law. However, the Court points out that the beneficiaries of the Residence Directive enjoy a status and rights entirely different from those that may be relied upon by the beneficiaries of the Return Directive. Consequently, in view of the fundamental status of Union citizens, measures

8 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) N° 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) ('the Residence Directive').

9 In accordance with paragraph 2 of that article, restrictive measures taken on grounds of public policy or public security are to comply with the principle of proportionality and are to be based exclusively on the personal conduct of the individual concerned.

10 Article 7(3) of the Return Directive. According to that provision, 'certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure'.

11 Article 27 of the Residence Directive.

12 Article 27(1) of the Residence Directive.

which may be imposed on them in order to avoid a risk of absconding cannot be less favourable than measures provided for under national law to avoid a risk of third-country nationals absconding, during the period for voluntary departure, where such third-country nationals are subject to a return procedure on grounds of public policy.

Second, as regards detention for the purpose of removal, the Court rules that Articles 20 and 21 TFEU and the Residence Directive preclude national legislation which applies to Union citizens and their family members who, after the expiry of the period allowed for them to leave the territory or an extension of that period, have not complied with an expulsion decision taken against them on grounds of public policy or public security, a detention measure for a maximum period of detention of eight months, that period being identical to that applicable, in national law, to third-country nationals who have not complied with a return decision issued on such grounds pursuant to the Return Directive. [13]

In that regard, the Court states that the period of detention provided for by the national provision concerned, which is identical to that applicable to the removal of third-country nationals, must be proportionate to the objective, which is to establish an effective removal policy in respect of Union citizens and their family members. As regards specifically the duration of the removal procedure, Union citizens and their family members are not in a comparable situation to that of third-country nationals, with the result that there is no justification for treating all those individuals in the same way as regards the maximum period of detention.

In particular, the Member States have systems of cooperation and facilities in the context of the expulsion of Union citizens or their family members to another Member State that they do not necessarily have in the context of the removal of a third-country national to a third country. Since relations between Member States are based on the duty of sincere cooperation and the principle of mutual trust, they should not give rise to the same difficulties as those which may arise where there is cooperation between Member States and third countries. Nor should the practical difficulties involved in organising the return journey generally be the same for both categories of individual. Last, the return of a Union citizen to the territory of the Member State of origin is facilitated by the Residence Directive. [14]

According to the Court, it follows that a maximum period of detention of eight months for the purpose of removal for Union citizens and their family members goes beyond what is necessary to achieve the objective pursued.

Judgment of the Court (Grand Chamber) of 22 June 2021, Staatsecretaris van Justitie en Veiligheid (Effets d'une décision d'éloignement), C-719/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Directive 2004/38/EC – Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – Article 15 – End of a Union citizen's temporary residence in the territory of the host Member State – Expulsion decision – Physical departure of that Union citizen from that territory – Temporal effects of that expulsion decision – Article 6 – Possibility for that Union citizen to enjoy a new right of residence on his or her return to that territory

13 Article 6(1) of the Return Directive.

14 Under Article 27(4), the Member State which issued the passport or identity card must allow the holder of such a document who has been expelled from another Member State to re-enter its territory without any formality.

By decision of 1 June 2018, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') found that FS, a Polish national, was residing illegally in the territory of the Netherlands on the ground that he no longer satisfied the conditions laid down in Article 7 of Directive 2004/38, [15] relating to the right of residence for more than three months, and ordered him to leave the territory of the Netherlands. By decision of 25 September 2018 ('the expulsion decision'), the State Secretary declared unfounded the objection which FS had lodged against the previous decision. He set a period of four weeks for voluntary departure, expiring on 23 October 2018, beyond which FS could be expelled on the ground that he was illegally resident.

In any event, FS left the Netherlands by 23 October 2018 at the latest, since the German police arrested him on that date on suspicion of shoplifting. FS stated that he was resident in Germany, near the Netherlands border. FS also stated that, owing to his dependence on marijuana, he travelled to the Netherlands on a daily basis to purchase it. On 22 November 2018, he was apprehended in a supermarket in the Netherlands on suspicion of theft. Following his arrest and detention by the police, the State Secretary placed FS in administrative detention with a view to expelling him to his country of origin. The grounds stated for that decision were the risk of FS evading the monitoring of foreign nationals or avoiding or impeding preparations for his departure or the expulsion procedure.

By judgment delivered in December 2018, the rechtbank Den Haag, zittingsplaats Groningen (District Court, The Hague, sitting in Groningen, Netherlands), dismissed as unfounded the action brought by FS against the detention decision. FS lodged an appeal against that judgment before the referring court, the Raad van State (Council of State, Netherlands). That court observes that the expulsion decision adopted against FS is an expulsion decision within the meaning of Article 15 of the Residence Directive. [16] According to that court, the lawfulness of FS's detention following his return to the Netherlands depends on the issue of whether he had a right of residence in the Netherlands once again on the date on which he was placed in detention. Consequently, the Court has been asked to rule on the circumstances in which a Union citizen who has been the subject of an expulsion decision adopted on grounds other than public policy, public security or public health may rely on a new right of residence in the host Member State.

In its Grand Chamber judgment, the Court holds that a decision to expel a Union citizen from the territory of the host Member State, adopted on the basis of Article 15(1) of the Residence Directive on the ground that that Union citizen no longer enjoys a temporary right of residence in that territory under that directive, cannot be deemed to have been complied with in full merely because that Union citizen has physically left that territory within the period prescribed by that decision for his or her voluntary departure. The Court also states that, in order to enjoy a new right of residence under Article 6(1) of that directive in the same territory, the Union citizen who has been the subject of such an expulsion decision must not only have physically left the territory of the host Member State, but must also have genuinely and effectively terminated his or her residence there, with the result that, upon his or her return to that territory, his or her residence cannot be regarded as constituting in fact a continuation of his or her previous residence in that territory.

Findings of the Court

To reach that conclusion, in the first place, the Court examines whether the mere physical departure of a Union citizen from the host Member State is sufficient in order for an expulsion decision taken against that Union citizen under Article 15(1) of the Residence Directive to be regarded as having been

15 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) N° 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; 'the Residence Directive').

16 That provision provides, inter alia, that certain procedures provided for in Chapter VI of that directive, entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health' (the procedures laid down in Articles 30 and 31), are to apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

complied with in full. In that regard, the Court observes that the temporal effects of such an expulsion decision are not apparent from the wording of that directive. Next, having regard to the objective pursued by that provision and its context and the aim of that directive, the Court observes that the possibility offered to the host Member State of expelling Union citizens who are no longer legally resident in its territory is consistent with the specific objective provided for by the Residence Directive, which is to prevent Union citizens and their family members from becoming an unreasonable burden on the social assistance system of the host Member State during their temporary residence. The Court also points out that an interpretation which consists of stating that the mere physical departure of the Union citizen is sufficient for the purposes of complying with an expulsion decision would result in him or her being allowed to rely on multiple successive temporary periods of residence in a Member State in order, in fact, to reside there permanently, even though such a citizen did not satisfy the conditions for a right of permanent residence laid down in the Residence Directive. According to the Court, such an interpretation would be inconsistent with the overall context of the Residence Directive, which introduced a gradual system as regards the right of residence in the host Member State, which culminates in the right of permanent residence.

Furthermore, the Court considers that the grant of a minimum period of one month from notification of the expulsion decision to comply with that decision, [17] inasmuch as it enables the citizen concerned to prepare his or her departure, supports an interpretation of Article 15(1) of the Residence Directive to the effect that an expulsion decision is complied with when that citizen has terminated genuinely and effectively his or her residence in that territory.

In the second place, the Court provides useful indications to the referring court to enable it to determine, on the basis of an overall assessment of all the circumstances of the dispute before it, whether the Union citizen in question has genuinely and effectively terminated his or her residence in the host Member State, in such a way that the expulsion decision to which he was subject has been complied with in full. In that regard, the Court states first of all that to oblige such a citizen, in all cases, to leave the host Member State for a minimum period, for example three months, in order to be able to rely on a new right of residence in the Member State, under Article 6(1) of that directive, would be to render the exercise of that fundamental right subject to a limitation not provided for either by the Treaties or by that directive. However, the length of the period spent by that person outside the territory of the host Member State following the adoption of the expulsion decision may be of some importance, in so far as the longer the person concerned is absent from the host Member State, the more that absence attests to the genuine and effective nature of the end of his or her residence. In addition, among the other useful indications provided by the Court, the latter emphasises the importance of all the factors evidencing a break in the links between the Union citizen concerned and the host Member State, such as the termination of a lease contract or moving house or flat. The Court states that the relevance of such factors must be assessed by the competent national authority in the light of all the specific circumstances characterising the particular situation of the Union citizen concerned.

In the last place, the Court sets out the consequences of failure to comply with an expulsion decision. On that matter, the Court states that if it follows from such a verification that the Union citizen has not genuinely and effectively terminated his or her temporary residence in the territory of the host Member State, that Member State is not obliged to adopt a new expulsion decision on the basis of the same facts which gave rise to the expulsion decision already taken against that citizen, but may rely on that latter decision in order to oblige him or her to leave its territory. However, the Court points out that a material change in circumstances enabling the Union citizen to satisfy the conditions laid down in Article 7 of the Residence Directive, concerning the right of residence for more than three months, would deprive the expulsion decision of which he or she is the subject of any effect and would require, despite the failure to comply with that decision, that his or her residence on the

17 Provided for in Article 30(3) of the Residence Directive and applicable by analogy to a decision taken on the basis of Article 15 of that directive.

territory of the Member State concerned be regarded as legal. With respect to the possibility for a Member State to verify whether such an expulsion decision has been complied with in full, despite the limitations imposed by EU law on such controls, certain provisions of the Residence Directive are intended to enable the host Member State to ensure that the temporary residence of nationals of other Member States in its territory is carried out in a matter consistent with that directive. [18] Finally, the Court states that an expulsion decision taken against a Union citizen under Article 15(1) of the Residence Directive cannot be enforced against him or her where, under Article 5 of that directive, which provides for the right of entry to the territory of the host Member State, that citizen travels to that territory on an ad hoc basis for purposes other than to reside there.

III. PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 15 June 2021, Facebook Ireland and Others, C-645/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 47 – Regulation (EU) 2016/679 – Cross-border processing of personal data – 'One-stop shop' mechanism – Sincere and effective cooperation between supervisory authorities – Competences and powers – Power to initiate or engage in legal proceedings

On 11 September 2015, the President of the Belgian Privacy Commission ('the Privacy Commission') brought an action before the Nederlandstalige rechtbank van eerste aanleg Brussel (Dutch-language Court of First Instance, Brussels, Belgium), seeking an injunction against Facebook Ireland, Facebook Inc. and Facebook Belgium, aiming to put an end to alleged infringements of data protection laws by Facebook. Those infringements consisted, inter alia, of the collection and use of information on the browsing behaviour of Belgian internet users, whether or not they were Facebook account holders, by means of various technologies, such as cookies, social plug-ins [19] or pixels.

On 16 February 2018, that court held that it had jurisdiction to give a ruling on that action and, on the substance, held that the Facebook social network had not adequately informed Belgian internet users of the collection and use of the information concerned. Further, the consent given by the internet users to the collection and processing of that data was held to be invalid.

On 2 March 2018, Facebook Ireland, Facebook Inc. and Facebook Belgium brought an appeal against that judgment before the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium), the referring court in the present case. Before that court, the Belgian Data Protection Authority ('the DPA') acted as the legal successor of the President of the Privacy Commission. The referring court held that it solely has jurisdiction to give a ruling on the appeal brought by Facebook Belgium.

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18 That is true, inter alia, of Article 5(5) of the Residence Directive, according to which the Member State may require the person concerned to report his or her presence within its territory within a reasonable and non-discriminatory period of time, since failure to comply with that obligation, like a failure to comply with the registration obligation, may make the person concerned liable to non-discriminatory and proportionate sanctions.

19 For example, the 'Like' or 'Share' buttons.

The referring court was uncertain as to the effect of the application of the 'one-stop shop' mechanism provided for by the General Data Protection Regulation [20] on the competences of the DPA and, in particular, as to whether, with respect to the facts subsequent to the date of entry into force of the GDPR, namely 25 May 2018, the DPA may bring an action against Facebook Belgium, since it is Facebook Ireland which has been identified as the controller of the data concerned. Since that date, and in particular under the 'one-stop shop' rule laid down by the GDPR, only the Data Protection Commissioner (Ireland) is competent to bring injunction proceedings, subject to review by the Irish courts.

In its Grand Chamber judgment, the Court of Justice specifies the powers of national supervisory authorities within the scheme of the GDPR. Thus, it considers, inter alia, that that regulation authorises, under certain conditions, a supervisory authority of a Member State to exercise its power to bring any alleged infringement of the GDPR before a court of that State and to initiate or engage in legal proceedings in relation to an instance of cross-border data processing, [21] although that authority is not the lead supervisory authority with regard to that processing.

Findings of the Court

In the first place, the Court specifies the conditions governing whether a national supervisory authority, which does not have the status of lead supervisory authority in relation to an instance of cross-border processing, must exercise its power to bring any alleged infringement of the GDPR before a court of a Member State and, where necessary, to initiate or engage in legal proceedings in order to ensure the application of that regulation. Thus, the GDPR must confer on that supervisory authority a competence to adopt a decision finding that that processing infringes the rules laid down by that regulation and, in addition, that power must be exercised with due regard to the cooperation and consistency procedures provided for by that regulation. [22]

With respect to cross-border processing, the GDPR provides for the 'one-stop shop' mechanism, [23] which is based on an allocation of competences between one 'lead supervisory authority' and the other national supervisory authorities concerned. That mechanism requires close, sincere and effective cooperation between those authorities in order to ensure consistent and homogeneous protection of the rules for the protection of personal data, and thus preserve its effectiveness. As a general rule, the GDPR guarantees in this respect the competence of the lead supervisory authority for the adoption of a decision finding that an instance of cross-border processing is an infringement of the rules laid down by that regulation, [24] whereas the competence of the other supervisory authorities concerned for the adoption of such a decision, even provisionally, constitutes the exception to the rule. [25] However, in the exercise of its competences, the lead supervisory authority cannot eschew essential dialogue and sincere and effective cooperation with the other supervisory authorities concerned. Accordingly, in the context of that cooperation, the lead supervisory authority may not ignore the views of the other supervisory authorities concerned, and any relevant and reasoned objection made by one of the other supervisory authorities has the effect of blocking, at least temporarily, the adoption of the draft decision of the lead supervisory authority.

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20 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) ('the GDPR'). Under Article 56(1) of the GDPR: 'Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor'.

21 Within the meaning of Article 4, point (23), of the GDPR.

22 Laid down in Articles 56 and 60 of the GDPR.

23 Article 56(1) of the GDPR.

24 Article 60(7) of the GDPR.

25 Article 56(2) and Article 66 of the GDPR set out exceptions to the general rule that it is the lead supervisory authority that is competent to adopt such decisions.

The Court also adds that the fact that a supervisory authority of a Member State which is not the lead supervisory authority with respect to an instance of cross-border data processing may exercise the power to bring any alleged infringement of the GDPR before a court of that State and to initiate or engage in legal proceedings only when that exercise complies with the rules on the allocation of competences between the lead supervisory authority and the other supervisory authorities [26] is compatible with Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, which guarantee data subjects the right to the protection of his or her personal data and the right to an effective remedy, respectively.

In the second place, the Court holds that, in the case of cross-border data processing, it is not a prerequisite for the exercise of the power of a supervisory authority of a Member State, other than the lead supervisory authority, to initiate or engage in legal proceedings [27] that the controller or the processor with respect to the cross-border processing of personal data to which that action relates has a main establishment or another establishment on the territory of that Member State. However, the exercise of that power must fall within the territorial scope of the GDPR, [28] which presupposes that the controller or the processor with respect to the cross-border processing has an establishment in the European Union.

In the third place, the Court rules that, in the event of cross-border data processing, the power of a supervisory authority of a Member State, other than the lead supervisory authority, to bring any alleged infringement of the GDPR before a court of that Member State and, where appropriate, to initiate or engage in legal proceedings, may be exercised both with respect to the main establishment of the controller which is located in that authority's own Member State and with respect to another establishment of that controller, provided that the object of the legal proceedings is a processing of data carried out in the context of the activities of that establishment and that that authority is competent to exercise that power.

However, the Court adds that the exercise of that power presupposes that the GDPR is applicable. In this instance, since the activities of the establishment of the Facebook group located in Belgium are inextricably linked to the processing of personal data at issue in the main proceedings, with respect to which Facebook Ireland is the controller within the European Union, that processing is carried out 'in the context of the activities of an establishment of the controller' and, therefore, does fall within the scope of the GDPR.

In the fourth place, the Court holds that, where a supervisory authority of a Member State which is not the 'lead supervisory authority' brought, before the date of entry into force of the GDPR, legal proceedings concerning an instance of cross-border processing of personal data, that action may be continued, under EU law, on the basis of the provisions of the Data Protection Directive, [29] which remains applicable in relation to infringements of the rules laid down in that directive committed up to the date when that directive was repealed. In addition, that action may be brought by that authority with respect to infringements committed after the date of entry into force of the GDPR, provided that that action is brought in one of the situations where, exceptionally, that regulation confers on that authority a competence to adopt a decision finding that the processing of data in question is in breach of the rules laid down by that regulation, and that the cooperation and consistency procedures provided for by the regulation are respected.

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26 Laid down in Articles 55 and 56, read together with Article 60 of the GDPR.

27 Pursuant to Article 58(5) of the GDPR.

28 Article 3(1) of the GDPR provides that that regulation is applicable to the processing of personal data 'in the context of the activities of an establishment of a controller or a processor in the [European] Union, regardless of whether the processing takes place in the [European] Union or not'.

29 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

In the fifth and last place, the Court recognises the direct effect of the provision of the GDPR under which each Member State is to provide by law that its supervisory authority is to have the power to bring infringements of that regulation to the attention of the judicial authorities and, where appropriate, to initiate or engage otherwise in legal proceedings. Consequently, such an authority may rely on that provision in order to bring or continue a legal action against private parties, even where it has not been specifically implemented in the legislation of the Member State concerned.

Judgment of the Court (Grand Chamber) of 22 June 2021, Latvijas Republikas Saeima (Points de pénalité), C-439/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Articles 5, 6 and 10 – National legislation providing for public access to personal data relating to penalty points imposed for road traffic offences – Lawfulness – Concept of 'personal data relating to criminal convictions and offences' – Disclosure for the purpose of improving road safety – Right of public access to official documents – Freedom of information – Reconciliation with the fundamental rights to respect for private life and to the protection of personal data – Re-use of data – Article 267 TFEU – Temporal effect of a preliminary ruling – Ability of a constitutional court of a Member State to maintain the legal effects of national legislation incompatible with EU law – Principles of primacy of EU law and of legal certainty

B is a natural person upon whom penalty points were imposed on account of one or more road traffic offences. The Ceļu satiksmes drošības direkcija (Road Safety Directorate, Latvia) ('the CSDD') entered those penalty points in the national register of vehicles and their drivers.

Under the Latvian Law on road traffic, [30] information relating to the penalty points imposed on drivers of vehicles entered in that register is accessible to the public and disclosed by the CSDD to any person who so requests, without that person having to establish a specific interest in obtaining that information, including to economic operators for re-use. Uncertain as to the lawfulness of that legislation, B brought a constitutional appeal before the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia), requesting the court to examine whether the legislation complied with the right to respect for private life.

The Constitutional Court held that, in its assessment of that constitutional law, it must take account of the General Data Protection Regulation ('the GDPR'). [31] Thus, it asked the Court to clarify the scope of several provisions of the GDPR with the aim of determining whether the Latvian Law on road traffic is compatible with that regulation.

By its judgment, delivered in the Grand Chamber, the Court holds that the GDPR precludes the Latvian legislation. It notes that it has not been established that disclosure of personal data relating to the penalty points imposed for road traffic offences is necessary, particularly with regard to the objective of improving road safety invoked by the Latvian Government. Furthermore, according to the Court, neither the right of public access to official documents nor the right to freedom of information justify such legislation.

30 Article 14[1](2) of the Ceļu satiksmes likums (Law on road traffic) of 1 October 1997 (*Latvijas Vēstnesis* 1997, N° 274/276).

31 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119, p. 1).

Findings of the Court

In the first place, the Court holds that the processing of personal data relating to penalty points constitutes 'processing of personal data relating to criminal convictions and offences', [32] in respect of which the GDPR provides for enhanced protection because of the particular sensitivity of the data at issue.

In that context, it notes, as a preliminary point, that the information relating to penalty points is personal data and that its disclosure by the CSDD to third parties constitutes processing which falls within the material scope of the GDPR. That scope is very broad, and that processing is not covered by the exceptions to the applicability of that regulation.

Thus, first, that processing is not covered by the exception relating to the non-applicability of the GDPR to processing carried out in the course of an activity which falls outside the scope of EU law. [33] That exception must be regarded as being designed solely to exclude from the scope of that regulation the processing of personal data carried out by State authorities in the course of an activity which is intended to safeguard national security or of an activity which can be classified in the same category. These activities encompass, in particular, those that are intended to protect essential State functions and the fundamental interests of society. Activities relating to road safety do not pursue that objective and consequently cannot be classified in the category of activities having the aim of safeguarding national security.

Second, the disclosure of personal data relating to penalty points is not processing covered by the exception providing for the non-applicability of the GDPR to processing of personal data carried out by the competent authorities in criminal matters either. [34] The Court finds, in fact, that in carrying out that disclosure, the CSDD cannot be regarded as such a 'competent authority'. [35]

In order to determine whether access to personal data relating to road traffic offences, such as penalty points, amounts to processing of personal data relating to 'offences', [36] which enjoy enhanced protection, the Court finds, relying in particular on the history of the GDPR, that that concept refers only to criminal offences. However, the fact that, in the Latvian legal system, road traffic offences are classified as administrative offences is not decisive when determining whether those offences fall within the concept of 'criminal offence', since it is an autonomous concept of EU law which requires an autonomous and uniform interpretation throughout the European Union. Thus, after recalling the three criteria relevant for assessing whether an offence is criminal in nature, namely the legal classification of the offence under national law, the nature of the offence and the degree of severity of the penalty incurred, the Court finds that the road traffic offences at issue are covered by the term 'offence' within the meaning of the GDPR. As regards the first two criteria, the Court finds that, even if offences are not classified as 'criminal' by national law, the nature of the offence, and in particular the punitive purpose pursued by the penalty that the offence may give rise to, may result in its being criminal in nature. In the present case, the giving of penalty points for road traffic offences, like other penalties to which the commission of those offences may give rise, are intended, inter alia, to have such a punitive purpose. As regards the third criterion, the Court observes that only road traffic offences of a certain seriousness entail the giving of penalty points and that they are therefore liable to give rise to penalties of a certain severity. Moreover, the imposition of such points is generally

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32 Article 10 of the GDPR.

33 Article 2(2)(a) of the GDPR.

34 Article 2(2)(d) of the GDPR.

35 Article 3(7) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

36 Article 10 of the GDPR.

additional to the penalty imposed, and the accumulation of those points has legal consequences which may even extend to a driving ban.

In the second place, the Court holds that the GDPR precludes Latvian legislation which obliges the CSDD to make the data relating to the penalty points imposed on drivers of vehicles for road traffic offences accessible to the public, without the person requesting access having to establish a specific interest in obtaining the data.

In that regard, the Court points out that the improvement of road safety, referred to in the Latvian legislation, is an objective of general interest recognised by the European Union and that Member States are therefore justified in classifying road safety as a 'task carried out in the public interest'. [37] However, it is not established that the Latvian scheme of disclosing personal data relating to penalty points is necessary to achieve the objective pursued. First, the Latvian legislature has a large number of methods which would have enabled it to achieve that objective by other means less restrictive of the fundamental rights of the persons concerned. Second, account must be taken of the sensitivity of the data relating to penalty points and of the fact that their public disclosure is liable to constitute a serious interference with the rights to respect for private life and to the protection of personal data, since it may give rise to social disapproval and result in stigmatisation of the data subject.

Furthermore, the Court takes the view that, in the light of the sensitivity of those data and of the seriousness of that interference with those two fundamental rights, those rights prevail over both the public's interest in having access to official documents, such as the national register of vehicles and their drivers, and the right to freedom of information.

In the third place, for the same reasons, the Court holds that the GDPR also precludes Latvian legislation in so far as it authorises the CSDD to disclose the data on penalty points imposed on drivers of vehicles for road traffic offences to economic operators in order for the data to be re-used and disclosed to the public by them.

In the fourth and last place, the Court states that the principle of the primacy of EU law precludes the referring court, before which the action has been brought challenging the Latvian legislation, classified by the Court as incompatible with EU law, from deciding that the legal effects of that legislation be maintained until the date of delivery of its final judgment.

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37 Under Article 6(1)(e) of the GDPR, the processing of personal data is lawful where it is 'necessary for the performance of a task carried out in the public interest …'.

IV. LITIGATION OF THE UNION

1. ACTION FOR ANNULMENT

Order of the Court (First Chamber) of 16 June 2021, Sharpston v Council and Conférence des Représentants des Gouvernements des États membres, C-684/20 P

Link to the complete text of the order

Appeal – Article 181 of the Rules of Procedure of the Court of Justice – Consequences of the departure of the United Kingdom of Great Britain and Northern Ireland from the European Union for the members of the Court of Justice – Declaration of the Conference of the Representatives of the Governments of the Member States – End of the mandate of an Advocate General – Action for annulment

and

Order of the Court (First Chamber) of 16 June 2021, Sharpston v Council and Conférence des Représentants des Gouvernements des États membres, C-685/20 P

Link to the complete text of the order

Appeal – Article 181 of the Rules of Procedure of the Court of Justice – Consequences of the departure of the United Kingdom of Great Britain and Northern Ireland from the European Union for the members of the Court of Justice – Decision of the Representatives of the Governments of the Member States to appoint three Judges and an Advocate General to the Court of Justice – End of the mandate of an Advocate General – Action for annulment

In 2005, on the nomination of the Government of the United Kingdom, the representatives of the governments of the Member States appointed Ms Sharpston, the appellant, to the Court of Justice to serve as an Advocate General for the remaining term of her predecessor's mandate, that is until 6 October 2009. Her mandate was renewed, for the period from 7 October 2009 to 6 October 2015, and then from 7 October 2015 to 6 October 2021.

On 29 January 2020, the Conference of the Representatives of the Governments of the Member States adopted the Declaration on the consequences of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union for the Advocates General of the Court of Justice of the European Union ('the declaration at issue'). In that declaration, it noted that, since the United Kingdom had initiated the procedure laid down in Article 50 TEU to withdraw from the European Union, the Treaties would cease to apply to it as from the date of entry into force of the Withdrawal Agreement. [38] It also noted that, therefore, the mandates of all members of institutions, bodies, offices and agencies of the Union who were nominated, appointed or elected in relation to the United Kingdom's membership of the European Union would end on the date of the withdrawal.

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38 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'), approved by Council Decision (EU) 2020/135 of 30 January 2020 (OJ 2020 L 29, p. 1), and entered into force on 1 February 2020.

The Conference of the Representatives of the Governments of the Member States stated that it followed that the permanent post of Advocate-General which was assigned to the United Kingdom [39] would therefore be integrated in the rotation system among the Member States for the appointment of Advocates-General. It noted that, in accordance with the protocol order, the next eligible Member State would be the Hellenic Republic.

On 2 September 2020, by decision of the representatives of the governments of the Member States appointing three Judges and an Advocate General to the Court of Justice [40] ('the decision at issue'), the appellant's successor, Mr Rantos, was appointed to the post of Advocate General at the Court of Justice from 7 September 2020 to 6 October 2021.

By her two actions, brought, before the General Court, on 7 April 2020 and 4 September 2020, respectively, Ms Sharpston sought partial annulment of the declaration at issue and annulment of the decision at issue, in so far as it concerns the appointment of Mr Rantos to the post of Advocate General at the Court of Justice for the period from 7 September 2020 to 6 October 2021.

By two orders of 6 October 2020, the General Court dismissed those two actions for annulment as inadmissible and manifestly inadmissible, respectively. [41]

By her two appeals, Ms Sharpston asked the Court of Justice to set aside the two orders under appeal. She maintained, in essence, that the General Court had erred in law in dismissing, first, as inadmissible her application for partial annulment of the declaration at issue and, secondly, as manifestly inadmissible her application for annulment of the decision at issue, on the ground that they were adopted by the representatives of the governments of the Member States acting as such and not by the Council.

Upholding the orders under appeal, the Court of Justice dismisses the two appeals as being in part manifestly inadmissible and in part manifestly unfounded.

Findings of the Court

First, the Court of Justice notes that it follows from the wording of Article 263 TFEU that acts adopted by representatives of the governments of the Member States, acting not in their capacity as members of the Council but as representatives of their government, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts. The relevant criterion thus applied by the Court of Justice to exclude the jurisdiction of the EU Courts to hear and determine a legal action brought against such acts is therefore that relating to their author, irrespective of their binding legal effects.

According to the Court of Justice, it is clear that a broad interpretation of the authors of the acts to which Article 263 TFEU refers, as maintained by the applicant, would be contrary to the intention of the authors of the Treaties, reflected by that article, whose scope is limited solely to acts of EU law adopted by the institutions, bodies, offices and agencies of the European Union, to exclude acts that it is for the Member States to adopt, such as decisions to appoint members of the EU Courts from judicial review by the Court of Justice.

The Court of Justice notes that it is also immaterial whether the representatives of the governments of the Member States acted within the framework of the Treaties or of other legal sources, such as international law.

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39 By Declaration on Article 252 TFEU regarding the number of Advocates General in the Court of Justice annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

40 Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States of 2 September 2020 appointing three Judges and an Advocate General to the Court of Justice (OJ 2020 L 292, p. 1).

41 Order of the General Court of 6 October 2020, *Sharpston* v *Council and Conference of the Representatives of the Governments of the Member States* (T-180/20, not published, EU:T:2020:473) and order of the General Court of 6 October 2020, *Sharpston* v *Council and Representatives of the Governments of the Member States* (T-550/20, not published, EU:T:2020:475).

Consequently, the Court of Justice considers that the General Court did not commit any error in noting that it follows from Article 263 TFEU that acts adopted by representatives of the governments of the Member States, acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their government, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts.

Next, examining the appellant's ground of appeal alleging that the EU Courts should nevertheless consider that they have jurisdiction to assess the legality of the declaration at issue and the decision relating to the appointment of a new Advocate General, on the ground that the former contains a decision of the representatives of the governments of the Member States finding, *ultra vires*, that her mandate as Advocate General ended prematurely and that, as regards the latter, the withdrawal of the United Kingdom from the European Union did not have the effect of terminating the appellant's mandate as Advocate General, the Court of Justice considers however that analysis cannot be upheld, since the declaration at issue and the decision at issue cannot, in any event, be regarded as having been adopted by an institution, body, office or agency of the European Union referred to in Article 263 TFEU.

Furthermore, the Court of Justice finds that the declaration at issue and the decision at issue cannot be regarded as containing a decision having legal effects adversely affecting the appellant, in so far as they purportedly decided on the premature end of her mandate as Advocate General or indeed, as regards the latter, that it is based on such a decision. The Court finds in that regard that the declaration at issue merely took note of the consequences necessarily entailed by the United Kingdom's departure from the European Union.

The Treaties having ceased to be applicable to the United Kingdom on the date of its withdrawal, that is 1 February 2020, by virtue of Article 50(3) TEU, that State is not longer, as from that date, a Member State. It follows, as stated in the eighth paragraph of the preamble to the Withdrawal Agreement that the ongoing mandates of all members of institutions, bodies and agencies of the Union who were nominated, appointed or elected in relation to the United Kingdom's membership of the European Union ended automatically on that date.

Consequently, the General Court cannot be criticised for not having considered that it had jurisdiction to assess, first, the legality of a purported decision of the representatives of the governments of the Member States finding that the appellant's mandate had ended prematurely and, secondly, the legality of the decision at issue.

Judgment of the Court (Grand Chamber) of 22 June 2021, Venezuela v Council (Affectation d'un État tiers), C-872/19 P

Link to the complete text of the judgment

Appeal – Common foreign and security policy (CFSP) – Restrictive measures taken with regard to the situation in Venezuela – Action for annulment brought by a third State – Admissibility – Fourth paragraph of Article 263 TFEU – *Locus standi* – Condition that the applicant must be directly concerned by the measure that forms the subject matter of the action – Concept of a 'legal person' – Interest in bringing proceedings – Regulatory act which does not entail implementing measures

In 2017, the Council of the European Union adopted restrictive measures against the Bolivarian Republic of Venezuela ('Venezuela'), in view of the deterioration of democracy, the rule of law and

human rights in that country. Articles 2, 3, 6 and 7 of Regulation 2017/2063 [42] laid down, inter alia, a prohibition on selling or supplying military equipment and related technology which might be used for internal repression to any natural or legal person, entity or body in Venezuela, and a prohibition on providing certain technical, brokering or financial services connected with the supply of such equipment to those natural or legal persons, entities or bodies in Venezuela.

On 6 February 2018, Venezuela brought an action for annulment of Regulation 2017/2063, in so far as its provisions concern Venezuela. It subsequently adapted its application so that it also referred to Decision 2018/1656 and Implementing Regulation 2018/1653, [43] by which the Council had extended the restrictive measures adopted. By judgment of 20 September 2019, the General Court of the European Union dismissed that action as inadmissible, on the ground that the legal situation of Venezuela was not directly affected by the contested provisions. [44]

The Court of Justice, before which Venezuela lodged an appeal, rules on the application of the criteria for admissibility laid down in the fourth paragraph of Article 263 TFEU in relation to an action for annulment brought by a third State against restrictive measures adopted by the Council in view of the situation in that State. It sets aside the judgment of the General Court in so far as the latter had declared inadmissible the action brought by Venezuela for annulment of Articles 2, 3, 6 and 7 of Regulation 2017/2063 and refers the case back to the General Court for judgment on the merits of that action.

Findings of the Court

As a preliminary point, the Court notes that, since Venezuela's appeal does not relate to the part of the judgment under appeal in which its action for annulment of Implementing Regulation 2018/1653 and Decision 2018/1656 was dismissed as inadmissible, the General Court has given a final ruling in that respect. Next, the Court points out that, according to settled case-law, it may rule, if necessary of its own motion, whether there is an absolute bar to proceeding arising from disregard of the conditions as to admissibility laid down in Article 263 TFEU.

In the present case, it raises of its own motion the question whether Venezuela may be regarded as a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU. In that regard, it observes that it does not follow from that provision that certain categories of legal persons cannot avail themselves of the possibility of bringing an action for annulment provided for in that article. Nor, moreover, does it follow from its earlier case-law that the concept of a 'legal person', used in the fourth paragraph of Article 263 TFEU, is to be interpreted restrictively. The Court then points out that the principle that one of the European Union's founding values is the rule of law follows from both Article 2 TEU and Article 21 TEU, to which Article 23 TEU, relating to the CFSP, refers. In those circumstances, it considers that, under the fourth paragraph of Article 263 TFEU, read in the light of the principles of effective judicial review and the rule of law, a third State should have standing to bring proceedings as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied. It states in that regard that the European Union's obligations to ensure respect for the rule of law are not subject to a condition of reciprocity. Accordingly, Venezuela, as a State with international legal personality, must be regarded as a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU.

Next, the Court holds that the General Court erred in law in considering that the restrictive measures at issue did not directly affect the legal situation of Venezuela. In that regard, it notes that the

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42 Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21).

43 Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10), and Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1).

44 Judgment of 20 September 2019, *Venezuela* v *Council* (T-65/18, EU:T:2019:649).

restrictive measures at issue were adopted against Venezuela. Prohibiting EU operators from carrying out certain transactions amounted to prohibiting Venezuela from carrying out those transactions with those operators. Furthermore, since the entry into force of Regulation 2017/2063 had the effect of immediately and automatically applying the prohibitions laid down in Articles 2, 3, 6 and 7 thereof, those prohibitions prevented Venezuela from obtaining numerous goods and services. The Court concludes from this that those provisions directly affect the legal situation of that State. It considers, in that regard, that it is not necessary to draw a distinction according to whether the commercial transactions of that State constitute acts carried out in a private capacity (*iure gestionis*) or acts carried out in the exercise of State sovereignty (*iure imperii*). Similarly, it notes that the fact that the restrictive measures at issue do not constitute an absolute obstacle preventing Venezuela from procuring the goods and services in question is irrelevant in that respect.

Subsequently, the Court of Justice gives final judgment on the other grounds of inadmissibility initially raised by the Council before the General Court. As regards the ground alleging that Venezuela has no interest in bringing proceedings, the Court considers that, since the prohibitions laid down in Articles 2, 3, 6 and 7 of Regulation 2017/2063 are liable to harm the interests, in particular the economic interests, of Venezuela, their annulment is, by itself, capable of procuring an advantage for it. As regards the ground that Venezuela is not directly concerned by the contested provisions, the Court considers that the prohibitions laid down by the articles of Regulation 2017/2063 at issue apply without leaving any discretion to the addressees responsible for implementing them and without requiring the adoption of implementing measures. Since it had already found that those provisions affect the legal situation of Venezuela, the Court rejects that ground.

Finally, the Court notes that Regulation 2017/2063 constitutes a 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU. Since, moreover, the articles of that regulation contested by Venezuela do not entail implementing measures, the Court concludes that that third State does indeed have standing to bring proceedings against those articles on the basis of that provision, without having to establish that those articles are of individual concern to it.

Order of the General Court (Tenth Chamber, Extended Composition) of 8 June 2021, Silver and Others v Council, T-252/20

Link to the complete text of the order

and

Order of the General Court (Tenth Chamber, Extended Composition) of 8 June 2021, Shindler and Others v Council, T-198/20

Link to the complete text of the order

Action for annulment – Area of freedom, security and justice – Agreement on the withdrawal of the United Kingdom from the European Union and from Euratom – Council Decision on the conclusion of the agreement on withdrawal – United Kingdom nationals – Loss of EU citizenship – Lack of individual concern – Non-regulatory act – Inadmissibility

The applicants, including H. Shindler and J. Silver, are United Kingdom nationals resident in the United Kingdom and in several Member States of the European Union.

Following the referendum on 23 June 2016, the United Kingdom of Great Britain and Northern Ireland notified the European Council of its intention to withdraw from the European Union pursuant to Article 50(2) TEU. On 24 January 2020, the representatives of the European Union and the United Kingdom signed the withdrawal agreement, [45] following which the Council of the European Union adopted the contested decision [46] by which that agreement was approved on behalf of the European Union and the European Atomic Energy Community. On 31 January 2020, the United Kingdom withdrew from the European Union and the European Atomic Energy Community. On 1 February 2020, the withdrawal agreement entered into force.

In those circumstances, the applicants brought before the General Court two actions for partial annulment of the contested decision, in so far as that act allegedly deprives them of their status as EU citizens and of the rights attaching thereto. [47]

In its two orders, delivered by the Chamber sitting in extended composition, the Court holds, for the first time, that a decision approving the conclusion of an international agreement – in the present case the decision approving the conclusion of the agreement setting out the arrangements for the withdrawal of the United Kingdom from the European Union – does not constitute a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. [48] Consequently, the Court dismisses the two actions as inadmissible, since the applicants do not have standing to bring proceedings against such a decision.

Findings of the Court

First of all, the Court notes that the applicants are addressees neither of the withdrawal agreement nor of the contested decision and therefore have no right of action on the basis of the first limb of the fourth paragraph of Article 263 TFEU. In those circumstances, the Court examines whether the applicants could have a right of action on the basis of one or other of the situations provided for in the second and third limbs of the fourth paragraph of Article 263 TFEU.

As regards the second limb of the fourth paragraph of Article 263 TFEU, the Court notes that the conditions that the act of which annulment is sought should be of direct concern, on the one hand, and of individual concern, on the other hand, laid down in that provision, are cumulative. Given the circumstances of the present case, the Court first examines whether the second condition, relating to whether the applicants are individually concerned, is satisfied. In that regard, it notes that the contested decision, which brings the withdrawal act into the EU legal order, is itself an act of general application and, as such, affects the applicants by reason of their objective status as United Kingdom nationals. The circumstances on which the applicants rely, alleging that they belong to particular categories of United Kingdom nationals who have exercised their right to freedom of movement within the European Union, do not permit them to be regarded as forming part of a limited class of persons individually concerned by the contested decision at the time of its adoption, in so far as EU citizen status and the rights attaching thereto cannot be classified as specific or exclusive rights, the loss of which would have specific, different and significant effects for the applicants which would distinguish them individually from all other persons, in the same way as addressees of the contested decision.

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45 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7).

46 Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1; 'the contested decision').

47 Those rights include the right to move and reside freely in the territories of the Member States and the right to vote and to stand as a candidate in elections to the European Parliament and in the municipal elections of their State of residence.

48 Article 263 TFEU, fourth paragraph, provides as follows; 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

Consequently, the Court considers that the applicants are not individually concerned by the contested decision and that, therefore, they do not have standing to bring proceedings under the second limb of the fourth paragraph of Article 263 TFEU.

As regards the third limb of the fourth paragraph of Article 263 TFEU, the Court recalls that the conditions relating (i) to the regulatory nature of the contested act, (ii) to the applicant being directly concerned and, (iii) to the absence of implementing measures, provided for in the third limb of the fourth paragraph of Article 263 TFEU, are cumulative. In the circumstances of the present case, the Court examines first whether the contested decision constitutes a 'regulatory act'. In that regard, it points out that the concept of 'regulatory act', within the meaning of that provision, is more restricted in scope than that of 'acts', used in the first and second limbs of the fourth paragraph of Article 263 TFEU, in so far as it relates to a more restricted category of acts of general application and does not include legislative acts.

In the present case, the Court finds, in the first place, that the contested decision is a non-legislative act of general application, since it was adopted under Article 50(2) TEU. In that regard, the Court notes that although that provision states that the agreement setting out the arrangements for the withdrawal of a Member State is concluded on behalf of the European Union by the Council, acting by a qualified majority, after obtaining the consent of the Parliament, it makes no express reference either to the ordinary legislative procedure or to the special legislative procedure. It follows that the contested decision cannot be classified as a legislative act.

In the second place, the General Court notes that the Court of Justice has not yet had the opportunity to examine whether decisions approving the conclusion of an international agreement, and in particular decisions approving the conclusion of an agreement setting out the arrangements for the withdrawal of a Member State, must be classified as regulatory acts within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. In those circumstances, the Court examines whether the concept of 'regulatory act' also covers such decisions. In that regard, the Court notes in particular that, like any international agreement concluded by the European Union, an agreement setting out the arrangements for the withdrawal of a Member State binds the EU institutions and takes precedence over acts of general application which they lay down, both legislative and regulatory. Consequently, the contested decision introduces into the EU legal order rules, contained in the withdrawal agreement, which prevail over legislative and regulatory acts and which therefore cannot themselves be of a regulatory nature. Accordingly, the concept of 'regulatory act', within the meaning of the third limb of the fourth paragraph of Article 263 TFEU, must be interpreted as not including decisions approving the conclusion of an international agreement, such as, in particular, decisions approving the conclusion of an agreement setting out the arrangements for the withdrawal of a Member State.

As a result, the contested decision does not constitute a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU and the applicants do not have standing to bring proceedings under that provision. [49]

[49] The order in *Price* v *Council* (T-231/20, not published) concerns the same issue.

2. NON-CONTRACTUAL LIABILITY

Judgement of the General Court (Third Chamber) of 30 June 2021, Fondazione Cassa di Risparmio di Pesaro and Others v Commission, T-635/19

Non-contractual liability – State aid – Banking sector – Planned recapitalisation of a member by a private-law consortium of banks – Measure authorised by the Central Bank of the Member State – Decision not to proceed with the rescue and initiation of a resolution procedure – Directives 2014/49/EU and 2014/59/EU – Decision not to raise any objections – Requests for information and views expressed by the Commission during the preliminary examination stage – No causal link

The applicants were shareholders and subordinated creditors of the Banca delle Marche, which was the main banking institution in the Italian Marche region.

On 9 January 2012, the Banca d'Italia (Bank of Italy) stated that the checks carried out within the Banca delle Marche had revealed serious shortcomings in the internal control systems which led to inevitable knock-on effects on its 'significant exposure … to credit and financial risks'. On 15 October 2013, Banca delle Marche was placed under extraordinary administration on account, inter alia, of 'serious … deficiencies and irregularities'.

On 10 October 2014, in the context of a preliminary examination stage initiated of its own motion concerning the support measures envisaged by the Fondo interbancario di tutela dei depositi (Interbank Deposits Protection Fund, Italy; 'the FITD'), the Italian deposit guarantee scheme in the form of a consortium governed by private law between banks managing own funds, in favour of another Italian bank, Banca Tercas, [50] and Banca delle Marche, the European Commission made a request for information to the Italian authorities making it clear that it could not be excluded that those measures amount to State aid. If the Bank of Italy were to consider authorising such a measure, it was appropriate, according to the Commission, for those authorities to notify the measure in question before it is approved. [51]

By letter of 21 August 2015, concerning the procedure relating to the Banca delle Marche, the Commission drew attention to the possible existence of State aid and requested the Italian authorities to provide it with updated information in that regard and to refrain from implementing any measure of the FITD before notifying it and receiving a decision from the Commission.

On 8 October 2015, the FITD fixed and approved the key elements of a second attempt at a measure to support Banca delle Marche and informed the Bank of Italy thereof.

By letter of 19 November 2015, the Commission, inter alia, drew the attention of the Italian authorities to the fact that the use of a deposit guarantee scheme to recapitalise a bank [52] was subject to the State aid rules.

On 21 November 2015, the Bank of Italy initiated a resolution procedure, the draft of which was notified to the Commission beforehand. In that draft, the Bank of Italy noted, inter alia, the fact that it had not been possible for the FITD to recapitalise Banca delle Marche, in the absence of a 'prior

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50 See judgment of 2 March 2021, Commission v Italy and Others (C-425/19 P, EU:C:2021:154) (press release 30/21).

51 In accordance with the requirements of Article 108(3) TFEU.

52 Article 11(3) of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149).

positive assessment by the Commission … of the compatibility of [that transaction] with the [EU] State aid rules'.

Taking the view that the Commission prevented, by means of unlawful instructions sent to the Italian authorities, the rescue by means of the recapitalisation of Banca delle Marche by the FITD, the applicants brought an action before the General Court seeking to establish and find that the European Union incurred non-contractual liability. According to the applicants, the Commission prevented such a rescue and led the Italian authorities to initiate a resolution procedure in respect of Banca delle Marche under the Italian law rules transposing Directive 2014/59. [53]

By its judgment, the Court dismisses the applicants' action on the ground that they have not established a causal link between the Commission's allegedly unlawful conduct and the alleged damage, with the result that the conditions for the European Union to incur non-contractual liability are not fulfilled.

Findings of the General Court

As a preliminary point, the Court notes that the European Union may incur non-contractual liability [54] only if a number of conditions are fulfilled, namely the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the fact of damage and the existence of a causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties. That latter condition relates to the existence of a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, the burden of proof of which rests on the applicant, so that the conduct complained of must be the determining cause of the damage. Furthermore, non-contractual liability on the part of the European Union cannot be held to be incurred unless all the conditions which thus govern the obligation to provide compensation are fulfilled, with the result that failure to fulfil one of those conditions is sufficient for the action to be dismissed.

In the context of the assessment of the condition relating to the existence of a sufficiently direct causal link, the Court rejects the applicants' argument that, in essence, the Commission's letters and provisional views which led to the adoption of the Banca delle Marche resolution decision are the result of a failure by the Commission to have regard to the concept of aid in that it wrongly held that, notwithstanding their private nature, the measures adopted by the FITD constituted measures attributable to the Italian State and involving State resources. According to the Court, since the Commission reminded the Italian authorities of the need to give prior notification of, and not implement, possible aid measures in favour, inter alia, of that bank, those letters and views do not contain any legal assessment in the light of the concept of aid criteria. The Commission did not therefore express therein its views on a specific measure or on the precise manner in which it interprets the concept of aid. Accordingly, the Commission neither threatened the Italian authorities to block or prohibit possible measures by the FITD for the benefit of Banca delle Marche, nor did it exert pressure in that respect.

In that regard, the Court considers that the applicants are not justified in relying on the decision to open the formal investigation procedure concerning the measures adopted by the FITD for the benefit of Banca Tercas, adopted on 27 February 2015, in which the Commission had found that that measure met the criteria of imputability and State resources. Unlike those support measures for Banca Tercas, before the adoption of the Banca delle Marche resolution decision, there was no definite proposal for a measure by the FITD for the benefit of Banca delle Marche, or request for

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53 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) N° 1093/2010 and (EU) N° 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

54 Article 340, second paragraph, TFEU.

authorisation of such a proposal addressed to the Bank of Italy, or formal notification of that proposal, or any other reason for the Commission to open a formal investigation procedure in that regard. Therefore, according to the Court, it was impossible for the Commission to know with sufficient precision whether the possible measure envisaged by the FITD for the benefit of Banca delle Marche was capable of meeting the State aid criteria.

The Court points out that the decisive factors in favour of the Banca delle Marche resolution decision were the failing nature of that bank, as evidenced by the total losses of EUR 1 445 thousand million, a reported financial deficit of EUR 1 432 thousand million as at 30 September 2015 and the fact that, during the extraordinary administration procedure, it had not been possible to decide measures by the private sector capable of resolving its crisis situation.

Moreover, even before the transposition into Italian law of Directive 2014/59, which would have made such a support measure possible, the Banca delle Marche's extraordinary commissioners informed the Bank of Italy of the imminent suspension of payment by that bank and stated that they feared that its rescue could not take place in good time given its financial situation. According to the Court, that in itself indicates that it is impossible for the FITD to intervene rapidly, irrespective of the possible need to give prior notification of that intervention to the Commission. [55]

Furthermore, the Court rejects the applicants' claims that the allegedly unlawful conduct of the Commission prevented the rescue of Banca delle Marche and was the actual and exclusive cause of the damage that they suffered. According to the Court, even though that conduct played a certain role in the investigation process which led the Italian authorities to decide the resolution of that bank, their decision to initiate the resolution procedure of Banca delle Marche, adopted in the exercise of their own powers and of their discretion, was still autonomous, not decisively influenced by the Commission's attitude, and was essentially based on their finding of that bank's failure, which was the decisive reason for that resolution. Accordingly, the Court finds that the applicants have not demonstrated to the requisite legal standard that, in the absence of the allegedly unlawful conduct of the Commission, the FITD, with the consent of the Italian authorities, in particular the Bank of Italy, would actually have been able to rescue Banca delle Marche in November 2015.

V. ASYLUM POLICY

Judgment of the Court (Fourth Chamber) of 3 June 2021, Westerwaldkreis, C-546/19

Reference for a preliminary ruling – Area of freedom, security and justice – Immigration policy – Return of illegally staying third-country nationals – Directive 2008/115/EC – Article 2(1) – Scope – Third-country national – Criminal conviction in the Member State – Article 3(6) – Entry ban – Grounds of public policy and public security – Withdrawal of the return decision – Lawfulness of the entry ban

BZ, a third-country national, has resided in Germany since 1990. Although he has been under an obligation to leave the territory, he has continued to reside in that Member State by virtue of a 'temporary suspension of removal', which has been regularly extended on the basis of national law.

In 2013, BZ was given a custodial sentence for supporting terrorism and, in 2014, the enforcement of the remainder of his prison sentence was suspended.

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55 Article 108, paragraph 3, TFEU.

As a result of that criminal conviction, the Westerwaldkreis (District of Westerwald, Germany), by decision of 24 February 2014, ordered the expulsion of BZ and imposed a ban on entry into and residence in Germany for a period of six years, reduced subsequently to four years, beginning on the date on which BZ actually left German territory, and ending no later than 21 July 2023. At the same time, the District of Westerwald issued a removal warning against BZ, which, however, it withdrew in the context of administrative opposition proceedings.

The action brought against the measures issued in respect of him having been dismissed, BZ brought an appeal against the rejection decision before the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate, Germany).

In 2017, BZ's application for asylum was rejected by the competent German authority as manifestly unfounded. That authority also found that BZ could not be returned to Syria, since the conditions which precluded removal were satisfied so far as that country was concerned.

Since the appeal for the annulment of the expulsion order and for the determination of the duration of the entry and residence ban was dismissed by judgment of 5 April 2018, BZ brought an appeal on a point of law against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court, Germany). That court dismissed BZ's appeal on a point of law in so far as it related to the expulsion order issued in respect of him, which thus became final. Moreover, that court pursued the appeal proceedings on a point of law in so far as they concerned the decision to reduce the duration of the entry and residence ban accompanying that order to four years, beginning on the date of any departure of BZ from German territory and ending no later than 21 July 2023.

The referring court wonders whether the Return Directive [56] applies to an entry ban such as that at issue, imposed on a third-country national for purposes 'not related to migration'. Its doubts arise from the fact that, according to the Commission's 'Return Handbook', [57] the rules on return-related entry bans [58] under the Return Directive 'leave unaffected entry bans issued for other purposes not related to migration'. It states, however, that Germany has not exercised the option conferred on Member States by Article 2(2)(b) of the Return Directive not to apply that directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law.

If the Return Directive is applicable in such circumstances, the referring court is uncertain as to the compatibility with EU law of the maintenance of an entry ban [59] issued by a Member State against a third-country national who is on its territory and is the subject of an expulsion order, which has become final, where the return decision issued in respect of that national by the Member State has been withdrawn. It states in that regard that, under German law, an expulsion order does not constitute a 'return decision' [60] within the meaning of the Return Directive, unlike a removal warning.

Accordingly, the referring court decided to ask the Court for clarification on the scope of the Return Directive and on the link made therein between an entry ban and a return decision.

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

57 Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ 2017 L 339, p. 83).

58 This encompasses entry bans related to breach of the migration rules in the Member States.

59 Defined in Article 3(6) of the Return Directive as an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision.

60 Defined, in Article 3(4) of the Return Directive as an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.

Findings of the Court

In the first place, the Court holds that a ban on entry and stay issued by a Member State which has not exercised the option conferred on it by Article 2(2)(b) of that directive against a third-country national who is on its territory and is the subject of an expulsion order on grounds of public security and public policy, on the basis of a previous criminal conviction, falls within the scope of the Return Directive.

The Court points out, in that regard, that, under Article 2(1) thereof, the Return Directive applies to third-country nationals staying illegally on the territory of a Member State. In the light of the definition of 'illegal stay' in the Return Directive, any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally and, therefore, falls within the scope of that directive.

It follows that the scope of that directive is defined by reference solely to the situation of the illegal stay in which a third-country national finds him- or herself, irrespective of the reasons for that situation or the measures that may be adopted in respect of that national. The scope of the Return Directive cannot be altered by a Commission recommendation, which has no binding effect.

In the second place, the Court holds that the Return Directive precludes the maintenance in force of a ban on entry and stay issued by a Member State against a third-country national who is on its territory and is the subject of an expulsion order, which has become final, adopted on grounds of public security and public policy on the basis of a previous criminal conviction, where the return decision issued in respect of that national by that Member State has been withdrawn, even if that expulsion order has become final.

In reaching that conclusion, the Court observes that it follows from the Return Directive [61] that an entry ban is intended to supplement a return decision by prohibiting the person concerned, for a specified period of time following his or her 'return', as defined by the directive, and thus after his or her departure from the territory of the Member States, from again entering and then staying in that territory. Consequently, an entry ban produces its effects only from the point in time at which the person concerned actually leaves the territory of the Member States.

In the present case, the entry ban imposed on BZ is no longer accompanied by any return decision. In so far as an entry ban falling within the scope of the Return Directive can produce its legal effects only following the enforcement of the return decision, it cannot be maintained in force after that decision has been withdrawn.

It follows that, where a Member State is faced with a third-country national who is on its territory without a valid residence permit, it must determine whether that national is to be issued with a new residence permit. If that is not the case, it must issue in respect of that national a return decision which, in accordance with Article 11(1) of the Return Directive, may or must be accompanied by an entry ban within the meaning of Article 3(6) of that directive.

The Court considers that it is contrary to the Return Directive to tolerate the existence of an intermediate status of third-country nationals who are on the territory of a Member State without any right of stay or any residence permit and, depending on the circumstances, may be subject to an entry ban, without any valid return decision subsisting in relation to them. The fact that an expulsion order, such as that concerning BZ, has become final does not justify maintaining in force an entry ban when no return decision subsists in relation to BZ.

Those considerations also apply to third-country nationals staying illegally on the territory of a Member State who, like BZ, cannot be removed because the principle of non-refoulement precludes it. According to the directive, that circumstance does not justify the failure to issue a return decision in

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61 Specifically, Article 3(4) and (6) and Article 11(1) thereof.

respect of a third-country national in such a situation, but only the postponement of his or her removal, pursuant to that decision.

VI. STATE AID

Judgment of the General Court (Fourth Chamber, Extended Composition) of 9 June 2021, Dansk Erhverv v Commission, T-47/19

Link to the complete text of the judgment

State aid – Sale of canned beverages in border shops in Germany to foreign residents – Exemption from the deposit on condition that the beverages purchased are consumed outside Germany – Complaint – Decision by the Commission not to raise objections – Action for annulment – *Locus standi* – Admissibility – Conditions for initiating a formal investigation procedure – Error of law – Serious difficulties – Concept of 'State aid' – State resources – Non-imposition of a fine

The German Federal legislation 'VerpackV' [62] transposes Directive 94/62 on packaging and packaging waste. [63] In respect of certain non-reusable drinks packaging, that legislation establishes a deposit scheme, including value added tax which must be charged at each distribution level until transfer to the end-consumer and refunded on return of the packaging. Failure to collect the deposit constitutes an administrative offence punishable by a fine of up to EUR 100 000.

Under the division of competences laid down in the Basic Law for the Federal Republic of Germany, the implementation of that legislation is the responsibility of the regional authorities which are in a position to enforce it through administrative orders or the imposition of fines. In that context, the Schleswig-Holstein and Mecklenburg-Vorpommern authorities took the view that the obligation to charge the deposit did not apply to border shops if the beverages were sold only to customers resident in particular in Denmark and if those customers undertook in writing (by signing an export declaration) to consume those beverages and to dispose of their packaging outside Germany.

Taking the view that the exemption from charging the deposit on non-reusable drinks packaging amounted to granting unlawful aid incompatible with the internal market to a group of retail undertakings in the north of Germany, Dansk Erhverv ('the applicant'), a trade association representing the interests of Danish undertakings, submitted a State aid complaint to the European Commission. At the end of the preliminary examination stage, the Commission adopted a decision finding that the measures at issue, namely the non-charging of the deposit, the non-collection of value added tax relating to the deposit and the non-imposition of a fine on the undertakings which do not charge the deposit, do not constitute State aid within the meaning of Article 107(1) TFEU ('the contested decision'). [64]

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62 The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Verpackungsverordnung) is an ordinance of 21 August 1998 on the prevention and recycling of packaging waste (BGBl. 1998 I, p. 2379).

63 European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

64 Commission Decision C(2018) 6315 final of 4 October 2018 concerning State Aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops.

On 23 January 2019, the applicant brought an action for annulment of that decision. In its examination of that action, the General Court provides important clarifications, first, as regards the relationship between the provisions on State aid and other provisions of EU or national law and, secondly, on the appropriate conclusions to be drawn, concerning fines, from the existence of difficulties in interpreting the applicable legislation in determining whether a State resource exists.

Findings of the General Court

In the first place, the General Court clarifies to what extent infringement of provisions which do not relate to the law on State aid may usefully be relied on in order to establish that a relevant decision adopted by the Commission is unlawful. In that regard, according to the General Court, a distinction must be made depending on whether the Commission's decision concerns the compatibility of aid with the internal market or whether it concerns the existence of aid. In the first situation, where aid which, by some of its conditions, contravenes other provisions of the FEU Treaty cannot be declared compatible with the internal market, failure by a national measure, classified as State aid, to have regard to provisions of the FEU Treaty other than those relating to State aid may properly be relied on to challenge the legality of a decision by which the Commission considers that such aid is compatible with the internal market.

On the other hand, according to the General Court, the same is not true of decisions on the existence of State aid. In that regard, it notes that it is true that Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities. However, such integration is intended to be carried out at the stage of the examination of the compatibility of aid and not that of the examination of its existence. Since the taking into account of a ground of general interest is ineffective at the stage of classification as State aid, the General Court holds that the fact that a national measure infringes provisions of EU law other than those relating to State aid cannot properly be relied on, in itself, for the purpose of establishing that that measure is State aid. It is contrary to the wording of Article 107(1) TFEU to consider that a national measure, because it infringes other provisions of the Treaties, constitutes aid even though it does not fulfil the conditions expressly laid down by that provision for the purpose of identifying aid.

According to the General Court, the same applies, a fortiori, to legislation of a Member State. The need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question. The General Court finds that no express reference is made to the law of the Member States in Article 107(1) TFEU. Furthermore, it is not for the Commission, but for the competent national courts, to review the legality of national measures in the light of national law. In that regard, if it were accepted that infringement of a Member State's legislation must lead the Commission to classify national measures as State aid, it might be required to decide on the lawfulness of those measures in the light of national law, in disregard of the jurisdiction of the national courts.

Thus, the General Court rejects the applicant's claim that the Commission should have taken into consideration, in examining whether the measure, consisting of exemption from charging of the deposit, was State aid, the obligations of the Federal Republic of Germany under Directive 94/62, the 'polluter pays principle' and German law.

In the second place, in examining the complaint that, in order to determine whether the non-imposition of a fine constituted an advantage financed through State resources, the Commission wrongly applied an unprecedented legal test alleging the existence of difficulties in interpreting the legislation at issue, the General Court notes that, in the present case, the non-imposition of a fine is inseparable from the non-charging of the deposit and, therefore, from the interpretation of the legislation in force accepted in practice by the competent German regional authorities. Such a context does not correspond to any of the situations hitherto considered in the case-law on fines.

In those circumstances, according to the General Court, the Commission was right to rely on a new legal test, based on the link between the interpretation of the relevant legislation and the exercise of the power to impose penalties by the authorities with that power, in order to examine whether the non-imposition a fine could be regarded as an advantage financed through State resources. The

Commission was also fully entitled to take the view that the difficulties in interpreting legislation were, in principle, capable of precluding the non-imposition of a fine from being regarded as an exemption from a fine constituting State aid. The situation in which there are difficulties in interpreting a provision, non-compliance with which may be penalised by the imposition of a fine, is clearly different, from the point of view of the advantage in question, from that in which the competent authority decides to exempt an undertaking from payment of a fine which it would have to bear under the legislation. In the first situation, unlike the position in the second, there is no pre-existing charge. In view of the uncertain scope of the provision, the existence of unlawful conduct is not obvious and the penalising of such conduct by a fine does not therefore appear, where there is such uncertainty, to be necessary or inevitable.

The General Court states, however, that the test relating to the existence of difficulties in interpreting the applicable legislation can apply only on condition that those difficulties are temporary and that they form part of a process of gradual clarification of legislative provisions. The Commission did not refer to the temporary and inherent nature of the gradual clarification of the difficulties of interpretation of the legislative provisions, although those two conditions must be satisfied in order for it to be possible to reach a finding that there are no State resources. As regards the temporary nature of any difficulties in interpreting the legislation, the General Court notes that the Commission does not refer to any particular circumstance capable of justifying the continuation of such uncertainty from 2005, or even 2003. Furthermore, as regards the inherent nature of the gradual clarification of the difficulties in interpreting the legislation, it is noted that there is nothing in the documents before the General Court to suggest that such difficulties were in the process of being resolved.

Consequently, the General Court held that the Commission erred in law in concluding that the condition relating to State resources was not satisfied without examining whether the difficulties of interpretation on which it relied were temporary and inherent in the gradual clarification of the legislative provisions. That finding constitutes evidence from which it may be concluded that the Commission was not in a position to overcome, at that preliminary stage, all the serious difficulties encountered in determining whether the non-charging of the deposit and the non-imposition of a fine constituted State aid. Since other evidence of serious difficulties which the Commission could not overcome at the preliminary examination stage were identified, the General Court annuls the contested decision in its entirety.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 9 June 2021, Ryanair v Commission (Condor; Covid-19), T-665/20

Link to the complete text of the judgment

State aid – German air transport market – Public loan guaranteed by Germany to Condor Flugdienst in the context of the COVID-19 pandemic – Decision not to raise any objections – Aid intended to make good the damage caused by an exceptional occurrence – Article 107(2)(b) TFEU – Assessment of damages – Causal link – Obligation to state reasons – Maintenance of the effects of the decision

The General Court annuls the Commission decision approving the State aid granted by Germany to the airline Condor Flugdienst on the ground of an inadequate statement of reasons. However, because of the economic and social context marked by the COVID-19 pandemic, it suspends the effects of the annulment pending the adoption of a new decision by the Commission.

In April 2020, the Federal Republic of Germany notified the Commission of individual aid in favour of the airline Condor Flugdienst GmbH ('Condor'), in the form of two loans in the amount of EUR 550 million, guaranteed by the State with subsidised interest. The purpose of that measure was to compensate Condor for the damage directly suffered as a result of the cancellation or rescheduling of its flights following the imposition of travel restrictions as a result of the COVID-19 pandemic.

Condor is an airline which was previously owned by Thomas Cook Group plc. After that group was placed into compulsory liquidation, Condor faced financial difficulties and had to file for insolvency in

September 2019. [65] Those insolvency proceedings, which should have been closed following the sale of Condor to a potential investor, were extended in April 2020 because the investor withdrew its purchase offer.

By decision of 26 April 2020, the Commission declared the notified aid compatible with the internal market within the meaning of Article 107(2)(b) TFEU. [66] In accordance with that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market.

In order to assess the amount of damage suffered by Condor as a result of the cancellation or rescheduling of its flights following the imposition of travel restrictions in the context of the COVID-19 pandemic, the Commission first calculated the difference between the forecasts of profits before taxes for the period from March to December 2020, made before and after the announcement of travel restrictions and lockdown measures. The amount of that difference was then increased by the costs associated with the extension of Condor's insolvency period following its abortive sale to the investor concerned.

The airline Ryanair brought an action for annulment of the Commission's decision, which is upheld by the Tenth Chamber, Extended Composition, of the General Court, while suspending the effects of the annulment pending the adoption of a new decision. In its judgment, the Court clarified the scope of the Commission's obligation to state reasons when it states that there is a direct causal link between the damage which an aid measure seeks to compensate and exceptional occurrences within the meaning of Article 107(2)(b) TFEU.

Findings of the Court

In support of its action for annulment, Ryanair alleged, inter alia, an infringement of the obligation to state reasons by the Commission, in that it did not provide any explanation of the reasons which led it to include, in calculating the damage which the aid measure at issue is intended to compensate, the costs associated with the extension of the period of Condor's insolvency following its abortive sale to a potential investor. In that regard, the Court states that, in accordance with Article 107(2)(b) TFEU, only economic damage directly caused by natural disasters or exceptional occurrences may be compensated for under that provision. There must be a direct link between the damage caused by the exceptional occurrence and the State aid and as precise an assessment as possible must be made of the damage suffered. Thus, the Commission must examine whether or not the aid measures at issue are of a kind as to be useful in the making good of damage caused by exceptional occurrences, given that Article 107(2)(b) TFEU bans general measures that are unconnected with the damage allegedly caused by such occurrences. The Commission must also check that the amount of compensation granted by the Member State concerned is limited to what is necessary to make good the damage suffered by the beneficiaries of the measure at issue.

In the light of those clarifications, the Court analyses, in the first place, the stated objective of the aid measure and finds that, according to the actual wording of the contested decision, the aid measure sought to compensate Condor only for the direct damage suffered due to the cancellation or rescheduling of its flights as a result of the travel restrictions imposed in the context of the COVID-19 pandemic, excluding any other damage more generally linked to that pandemic.

In the second place, the Court examines the reasons which led the Commission to consider that the additional costs incurred by Condor as a result of the extension of the insolvency proceedings were

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65 At the same time as the launch of the insolvency proceedings, the Federal Republic of Germany granted Condor aid in the form of a EUR 380 million rescue loan to enable it to continue its operations following the compulsory liquidation of the group of which it was a member. By decision of 14 October 2019, C(2019) 7429 final on State aid SA.55394 (2019/N) – Germany – Rescue aid to Condor, the Commission approved that aid.

66 Decision C(2020) 2795 final on State aid SA.56867 (2020/N, ex 2020/PN) – Germany – Compensation for the damage caused by the COVID-19 outbreak to Condor, 'the contested decision'.

directly caused by that cancellation and rescheduling of flights. In that regard, the Court finds that the Commission merely stated that it was 'legitimate' to add the additional costs incurred due to the extension of Condor's insolvency proceedings to the damage claimed, without explaining, in a sufficiently clear and precise manner, the reasons why it found that the decisive cause of those costs was the cancellation and rescheduling of Condor's flights as a result of the COVID-19 pandemic.

In the third place, the Court notes that there is nothing in the contested decision to indicate that the sale of Condor failed because of the cancellation and rescheduling of those flights. Rather, it is apparent from the contested decision that the insolvency proceedings, initiated before the COVID-19 pandemic, had been opened because of the financial difficulties faced by Condor following the liquidation of its parent company. Accordingly, it was incumbent on the Commission to examine with particular care whether the cancellation and rescheduling of Condor flights as a result of the travel restrictions imposed in the context of the pandemic were in fact the decisive cause of the additional costs incurred by Condor as a result of the extension of the insolvency proceedings, and to set out the reasons for its decision on that point to the requisite legal standard.

In the fourth place, the Court observes that the Commission failed to explain how the additional costs arising from the extension of the insolvency proceedings were assessed or what type of costs were involved. Nor did the Commission indicate whether all or only a part of those costs were considered to be directly caused by the cancellation and rescheduling of Condor's flights.

Accordingly, the Court finds that the contested decision contains an inadequate statement of reasons as regards the direct causal link between the costs occasioned by the extension of the insolvency period and the cancellation and rescheduling of Condor's flights as a result of the travel restrictions imposed in the context of the COVID-19 pandemic. Therefore, the Court annuls the contested decision.

However, in view of the fact that that annulment is the result of an inadequate statement of reasons for the contested decision and that the immediate calling into question of the receipt of the sums of money provided for by the notified aid measure would have harmful consequences for the German economy in an economic and social context already marked by a serious disturbance in the economy as a result of the COVID-19 pandemic, the Court suspends the effects of the annulment of the contested decision pending the adoption of a new decision by the Commission.

VII. APPROXIMATION OF LAWS

1. COPYRIGHT

Judgment of the Court (Grand Chamber) of 22 June 2021, YouTube and Cyando , C-682/18 and C-683/18

Link to the complete text of the judgment

Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Making available and management of a video-sharing platform or a file-hosting and -sharing platform – Liability of the operator for infringements of intellectual property rights by users of its platform – Directive 2001/29/EC – Article 3 and Article 8(3) – Concept of 'communication to the public' – Directive 2000/31/EC – Articles 14 and 15 – Conditions for exemption from liability – No knowledge of specific infringements – Notification of such infringements as a condition for obtaining an injunction

In the dispute giving rise to the first case (C-682/18), Frank Peterson, a music producer, is bringing an action against YouTube and its legal representative Google before the German courts in respect of the posting online, on YouTube, in 2008, of a number of recordings over which he claims to hold various rights. Those recordings were posted by users of that platform without his permission. They are songs from the album *A Winter Symphony* by Sarah Brightman and private audio recordings made during concerts on her '*Symphony Tour*'.

In the dispute giving rise to the second case (C-683/18), the publisher Elsevier is bringing an action against Cyando before the German courts in respect of the posting online, on the 'Uploaded' file-hosting and -sharing platform, in 2013, of various works over which Elsevier holds exclusive rights. Those works were posted by users of that platform without its permission. They are *Gray's Anatomy for Students*, *Atlas of Human Anatomy* and *Campbell-Walsh Urology*, which could be consulted on Uploaded via the link collections rehabgate.com, avaxhome.ws and bookarchive.ws.

The Bundesgerichtshof (Federal Court of Justice, Germany), which is hearing the two cases, referred a number of questions to the Court for a preliminary ruling so that the latter can provide clarification on, inter alia, the liability of the operators of online platforms as regards copyright-protected works illegally posted online on such platforms by platform users.

The Court has examined that liability under the set of rules, applicable at the material time, under Directive 2001/29 on copyright, [67] Directive 2000/31 on electronic commerce, [68] and Directive 2004/48 on the enforcement of copyright. [69] The questions referred do not concern the set of rules established by Directive 2019/790 relating to copyright and related rights in the Digital Single Market, [70] which came into force subsequently.

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67 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).

68 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

69 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

70 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92). That directive establishes, for operators of online platforms, a new specific liability regime in respect of works illegally posted online by users of those platforms. That directive, which must be transposed by each Member State into its national law by 7 June 2021 at the latest, requires, inter alia, those operators to seek permission from rightholders – for example, by concluding a licencing agreement – for works posted online by users of their platform.

In its Grand Chamber judgment, the Court finds, inter alia, that, as EU law currently stands, operators of online platforms do not themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms unless those operators contribute, beyond merely making those platforms available, to giving access to such content to the public in breach of copyright. Moreover, the Court finds that such operators may benefit from the exemption from liability under Directive 2000/31 on electronic commerce unless they play an active role of such a kind as to give them knowledge of or control over the content uploaded to their platform.

Assessment by the Court

In the first place, the Court examines the question whether the operator of a video-sharing platform or a file-hosting and -sharing platform on which users can illegally make protected content available to the public itself carries out, in circumstances such as those at issue in the present cases, a 'communication to the public' of that content within the meaning of Directive 2001/29 on copyright. [71] At the outset, the Court states the objectives and definition of the concept of a 'communication to the public' as well as the associated criteria which must be taken into account when making an individual assessment of what that concept means.

Amongst those criteria, the Court emphasises the indispensable role played by the platform operator and the deliberate nature of its intervention. That platform operator makes an 'act of communication' when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.

In that context, the Court finds that the operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, does not make a 'communication to the public' of that content, within the meaning of Directive 2001/29 on copyright, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright.

That is the case, inter alia, where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.

In the second place, the Court looks at the question whether the operator of online platforms may benefit from the exemption from liability, provided for in Directive 2000/31 on electronic commerce, [72] in respect of protected content which users illegally communicate to the public via its platform. In that context, the Court examines whether the role played by that operator is neutral, that is to say, whether its conduct is merely technical, automatic and passive, which means that it has no

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71 Article 3(1) of Directive 2001/29 on copyright. Under that provision, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

72 Article 14(1) of Directive 2000/31 on electronic commerce. Under that provision, where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States are to ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

knowledge of or control over the content it stores, or whether, on the contrary, that operator plays an active role that gives it knowledge of or control over that content. In that regard, the Court finds that such an operator can benefit from the exemption from liability provided that it does not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform. On that point, the Court specifies that, for such an operator to be excluded from the exemption from liability provided for in that directive, it must have knowledge of or awareness of specific illegal acts committed by its users relating to protected content that was uploaded to its platform.

In the third place, the Court clarifies the circumstances in which, under Directive 2001/29 on copyright, [73] rightholders can obtain injunctions against operators of online platforms. It finds that that directive does not preclude a situation under national law whereby a copyright holder or the holder of a related right may not obtain an injunction against an operator whose service has been used by a third party to infringe his or her right, that operator having had no knowledge or awareness of that infringement, within the meaning of Directive 2000/31 on electronic commerce, [74] unless, before court proceedings are commenced, that infringement has first been notified to that operator and the latter has failed to intervene expeditiously in order to remove the content in question or to block access to it and to ensure that such infringements do not recur.

It is, however, for the national courts to satisfy themselves, when applying such a condition, that that condition does not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder.

Judgment of the Court (Fifth Chamber) of 17 June 2021, M.I.C.M., C-597/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 3(1) and (2) – Concept of 'making available to the public' – Downloading of a file containing a protected work via a peer-to-peer network and the simultaneous provision for uploading pieces of that file – Directive 2004/48/EC – Article 3(2) – Misuse of measures, procedures and remedies – Article 4 – Persons entitled to apply for the application of measures, procedures and remedies – Article 8 – Right of information – Article 13 – Concept of 'prejudice' – Regulation (EU) 2016/679 – Point (f) of the first subparagraph of Article 6(1) – Protection of natural persons with regard to the processing of personal data – Lawfulness of processing – Directive 2002/58/EC – Article 15(1) – Legislative measures to restrict the scope of the rights and obligations – Fundamental rights – Articles 7 and 8, Article 17(2) and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European

The undertaking Mircom International Content Management Consulting (M.I.C.M.) Limited ('Mircom') submitted a request for information against Telenet BVBA, an internet service provider, to the Ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium; 'the referring court'). That request seeks a decision requiring Telenet to produce the identification data of its customers on the basis of IP addresses collected, by a specialised company, on behalf of Mircom. The internet connections of Telenet's customers have been used to share films in the Mircom catalogue, on a peer-to-peer network, using the BitTorrent protocol. Telenet challenges that request.

It is in that context that the referring court, first of all, asked the Court whether the sharing of pieces of a media file containing a protected work on that network constitutes a communication to the

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73 Article 8(3) of Directive 2001/29 on copyright. Under that provision, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

74 Article 14(1)(a) of Directive 2000/31 on electronic commerce.

public under EU law. Next, it sought to ascertain whether the holder of intellectual property rights, such as Mircom, which does not use them, but claims damages for alleged infringements, can benefit from the measures, procedures and remedies provided for by EU law in order to ensure that those rights are enforced, for example by requesting information. Finally, the referring court asked the Court of Justice to clarify the question of the lawfulness, first, of the way in which the customers' IP addresses have been collected by Mircom and, second, of the communication of the data requested by Mircom from Telenet.

In its judgment, the Court holds, first, that uploading of pieces of a media file onto a peer-to-peer network, such as that at issue, constitutes making available to the public within the meaning of EU law. [75] Second, a holder of intellectual property rights such as Mircom may benefit from the system of protection of those rights, but its request for information, in particular, must be non-abusive, justified and proportionate. [76] Third, the systematic registration of IP addresses of users and the communication of their names and postal addresses to that holder of intellectual property rights or to a third party in order to enable an action for damages to be brought are permissible under certain conditions. [77]

Findings of the Court

In the first place, the Court, which has already ruled on the concept of 'communication to the public' in the context of copyright protection, clarifies that the uploading of pieces, previously downloaded, of a media file containing a protected work using a peer-to-peer network constitutes 'making [a work] available to the public', even though those pieces are unusable in themselves and the uploading is automatically generated when the user has subscribed to the BitTorrent client sharing software in giving his or her consent to its application after having duly been informed of its characteristics.

It should be noted that any user of that network can easily reconstruct the original file from pieces available on the computers of other users. By downloading the pieces of a file, that user simultaneously makes them available for uploading by other users. In that regard, the Court finds that the user must not in fact download a minimum threshold of pieces and that any act by which he or she gives access to protected works in full knowledge of the consequences of his or her conduct may constitute an act of making available. The present case indeed concerns such an act, because it refers to an indeterminate number of potential recipients, involves a fairly large number of persons and is carried out with regard to a new public. That interpretation seeks to maintain the fair balance between the interests and fundamental rights of the holders of intellectual property rights, on the one hand, and users of protected subject matter, on the other.

In the second place, the Court considers that the holder of intellectual property rights, such as Mircom, which acquired those rights by assigning claims and does not use them, but seeks damages from alleged infringers, may, in principle, benefit from the measures, procedures and remedies provided for by EU law, unless that holder's claim is abusive. The Court states that any finding of such an abuse is a matter for the referring court, which could, for example, ascertain, for that purpose, whether legal proceedings have actually been brought in the event of an amicable settlement being refused. As regards, in particular, a request for information, such as that made by Mircom, the Court

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75 Article 3(1) and (2) 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).

76 Articles 3(2) and 8 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

77 Point (f) of the first subparagraph of Article 6(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1), read in conjunction 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 (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).

finds that it cannot be regarded as inadmissible on the ground that it is made during a pre-litigation stage. However, that request must be rejected if it is unjustified or disproportionate, which is for the referring court to determine. By that interpretation, the Court seeks to ensure a high level of protection of intellectual property in the internal market.

In the third place, the Court holds that EU law does not preclude, in principle, the systematic registration, by the holder of intellectual property rights or by a third party on his or her behalf, of IP addresses of users of peer-to-peer networks whose internet connections have allegedly been used in infringing activities (upstream processing of data), or the communication of the names and of postal addresses of users to that holder or to a third party for the purposes of an action for damages (downstream processing of data). However, initiatives and requests in that regard must be justified, proportionate, not abusive and provided for by a national legislative measure which limits the scope of rights and obligations under EU law. The Court states that the latter does not impose an obligation on a company such as Telenet to communicate personal data to private individuals in order to be able to bring proceedings before the civil courts for copyright infringements. However, EU law allows Member States to impose such an obligation.

2. INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Tenth Chamber, Extended Composition) of 2 June 2021, Style & Taste v EUIPO – The Polo/Lauren Company (Représentation d'un joueur de polo), T-169/19

Link to the complete text of the judgment

EU trade mark – Invalidity proceedings – EU figurative mark representing a polo player – Earlier national design – Relative ground for invalidity – Article 52(2)(d) of Regulation (EC) N° 40/94 [now Article 60(2)(d) of Regulation (EU) 2017/1001]

Following an application filed on 29 September 2004 with the European Union Intellectual Property Office (EUIPO), The Polo/Lauren Company LP obtained registration of the figurative sign representing a polo player as an EU trade mark. The trade mark was registered on 3 November 2005.

On 23 February 2016, Style & Taste, SL, filed an application for a declaration of invalidity of the contested mark on the basis of Article 52(2)(d) of Regulation N° 40/94, [78] according to which an EU trade mark is to be declared invalid where the use of that mark may be prohibited by virtue of an earlier industrial property right. [79] In support of its application for a declaration of invalidity, it relied on a Spanish design registered on 4 March 1997.

Given that its application for a declaration of invalidity had been rejected by a decision of the Fifth Board of Appeal of EUIPO of 7 January 2019, on the ground that the registration of the earlier design had expired on 22 May 2017, Style & Taste brought an action before the General Court seeking annulment of that decision.

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78 Council Regulation (EC) N° 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) N° 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended, itself replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [OJ 2017 L 154, p. 1)].

79 Article 52(2)(d) of Regulation No 40/94 [now Article 60(2)(d) of Regulation 2017/1001].

In its judgment, the Court holds, for the first time, that an application for a declaration of invalidity of an EU trade mark based on Article 52(2) of Regulation Nº 40/94 must be rejected if the conditions for prohibiting the use of that mark are no longer fulfilled on the date on which EUIPO decides on that application. It therefore dismisses the action.

Findings of the Court

First of all, the Court recalls that the provisions of Regulation Nº 40/94 must be interpreted in the light of the priority principle, pursuant to which the earlier right takes precedence over later registered trade marks.

Next, the Court notes that the use of the present tense in Article 52 of Regulation Nº 40/94 suggests that EUIPO must verify that the conditions for declaring an EU trade mark invalid under that provision are met on the date on which it decides on the application for a declaration of invalidity. In addition, the Court emphasises that it is apparent from the scheme of the other provisions of Regulation Nº 40/94, relating to relative grounds for invalidity, and in particular from Article 56(2) thereof, that an application for a declaration of invalidity must be rejected where it is established with certainty that the conflict with the earlier EU trade mark has ceased at the end of the invalidity proceedings.

Consequently, the Court considers that the proprietor of an earlier industrial property right referred to by Article 52(2)(d) of Regulation Nº 40/94 must establish that he or she may prohibit the use of the EU trade mark at issue not only on the date of filing or priority of that mark, but also on the date on which EUIPO decides on the application for a declaration of invalidity. In the present case, the Court states that Style & Taste neither claimed nor, a fortiori, demonstrated that, in accordance with Spanish law, it was possible to prohibit the use of an EU trade mark by virtue of a Spanish design whose registration expired. Consequently, it considers that the use of the contested mark could no longer be prohibited by virtue of the earlier design relied on by Style & Taste at the date of the contested decision.

Judgment of the General Court (Third Chamber) of 2 June 2021, Franz Schröder v EUIPO – RDS Design (MONTANA), T-854/19

Link to the complete text of the judgment

EU trade mark – Invalidity proceedings – EU word mark MONTANA – Absolute ground for refusal – Descriptiveness – Article 7(1)(c) of Regulation (EC) Nº 207/2009 (now Article 7(1)(c) of Regulation (EU) 2017/1001) – Right to be heard – Article 94(1) of Regulation 2017/1001 – Examination of the facts by EUIPO of its own motion – Admission of evidence submitted for the first time before the Board of Appeal – Article 95(1) and (2) of Regulation 2017/1001

The intervener, RDS Design ApS, is the proprietor of the EU word mark MONTANA. The applicant, Franz Schröder GmbH & Co. KG, filed with the European Union Intellectual Property Office (EUIPO) an application for a declaration that that mark was invalid on the ground that it had been registered in breach of Article 7(1)(c) of Regulation Nº 207/2009. [80]

The Cancellation Division of EUIPO upheld the application for a declaration of invalidity. As a result of an appeal on the part of the intervener, the Board of Appeal of EUIPO annulled that decision and rejected the application for a declaration of invalidity. It allowed the evidence which the parties had submitted for the first time before it and took the view that it could examine 'of its own motion' whether the absolute ground relied on in support of the application for a declaration of invalidity was

80 Council Regulation (EC) Nº 207/2009 of 26 February 2009 on the [European Union] trade mark (OJ 2009 L 78, p. 1).

present. The applicant brought an action before the General Court seeking the annulment of the Board of Appeal's decision.

The Court dismissed that action and, first, provided clarification regarding the Board of Appeal's discretion to take into account evidence submitted for the first time before it. Secondly, it developed the case-law relating to the limitation of EUIPO's examination to the grounds and arguments of the parties in invalidity proceedings based on absolute grounds for invalidity.

Findings of the Court

In the first place, the Court stated that Article 95(2) of Regulation 2017/1001 [81] grants EUIPO a broad discretion to decide whether or not to take into account facts and evidence which are submitted late. However, it pointed out that the exercise of that discretion, as regards facts and evidence submitted for the first time before the Board of Appeal, is now circumscribed by Article 27(4) of Regulation 2018/625, [82] according to which the Board of Appeal may accept them only if they are, on the face of it, likely to be relevant for the outcome of the case and if they have not been produced in due time for valid reasons. The Court stated that the Board of Appeal had not ascertained whether those two requirements had been satisfied. However, that did not entail the annulment of the contested decision, because it had not been established that that decision might have been substantively different.

In the second place, the Court stated that, in invalidity proceedings based on an absolute ground for refusal, EUIPO is to limit its examination, under Article 95(1) of Regulation 2017/1001, to the grounds and arguments submitted by the parties. The Board of Appeal may, however, exercise any power within the competence of the department that was responsible for the contested decision and conduct a new, full examination as to the merits of the appeal, in terms of both law and fact. [83] The Court pointed out that, in the present case, in spite of the Board of Appeal's infelicitous statement that it could examine, '*ex officio*', the presence of the absolute ground for refusal in question, the Board of Appeal had examined only whether that absolute ground, which the applicant had specifically relied on, was capable of resulting in the invalidity of the contested mark. It had not examined of its own motion relevant facts which might have led it to apply other absolute grounds for refusal that were capable of calling into question the validity of the mark at issue. Furthermore, the Court took the view that the Board of Appeal had not examined 'additional facts' of its own motion, because its findings were part of its assessment of the matters put forward by the applicant in support of the application for a declaration of invalidity and of its assessment of the grounds for the Cancellation Division's decision. That approach showed that the Board of Appeal had conducted a new, full examination as to the merits of the appeal, at the end of which it was entitled to reach a different decision from that sought by the applicant and from that of the Cancellation Division. Consequently, the Court held that the Board of Appeal had not failed to observe the limits of its examination which are set out in Article 95(1) of Regulation 2017/1001.

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81 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

82 Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

83 In accordance with Article 71(1) of Regulation 2017/1001.

Judgment of the General Court (Third Chamber) of 2 June 2021, Himmel v EUIPO – Ramirez Monfort (Hispano Suiza), T-177/20

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Application for EU word mark Hispano Suiza – Earlier EU word mark HISPANO SUIZA – Relative ground for refusal – Likelihood of confusion – Article 8(1)(b) of Regulation (EC) Nº 207/2009 [now Article 8(1)(b) of Regulation (EU) 2017/1001]

Mr Monfort filed an application for registration of the EU word mark Hispano Suiza with the European Union Intellectual Property Office (EUIPO) in respect of cars. Mr Himmel filed a notice of opposition to registration of that mark on the ground that there is a likelihood of confusion with his earlier EU word mark HISPANO SUIZA, registered in respect of horological and chronometric instruments, and clothing, footwear and headgear.

That opposition was rejected by EUIPO and Mr Himmel therefore brought an action before the General Court.

In its judgment, the General Court annuls EUIPO's decision and clarifies the criteria for assessing the similarity of goods or services in the context of Article 8(1)(b) of Regulation Nº 207/2009, [84] holding that the existence of a market practice may constitute a relevant criterion for the purposes of that examination.

The General Court's findings

First, the General Court recalls the judgment of the Court of Justice in *Canon*, [85] according to which, in order to compare the similarity of the goods or services covered by the marks at issue, all the relevant features relating to them should be taken into account, inter alia their nature, their intended purpose, their method of use, and whether they are in competition with each other or are complementary. The General Court points out, in the light of the wording used by the Court of Justice, that that list of criteria is not exhaustive and has, moreover, been supplemented in the case-law of the General Court and the Court of Justice by other criteria, including the usual origin of the goods concerned, their distribution channels or the fact that the goods are promoted by the same specialised magazines.

Thus, according to the General Court, it cannot be ruled out that criteria other than those set out by EUIPO in its decision, namely, besides the criteria established by the judgment in *Canon*, the distribution channels and the fact that the sales outlets are the same, may be relevant in assessing the similarity of goods or services in general and of the goods in the present case. The General Court therefore finds that EUIPO erred in law by ruling out, as a matter of principle, an assessment of the similarity of the goods in the light of the market practices criterion. The General Court notes, moreover, that that criterion, in particular the fact that goods and services are often sold together or that consumers would consider it usual for the goods to be sold under the same trade mark, has previously been taken into account in its case-law in assessing the similarity of goods or services.

Next, the General Court finds that the fact that a criterion is considered relevant to the assessment under Article 8(5) of Regulation Nº 207/2009 does not necessarily mean that it is not relevant in the application of paragraph 1(b) of that article.

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84 Council Regulation (EC) Nº 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended.

85 Judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 23).

In addition, the General Court states that, first, each criterion developed by the case-law, irrespective of whether it is one of the original or the additional criteria, is only one criterion among others, second, the criteria are autonomous, and third, the similarity between the goods or services at issue may be based on a single criterion. [86] Furthermore, although EUIPO is required to take into account all the relevant factors relating to the goods concerned, it may disregard factors which are irrelevant to the relationship between them.

In the light of the foregoing, the General Court concludes that the existence of a certain market practice may constitute a relevant criterion for the purposes of examining the similarity between goods or services in the context of Article 8(1)(b) of Regulation Nº 207/2009.

Lastly, since EUIPO did not examine the relevance and impact of the market practice criterion in its assessment of the similarity between the goods at issue, the General Court finds that it cannot give a ruling on that issue. Accordingly, on account of that error of law made by EUIPO and the failure to state reasons in the contested decision as regards why criteria relating to the usual origin of goods and distribution channels were not taken into account, the General Court annuls the contested decision.

VIII. SOCIAL POLICY

Judgment of the Court (Second Chamber) of 3 June 2021, Tesco Stores, C-624/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Social policy – Equal pay for male and female workers – Article 157 TFEU – Direct effect – Concept of 'work of equal value' – Claims seeking equal pay for work of equal value – Single source – Workers of different sex having the same employer – Different establishments – Comparison

Tesco Stores is a retailer that sells its products online and in stores located in the United Kingdom. The stores, of varying size, have a total of approximately 250 000 workers, who carry out various types of jobs. That company also has a distribution network with approximately 11 000 employees, who carry out various types of jobs. Approximately 6 000 employees or former employees of Tesco Stores, both female and male, who work or used to work in its stores, brought proceedings against it before the referring tribunal, the Watford Employment Tribunal (United Kingdom), from February 2018 onwards, on the ground that they had not enjoyed equal pay for male and female workers for equal work, contrary to national legislation and Article 157 TFEU. [87] The referring tribunal stayed the male workers' claims, since it took the view that their outcome depended on the outcome of the claims brought by the female claimants in the main proceedings.

The female claimants in the main proceedings submit that their work and that of the male workers employed by Tesco Stores in the distribution centres in its network are of equal value and that they

86 In the light of the judgment of 21 January 2016, *Hesse* v *OHIM* (C-50/15 P, EU:C:2016:34, paragraph 23).

87 Under that provision, 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

are entitled to compare their work and that of those workers under Article 157 TFEU although the work is carried out in different establishments. They contend that, in accordance with that article, there is a 'single source', namely Tesco Stores, for their terms and conditions of employment and the terms and conditions of employment of those workers. Tesco Stores submits that Article 157 TFEU is not directly effective in the context of claims based on work of equal value, and therefore the female claimants in the main proceedings cannot rely on that provision before the referring tribunal. Furthermore, it disputes that it can be classified as a 'single source'.

The referring tribunal observes in respect of Article 157 TFEU that there is uncertainty, within United Kingdom courts and tribunals, regarding its direct effect, connected in particular with the distinction articulated by the Court between discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay and discrimination which can only be identified by reference to more explicit implementing provisions. [88] The claims at issue in the main proceedings could fall within the latter category, where there is no direct effect.

It was in that context that the referring tribunal sought a preliminary ruling from the Court. In its judgment, the Court holds that Article 157 TFEU has direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for 'work of equal value', as referred to in that article, is pleaded.

Findings of the Court

As a preliminary point, the Court holds that it has jurisdiction, pursuant to Article 86 of the withdrawal agreement, [89] to reply to the request for a preliminary ruling, despite the United Kingdom's withdrawal from the European Union.

As to the substance, the Court observes first of all, in respect of the wording of Article 157 TFEU, that that article imposes, clearly and precisely, an obligation to achieve a particular result and is mandatory as regards both 'equal work' and 'work of equal value'. It recalls next that, according to its settled case-law, Article 157 TFEU produces direct effects by creating rights for individuals which the national courts must safeguard, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public. The Court points out that it has explained that such discrimination is among the forms of discrimination which may be identified solely by reference to the criteria based on equal work and equal pay laid down by Article 119 of the EEC Treaty and that in such a situation a court is in a position to establish all the facts enabling it to decide whether a female worker is receiving lower pay than a male worker engaged in equal work or work of equal value. [90] Thus, it is apparent from settled case-law that, contrary to Tesco Stores' submissions, the direct effect of Article 157 TFEU is not limited to situations in which the workers of different sex who are compared perform 'equal work', but extends to situations of 'work of equal value'. In that context, the Court explains that the question whether the workers concerned perform 'equal work' or 'work of equal value' is a matter of factual assessment by the court.

Furthermore, the Court holds that the objective pursued by Article 157 TFEU, namely the elimination, for equal work or work of equal value, of all discrimination on grounds of sex as regards all aspects

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88 The referring tribunal makes reference, in that regard, to paragraph 18 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56).

89 See Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (EAEC) (OJ 2020 L 29, p. 1), by which the Council of the European Union approved that agreement (OJ 2020 L 29, p. 7), which was attached to the decision, on behalf of the European Union and the EAEC. The Court states that it follows from Article 86 of that agreement that it is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom which were made before the end of the transition period set at 31 December 2020, and that this is so in the present instance.

90 See, to that effect, judgments of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 18 and 21 to 23), and, subsequently, of 11 March 1981, *Worringham and Humphreys* (69/80, EU:C:1981:63, paragraph 23), concerning Article 119 of the EEC Treaty, which became, after amendment, Article 141 EC, now Article 157 TFEU.

and conditions of remuneration bears out such an interpretation. It observes in that regard that the principle, referred to in Article 157 TFEU, of equal pay for male and female workers for equal work or work of equal value forms part of the foundations of the European Union.

Finally, the Court points out that, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no entity which could restore equal treatment, with the result that such a situation does not come within the scope of Article 157 TFEU. By contrast, where such pay conditions can be attributed to a single source, the work and the pay of those workers can be compared, even if they work in different establishments. Consequently, that provision may be relied upon before national courts in proceedings concerning work of equal value carried out by workers of different sex having the same employer and in different establishments of that employer, provided that the latter constitutes such a single source.

Judgment of the Court (Grand Chamber) of 3 June 2021, TEAM POWER EUROPE, C-784/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Migrant workers – Social security – Legislation applicable – Regulation (EC) Nº 883/2004 – Article 12(1) – Posting of workers – Temporary agency workers – Regulation (EC) Nº 987/2009 – Article 14(2) – A1 certificate – Determination of the Member State in which the employer normally carries out its activities – Concept of 'substantial activities, other than purely internal management activities' – No assignment of temporary agency workers in the territory of the Member State in which the employer is established

In 2018, a Bulgarian national concluded a contract of employment with Team Power Europe, a company established in Bulgaria, whose commercial purpose is the provision of temporary work and work placement services in Bulgaria and in other countries. Pursuant to that contract he was assigned to a user undertaking established in Germany. From 15 October to 21 December 2018, he was required to work under the direction and supervision of that German undertaking.

Taking the view, first, that the direct relationship between Team Power Europe and the worker in question had not been maintained and, second, that that undertaking did not carry out substantial activity in the Bulgarian territory, the revenue service for the City of Varna rejected Team Power Europe's application for an A1 certificate certifying that the Bulgarian social security legislation was applicable to the worker in question during the period of his assignment. According to that service, that worker's situation did not therefore fall within the scope of Article 12(1) of Regulation Nº 883/2004, [91] pursuant to which Bulgarian legislation would apply. The administrative complaint brought by Team Power Europe against the revenue service's decision was rejected.

In those circumstances, the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria), seised of a court action seeking the annulment of the decision rejecting that administrative complaint, decided to ask Court of Justice as to the criteria to be taken into account in order to assess whether a temporary-work agency ordinarily performs 'substantial activities other than purely internal managerial activities' in the Member State in which it is established, within the meaning of

91 Regulation (EC) Nº 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) Nº 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation Nº 883/2004'). More specifically, pursuant to Article 12(1) of the regulation, 'a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person'.

Article 14(2) of Regulation Nº 987/2009,[92] which defines Article 12(1) of Regulation Nº 883/2004. The application of that latter provision to this case depends on Team Power Europe satisfying that requirement.

In its judgment, pronounced by the Grand Chamber, the Court clarifies, as regards temporary-work agencies, the meaning of the concept, laid down in that provision and defined in Article 14(2) of the Regulation Nº 987/2009, of an employer that 'normally carries out its activities' in the Member State.

Findings of the Court

The Court carried out, first of all, a literal interpretation of the latter provision and found that a temporary-work agency is characterised by the fact that it performs a set of activities consisting in the selection, recruitment and assignment of temporary agency workers to user undertakings. In that regard, the Court states that, even though the activities of selecting and recruiting temporary agency workers cannot be regarded as 'purely internal management activities' within the meaning of that provision, the performance of those activities in the Member State in which such an undertaking is established is insufficient for it to be regarded as performing 'substantial activities' there. The sole aim of the activities of selecting and recruiting temporary agency workers is the subsequent assignment of those workers by it to user undertakings. The Court observes in that regard that, although the selection and recruitment of temporary agency workers contribute to generating the turnover achieved by a temporary-work agency, since those activities constitute an essential prerequisite for the subsequent assignment of such workers, it is only the assignment of those workers to user undertakings, in performance of the contracts concluded with those undertakings for that purpose, that actually generates that turnover. Indeed, the income of such an undertaking depends on the amount of remuneration paid to temporary agency workers who have been assigned to user undertakings.

As regards, next, the context of the provision at issue, the Court recalls that the situation of a worker posted to perform work in another Member State remains subject to the legislation of the first Member State constitutes a derogation from the general rule that a person who pursues an activity as an employed or self-employed person in a Member State is subject to the legislation of that Member State. 93 Consequently, the provision governing such a situation must be subject to a strict interpretation. In those circumstances, that rule of derogation cannot apply to a temporary-work agency which, in the Member State in which it is established, does not assign any such workers to user undertakings which are also established there, or, at most, does so to a negligible extent. In addition, the definitions of the concepts of 'temporary-work agency' and 'temporary agency worker', laid down in Directive 2008/104,94 by making apparent the purpose of the activity of a temporary-work agency undertaking, also support the interpretation that such an undertaking cannot be regarded as carrying out, in the Member State in which it is established, 'substantial activities' unless it performs there, to a significant extent, activities of assigning workers for the benefit of user undertakings established and performing their activities in the same Member State.

As regards, lastly, the aim pursued by the provision in question, the Court states that the derogation contained in Article 12(1) of Regulation Nº 883/2004, which represents an advantage offered to undertakings that exercise the freedom to provide services, cannot benefit temporary-work agencies

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92 Regulation (EC) Nº 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) Nº 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1). According to Article 14(2) of the regulation, 'for the purposes of the application of Article 12(1) of the basic Regulation, the words "which normally carries out its activities there" shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out.'

93 Laid down in Article 11(3)(a) of Regulation Nº 883/2004.

94 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

that orient their activities of assigning temporary agency workers exclusively or mainly to one or more Member States other than that in which they are established. The contrary solution would be likely to encourage those undertakings to engage in forum shopping by establishing themselves in the Member States with the social security legislation that is the most favourable to them. Ultimately, such a solution might lead to a reduction in the level of protection offered by the Member States' social security systems. Furthermore, the Court noted that to grant such a benefit to those undertakings would have the effect of creating a distortion of competition between the various possible modes of employment in favour of recourse to temporary agency work as opposed to undertakings directly recruiting their workers, who would be affiliated to the social security system of the Member State in which they work.

The Court concludes that such a temporary-work agency established in a Member State must, in order for it to be considered that it 'normally carries out its activities' in that Member State, carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State.

IX. CONSUMER PROTECTION

Judgment of the Court (First Chamber) of 10 June 2021, KRONE – Verlag, C-65/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Consumer protection – Liability for defective products – Directive 85/374/EEC – Article 2 – Concept of 'defective product' – Copy of a printed newspaper containing inaccurate health advice – Exclusion from the directive's scope

KRONE – Verlag is a newspaper company established in Austria. It is a media proprietor and the publisher of a regional edition of the *Kronen-Zeitung* newspaper. On 31 December 2016, it published an article in that newspaper on the benefits of grated horseradish poultices, signed by a member of a religious order who, as an expert in the field of herbal medicine, provides free advice in a column published daily by the newspaper.

The article read as follows:

'Alleviating rheumatic pain

Fresh coarsely grated horseradish can help to reduce the pain experienced as a result of rheumatism. First, rub a fatty vegetable oil or lard into the affected areas, before applying a layer of grated horseradish to them and applying pressure. You can leave this layer on for two to five hours before then removing it. Its application has a positive draining effect.'

However, the length of time, between two and five hours, specified in the article, for which the substance should be applied, was, however, inaccurate, as the term 'hours' had been used instead of 'minutes'. The applicant, an Austrian national, following the duration of the treatment set out in the article, applied the substance to her ankle joint for approximately three hours and removed it only after experiencing severe pain due to a toxic skin reaction.

Considering that she had suffered damage, the applicant made a claim for compensation for corporeal damage against KRONE – Verlag. As that claim was dismissed at first instance and on appeal, the applicant brought an appeal on a point of law before the Oberster Gerichtshof (Supreme Court, Austria).

Ruling on a question referred by that court, the Court of Justice holds that a copy of a printed newspaper that, concerning paramedical matters, provides inaccurate health advice relating to the use of a plant which, when followed, has proved injurious to the health of a reader of that newspaper,

does not constitute a 'defective product' within the meaning of the directive on liability for defective products. [95]

Findings of the Court

The Court highlights at the outset that a product is defective within the meaning of the directive on liability for defective products [96] when it does not provide the safety which a person is entitled to expect. Its defective nature is determined on the basis of certain characteristics inherent to the product itself and related to, inter alia, its presentation, its use and the time when it was put into circulation.

Next, recalling that the fact that no provision is made in the directive for the possibility of liability for defective products in respect of damage caused by a service, of which the product is merely the medium, reflects the intentions of the EU legislature, the Court observes that, in this instance, the inaccurate advice does not relate to the printed newspaper of which it is the medium. More specifically, that service does not concern either the presentation or the use of the latter, with the result that that service is not part of the inherent characteristics of the printed newspaper which alone permit an assessment as to whether the product is defective.

Last, highlighting that the liability of service providers and the liability of manufacturers of finished products constitute two distinct liability regimes, as the activity of service providers cannot be equated with those of producers, importers and suppliers, the Court recalls that, having regard to the distinct characteristics of services, the liability regime applicable to providers should be governed by separate legislation. [97]

Therefore, according to the Court, inaccurate health advice which is published in a printed newspaper and concerns the use of another physical item falls outside the scope of the directive on liability for defective products and is not such as to render that newspaper defective and the 'producer' strictly liable pursuant to that directive, whether they are the publisher or the printer of that newspaper or even the author of the article.

In that regard, the Court specifies that although strict liability for defective products, provided for by the directive, is inapplicable to the present case, other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects, may be applicable.

Judgment of the Court (Sixth Chamber) of 10 June 2021, Ultimo Portfolio Investment (Luxembourg), C-303/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Credit agreements for consumers – Directive 2008/48/EC – Risk of over-indebtedness – Article 8 – Creditor's obligation to assess the consumer's creditworthiness – Article 23 – Effective, proportionate and dissuasive nature of the penalty in the event of infringement of that obligation

95 Article 2 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (OJ 1999 L 141, p. 20), read in the light of Articles 1 and 6 thereof, as amended by Directive 1999/34.

96 Article 6 of the directive.

97 Proposal for a Council Directive on the liability of suppliers of services COM(90) 482 final (OJ 1991 C 12, p. 8) submitted by the Commission on 9 November 1990.

On 23 May 2018, Aasa Polska, established in Warsaw (Poland), and KM, a natural person, concluded a consumer credit agreement, under which the total amount to be repaid was Polish zlotys (PLN) 8 626.58 (approximately EUR 1 862). The credit was to be repaid in 24 instalments amounting to PLN 408 each (approximately EUR 88). The debt arising from that agreement was assigned by Aasa Polska to Ultimo Portfolio Investment established in Luxembourg (Luxembourg).

As at the date on which the agreement in question was concluded, KM, as well as her husband, owed debts arising from various credit and loan agreements. The debts arising from all those agreements totalled PLN 457 830 (approximately EUR 98 840) and the corresponding monthly payments totalled PLN 9 974.35 (approximately EUR 2 153). As at the same date, KM was employed on the basis of an employment contract with a net salary of PLN 2 300 (approximately EUR 500), whereas her husband did not work for health reasons and received no income.

As stated by the Sąd Rejonowy w Opatowie I Wydział Cywilny (District Court, Opatów, First Civil Division, Poland) – before which an action was brought by Ultimo Portfolio Investment concerning a debt of PLN 7 139.76 (approximately EUR 1 540) – the agreement at issue in the main proceedings was concluded through a credit intermediary and, before the conclusion of that agreement, Aasa Polska did not check KM's financial situation nor the amount of her debts.

The referring court explained that, under the directive on credit agreements for consumers, [98] Member States must ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. [99] Furthermore, again under that directive, Member States must adopt rules on effective, proportionate and dissuasive penalties applicable to infringements of that obligation, by taking all necessary measures to ensure that they are implemented. [100] According to the referring court, the Polish law in force does not guarantee compliance with those requirements imposed by that directive. Under the national legislation, such non-compliance with the obligation to assess the consumer's creditworthiness is penalised only by imposing a fine provided for in the Code of minor offences. [101]

Having received a request for a preliminary ruling from the referring court, the Court of Justice holds that the examination of the effectiveness, proportionality and dissuasiveness of the penalties provided for in Article 23 of the directive on credit agreements for consumers, in the event, inter alia, of the failure to comply with the obligation to examine the creditworthiness of the consumer, laid down in Article 8 of that directive, must be carried out taking into account, in accordance with the third paragraph of Article 288 TFEU, [102] not only the provision adopted specifically in national law to transpose that directive, but also all the provisions of that law, interpreting them, so far as possible, in the light of the wording and objectives of that directive, so that those penalties meet the requirements laid down in Article 23 thereof.

Findings of the Court

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98 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

99 Article 8(1) of the directive.

100 Article 23 of the directive.

101 Article 138c(1a) and (4) of the ustawa – Kodeks wykroczeń (Law establishing the Code of minor offences) of 20 May 1971 ('the Code of minor offences') penalises non-compliance with the obligation to assess the consumer's creditworthiness by imposing the fine provided for in Article 24 of that code. In addition, the national legislation provides for the liability not of lenders as legal persons which have concluded loan agreements, but only of natural persons such as a director or the person authorised by the lender to conclude agreements with consumers.

102 The third paragraph of Article 288 TFEU provides that a directive is binding as to the result to be achieved upon each Member State to which it is addressed, while leaving to the national authorities the choice of form and methods.

First of all, the Court points out that, prior to the conclusion of a credit agreement, the creditor must assess the consumer's creditworthiness. [103] The Court notes, in that regard, that the purpose of that obligation is to make a creditor accountable and to prevent that creditor from granting credit to consumers who are not creditworthy.

The Court interprets, next, Article 23 of Directive 2008/48, which provides, first, that the system of penalties applicable in the event of infringement of the national provisions adopted pursuant to that obligation must be established in such a way as to ensure that the penalties are effective, proportionate and dissuasive and, secondly, that the Member States are to take all measures necessary to ensure that they are implemented, the choice of penalties remaining within the discretion of the Member States. In that regard, the Court observes that, in addition to the penalty resulting from the Code of minor offences, Polish law provides for a number of other penalties, including civil penalties, which the national courts may impose in the event of failure to comply with the obligation to check a consumer's creditworthiness. [104]

As regards, in the first place, the effectiveness and dissuasiveness of a fine provided for under Polish law, the Court points out that although a fine may, admittedly, constitute a dissuasive penalty, its low amount may nonetheless render that penalty inadequate and, above all, such a penalty is not capable of ensuring, in a sufficiently effective manner, the protection of consumers against the risks of over-indebtedness and insolvency, sought by the directive on credit agreements for consumers, if it has no effect on the situation of a consumer to whom credit was granted without assessing his or her creditworthiness.

However, the Court points out, in the second place, that a directive, while binding as to the result to be achieved upon each Member State to which it is addressed, leaves to the national authorities the choice of form and methods. [105] Consequently, in order to determine whether national legislation adequately implements the obligations resulting from a given directive, it is important to take into account not only the legislation specifically adopted for the purposes of transposing that directive, but also all the available and applicable legal rules. In that context, the Court clarifies that civil penalties, provided for in the Polish consumer protection legislation, must, in the light of the particular importance afforded to consumer protection by the directive on credit agreements for consumers, be implemented in compliance with the principle of effectiveness.

In the present case, as regards, first of all, the forfeiture of entitlement to interest, the Court recalls that that type of penalty, provided for by national legislation, must be regarded as proportionate, within the meaning of Article 23 of that directive, as regards cases of the creditor's breach of a vitally important obligation in the context of that directive, namely the obligation to check a consumer's creditworthiness.

As regards, next, the division of performance of the contract, the Court points out that this may allow the consumer's situation to be taken into account and avoid exposing the consumer to particularly unfavourable consequences.

Lastly, in order to meet the requirements laid down in Article 23 of the directive on credit agreements for consumers, the Court states that the referring court may apply that directive in conjunction with

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103 Article 8(1) of the directive.

104 More specifically, the provisions laid down by national legislation include the forfeiture of entitlement to interest, the division of the performance of the contract into non-interest-bearing instalments and the invalidity of certain terms on the basis of the national legislation transposing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) Nº 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

105 The third paragraph of Article 288 TFEU.

the directive on unfair terms in consumer contracts, [106] in order, where appropriate, to reach the conclusion that terms relating to excessive charges are not binding on the consumer. In so doing, the referring court must ascertain whether the imposition of the penalty provided for by that latter directive is not less advantageous for the consumer than a simple penalty of forfeiture of entitlement to interest, provided for by the national legislation.

X. ENVIRONMENT

Judgment of the General Court (First Chamber) of 16 June 2021, Krajowa Izba Gospodarcza Chłodnictwa i Klimatyzacji v European Commission, T-126/19

Environment – Regulation (EU) Nº 517/2014 – Fluorinated greenhouse gases – Allocation of quotas for placing hydrofluorocarbons on the market – Plea of illegality – Article 16 of Regulation Nº 517/2014 and Annexes V and VI thereto – Principle of non-discrimination – Obligation to state reasons

Krajowa Izba Gospodarcza Chłodnictwa i Klimatyzacji ('the applicant') is a Polish undertaking whose activity gives rise to emissions of fluorinated greenhouse gases, in particular hydrofluorocarbons (HFCs). HFCs are a category of fluorinated greenhouse gases whose climatic warming potential is much higher than that of carbon dioxide (CO2), and which are used, inter alia, in refrigeration and air-conditioning systems, aerosols and the manufacture of insulating foam. Regulation Nº 517/2014 on fluorinated greenhouse gases [107] seeks to limit those HFC emissions in the long term by gradually reducing the quantities of HFCs placed on the market by producers or importers. To that end, the Commission determines each year a maximum quantity of HFCs that may be placed on the market in the European Union. It also set up an electronic registry for quotas for placing HFCs on the market, where producers and importers which are active on that market must register.

In 2014, the applicant registered in that registry as a 'new market player', that is to say as an undertaking which had not declared that it had placed HFCs on the market between 2009 and 2012. The allocation of quotas for that category of undertakings is based exclusively on the annual declarations submitted to the Commission. For 2019, the applicant declared a need of 207 433 tonnes of CO2 equivalent HFC. By decision of the Commission of 11 December 2018 ('the contested decision'), the applicant was allocated a quota of 4 096 tonnes of CO2 equivalent HFC.

The applicant challenged that decision before the General Court, raising a plea of illegality in respect of Article 16 of Regulation Nº 517/2014, read in conjunction with Annexes V and VI thereto, which introduces the quota allocation system in question and which forms the basis of the contested decision. In that regard, it maintained, in particular, that the rules on the apportionment of quotas are contrary to the principle of non-discrimination. In its judgment, the Court dismisses the applicant's action and upholds the validity of Article 16 of Regulation Nº 517/2014.

Findings of the Court

The Court observes, first of all, that the principle of non-discrimination requires equal treatment of comparable situations. According to the case-law, for the EU legislature to be accused of breaching

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106 See footnote 7 above.

107 Regulation (EU) Nº 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) Nº 842/2006 (OJ 2014 L 150, p. 195).

the principle of non-discrimination, it must have treated comparable situations differently, thereby subjecting some persons to disadvantages as opposed to others. Next, that difference in treatment must not be capable of being justified on the basis of an objective and reasonable criterion and must not be proportionate to the aim pursued by that difference in treatment. In addition, where it is called upon to make choices, in particular, of a political nature, and undertake complex assessments, the legislature has a broad discretion.

Thus, the Court states, first, that there is a difference in treatment when allocating quotas for placing HFCs on the market between the historical undertakings, namely those which have declared that they had placed HFCs on the market between 2009 and 2012, and new entrants, which have not declared that they had placed HFCs on the market during that period. The historical undertakings were allocated, during the first three-year period when Regulation Nº 517/2014 was applicable, quotas representing 89% of the maximum quantity of HFCs that could be placed on the EU market each year, while the entirety of new entrants were allocated only 11%.

Second, historical undertakings and new entrants are in a comparable situation in the light of the purpose and objective of Regulation Nº 517/2014. Those two categories of undertaking produce greenhouse gas emissions which have an equally negative effect on the climate and require quotas for placing HFCs on the market.

Third, the difference in treatment gives rise to disadvantages for new entrants, such as the applicant, resulting, in particular, from the allocation to historical undertakings of quotas representing the majority of the available quantities of HFCs that can be placed on the EU market each year.

As to the justification for that difference in treatment, the Court notes, fourth, that it is based on a consideration of the relevant data resulting from an impact assessment and from a wide public consultation preceding the adoption of the regulation. It is apparent from that data that the free quota allocation system was favoured by the legislature as compared with the option of selling quotas by auction. The latter option would be disproportionate in relation to the size of the HFC market and its proper functioning would not be ensured given the highly concentrated nature of that market. In addition, the legislature opted for a quota allocation system based on historical emissions and not on requests from undertakings, in order to combat the practice of 'over-reporting' emissions. It follows that the difference in treatment is based on objective and appropriate criteria in order to ensure the proper functioning of the quota allocation system and guarantee sufficient access to the market for new entrants.

Finally, the Court concludes that the difference in treatment is proportionate to the aim pursued and that the legislature did not exceed its margin of discretion in the matter, since it took account of the interests of new entrants by providing them with a fixed reserve, for the first three-year period in which quotas were allocated, set at 11% of the available quantities of HFCs. In that regard, the Court notes that the proportion of quotas allocated from the reserve and, therefore, available to new entrants, will continue to increase over the years, while the proportion of the quantities to be allocated to historical undertakings will continually decrease.

XI. COMMON FOREIGN AND SECURITY POLICY

Judgment of the General Court (Fourth Chamber) of 9 June 2021, Borborudi v Council, T-580/19

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures taken against Iran with the aim of preventing nuclear proliferation – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Retention of the applicant's name on the list – Error of assessment – Article 266 TFEU

In 2010, the Council of the European Union adopted restrictive measures [108] in order to compel the Islamic Republic of Iran to end proliferation-sensitive nuclear activities or activities contributing to the development of nuclear weapon delivery systems by providing for the freezing of funds and economic resources of persons and entities involved in that nuclear programme. The applicant, Mr Borborudi, had been included on 1 December 2011 on the list of persons and entities covered by those measures on the grounds that he held the post of Deputy Head of the Atomic Energy Organisation of Iran (AEOI) and, in particular, that he had been involved in Iran's nuclear programme since at least 2002. The Council had subsequently extended that listing on several occasions.

Following the adoption of Decision 2019/870 [109] and Regulation 2019/855, [110] by which the Council extended the inclusion of his name on the list at issue on the same grounds against him, the applicant brought an action for annulment of that regulation. He alleged, inter alia, that the Council had made an error of assessment and had failed to establish that the restrictive measures were well founded.

The General Court annuls Regulation 2019/855 in so far as it concerns the applicant and examines the consequences of the annulment of that regulation, adopted on the basis of Article 215 TFEU, on Decision 2019/870, adopted on the basis of Article 29 TEU.

Findings of the Court

In the first place, the Court considers that the fact that the subject matter of the action is limited to an application for annulment of Regulation 2019/855, in so far as it concerns the applicant, and does not also relate to Decision 2019/870 does not preclude its examination. It recalls in that regard that decisions adopted on the basis of Article 29 TEU and regulations adopted on the basis of Article 215 TFEU are two types of act, the first declaring the Union's position with respect to the restrictive measures to be adopted and the second constituting the instrument giving effect to those measures at Union level. Despite their close connection, the Court holds that those acts are distinct and independent, so that there is nothing to prevent an applicant from challenging only an implementing regulation.

In the second place, the Court considers that the first ground for inclusion on the list at issue is unfounded in so far as the Council has not established that the applicant, on the date of adoption of the contested measure, was a Deputy Head of the AEOI. The Court notes in that regard that the

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108 Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39), and Council Regulation (EU) N° 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) N° 423/2007 (OJ 2010 L 281, p. 1).

109 Council Decision (CFSP) 2019/870 of 27 May 2019 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2019 L 140, p. 90).

110 Council Implementing Regulation (EU) 2019/855 of 27 May 2019 implementing Regulation (EU) N° 267/2012 concerning restrictive measures against Iran (OJ 2019 L 140, p. 1).

Council was not entitled to criticise the applicant, without reversing the burden of proof, for not having established that he had ceased all activity within the AEOI by requiring him to inform it of that fact and to submit evidence to the Council in that regard. On the contrary, the Council was required to examine carefully, in the context of the annual review of the restrictive measures, [111] the evidence substantiating the inclusion of the applicant's name on the list at issue, notwithstanding the power vested in the applicant to submit, at any time, observations or new evidence. [112] The Court observes, in the present case, that there is no evidence to substantiate the ground that, as was stated in the non-confidential extract of the listing proposal, the applicant was a Deputy Head of the AEOI on the date of adoption of the Regulation.

In the third place, the Court considers that the Council replaces the grounds on which the contested measure is based by claiming that the retention of the applicant's name on the list at issue is justified by his past activities. The Court recalls that the listing criterion relating to the provision of support for Iran's proliferation-sensitive nuclear activities implies that the existence of a direct or indirect link is established between the activities of the person and nuclear proliferation. It specifies in that respect that the adoption of restrictive measures against a person does not necessarily presuppose that that person has actually previously acted reprehensibly; the risk that that person may do so in the future may be sufficient in itself. However, the existence of a direct or indirect link between a person's activities and nuclear proliferation is, on the other hand, a necessary condition for the inclusion of that person's name on the list at issue. The Council could not, therefore, rely, on the date of adoption of the contested measure, on the applicant's former employment with the AEOI and his former involvement in Iran's nuclear programme, without adducing sound and consistent evidence from which it might be inferred that the applicant maintained links with the AEOI and that programme, or, more generally, with proliferation-sensitive nuclear activities.

Lastly, the Court examines the consequences of the annulment of Regulation 2019/855, in so far as it concerns the applicant, for Decision 2019/870, which the applicant has not challenged. It observes, first of all, that this judgment does not automatically lead to the annulment of Decision 2019/870. However, in so far as those two acts impose identical measures on the applicant, Decision 2019/870's remaining applicable despite the annulment of the contested measure would risk seriously jeopardising legal certainty. The Court goes on to recall that, in order to comply with the annulment judgment, the Council is required to have regard both to the operative part of the judgment and to the grounds on which it is based. Those grounds identify the grounds for including the applicant's name on the list at issue as being illegal and indicate the specific reasons for their illegality. The Council must therefore ensure that any subsequent decisions to freeze funds that may be adopted after the judgment are not vitiated by the same defects. For that purpose, the Court states, in the light of the retroactive effect of annulling judgments, that the finding of unlawfulness takes effect from the date on which the annulled measure entered into force. In so far as the date on which Decision 2019/870 enters into force is the same as that of the contested measure, the Court infers from this that the Council may be under an obligation to eliminate from that decision the grounds for including the applicant's name with the same content as those held to be unlawful in the present judgment, if those grounds are substantiated by the same evidence.

111 Article 26(3) of Decision 2010/413 and Article 46(7) of Regulation Nº 267/2012.

112 Article 24(4) of Decision 2010/413 and Article 46(5) of Regulation Nº 267/2012.

Nota :

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

- Judgment of 5 May 2021, ITD and Danske Fragtmænd v Commission, Case T-561/18, ECLI:EU:T:2021:240