COURT OF JUSTICE
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I. CITIZENSHIP OF THE UNION: RIGHTS OF UNION CITIZENS

Judgment of the Court (Grand Chamber) of 14 December 2021, Stolichna obshtina, rayon "Pancharevo", C-490/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Articles 20 and 21 TFEU – Right to move and reside freely within the territory of the Member States – Child born in the host Member State of her parents – Birth certificate issued by that Member State mentioning two mothers in respect of that child – Refusal by the Member State of origin of one of those two mothers to issue a birth certificate for the child in the absence of information as to the identity of the child's biological mother – Possession of such a certificate being a prerequisite for the issue of an identity card or a passport – Persons of the same sex not recognised as parents under the national legislation of that Member State of origin

V.M.A., a Bulgarian national, and K.D.K. have resided in Spain since 2015 and were married in 2018. Their child, S.D.K.A., was born in Spain in 2019. The child's birth certificate, drawn up by the Spanish authorities, refers to both mothers as being the parents of the child.

Since a birth certificate issued by the Bulgarian authorities is necessary to obtain a Bulgarian identity document, V.M.A. applied to the Sofia municipality (Bulgaria) [1] for a birth certificate for S.D.K.A. to be issued to her. In support of her application, V.M.A. submitted a legalised and certified translation into Bulgarian of the extract from the Spanish civil register relating to S.D.K.A.'s birth certificate.

The Sofia municipality instructed V.M.A. to provide evidence of the parentage of S.D.K.A., with respect to the identity of her biological mother. The model birth certificate applicable in Bulgaria has only one box for the 'mother' [2] and another for the 'father', and only one name may appear in each box.

V.M.A. took the view that she was not required to provide the information requested, whereupon the Sofia municipality refused to issue the requested birth certificate because of the lack of information concerning the identity of the child's biological mother and the fact that a reference to two female parents on a birth certificate was contrary to Bulgarian public policy, which does not permit marriage between two persons of the same sex.

V.M.A. brought an action against that refusal decision before the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia), the referring court.

That court is uncertain as to whether the refusal by the Bulgarian authorities to register the birth of a Bulgarian national, [3] which occurred in another Member State and has been attested by a birth certificate referring to two mothers, issued in the latter Member State, infringes the rights conferred on that Bulgarian national by Articles 20 and 21 TFEU and by Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union. [4] That refusal could make it more difficult for a Bulgarian identity document to be issued and, therefore, hinder the child's exercise of the right of free movement and thus full enjoyment of her rights as a Union citizen.

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1 Stolichna obshtina, rayon 'Pancharevo' (Sofia municipality, Pancharevo district, Bulgaria) ('the Sofia municipality').

2 According to the Semeen kodeks (Bulgarian Family Code), in the version applicable to the main proceedings, parentage with respect to the mother is determined by birth, the mother of the child being defined as the woman who gave birth to that child, including in the case of assisted reproduction.

3 According to the referring court, it is common ground that, even without a birth certificate issued by the Bulgarian authorities, the child has Bulgarian nationality under, in particular, Article 25(1) of the Bulgarian Constitution.

4 ' the Charter'.

In those circumstances, the referring court decided to ask the Court of Justice about the interpretation of Article 4(2) TEU, [5] Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter. It asks, in essence, whether those provisions oblige a Member State to issue a birth certificate, in order for an identity document to be obtained, for a child, a national of that Member State, whose birth in another Member State is attested by a birth certificate that has been drawn up by the authorities of that other Member State in accordance with the national law of that other State, and which designates, as the mothers of that child, a national of the first of those Member States and her wife, without specifying which of the two women gave birth to that child.

In its judgment, delivered by the Grand Chamber, the Court interprets the provisions referred to above as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

Findings of the Court

In reaching that conclusion, the Court recalls first of all that, in order to enable nationals of the Member States to exercise their right to move and reside freely within the territory of the Member States, [6] a right which every citizen of the Union enjoys under Article 21(1) TFEU, Directive 2004/38 [7] requires Member States, acting in accordance with their laws, to issue to their own nationals an identity card or passport stating their nationality.

Accordingly, since S.D.K.A. has Bulgarian nationality, the Bulgarian authorities are required to issue to her a Bulgarian identity card or passport stating her surname as it appears on the birth certificate drawn up by the Spanish authorities, regardless of whether a new birth certificate is drawn up.

Such a document, whether alone or accompanied by a document issued by the host Member State, must enable a child such as S.D.K.A. to exercise the right of free movement, with each of the child's two mothers, whose status as parents of that child has been established by the host Member State during a stay in accordance with Directive 2004/38.

The rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State. Since the Spanish authorities have lawfully established that there is a parent-child relationship, biological or legal, between S.D.K.A. and her two parents, attested in the birth certificate issued in respect of the child, V.M.A. and K.D.K. must, pursuant to Article 21 TFEU and Directive 2004/38, be recognised by all Member States as having the right, as parents of a Union citizen who is a minor and of whom they are the primary carers, to accompany that child when she is exercising her rights.

It follows, first, that the Member States must recognise that parent-child relationship in order to enable S.D.K.A. to exercise, with each of her parents, her right of free movement. Second, both parents must have a document which enables them to travel with that child. The authorities of the

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[5] Under which, in particular, the Union is to respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional.

[6] 'the right of free movement'.

[7] Article 4(3) of 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) No 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 corrigendum OJ 2004 L 229, p. 35).

host Member State are best placed to draw up such a document, which may consist in a birth certificate and which the other Member States are obliged to recognise.

Admittedly, a person's status is a matter which falls within the competence of the Member States, which are free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. In exercising that competence, each Member state must comply with EU law, in particular the Treaty provisions on Union citizens' freedom of movement and of residence, by recognising, for that purpose, the civil status of persons that has been established in another Member State in accordance with the law of that other Member State.

In the present case, the obligation for a Member State to issue an identity document to a child who is a national of that State, who was born in another Member State in which the birth certificate was drawn up and designates as parents two persons of the same sex, and, moreover, to recognise the parent-child relationship between that child and each of those two persons in the context of the child's exercise of her rights under Article 21 TFEU and secondary legislation relating thereto, does not undermine the national identity or pose a threat to the public policy of that Member State. It does not require the Member State concerned to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which the child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.

Lastly, a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where it is consistent with the fundamental rights guaranteed by the Charter. [8] It is contrary to the fundamental rights guaranteed by Articles 7 and 24 of the Charter for the child to be deprived of the relationship with one of her parents when exercising her right of free movement or for her exercise of that right to be made impossible or excessively difficult on the ground that her parents are of the same sex

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[8] Relevant rights in the situation with which the main proceedings are concerned are the right to respect for private and family life guaranteed by Article 7 of the Charter and the rights of the child guaranteed by Article 24 of the Charter, in particular the right to have the child's best interests taken into account and the right to maintain on a regular basis a personal relationship and direct contact with both parents.

II. FUNDAMENTAL RIGHTS: RIGHT TO AN EFFECTIVE REMEDY

Judgment of the Court (Grand Chamber) of 21 December 2021, Randstad Italia, C-497/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Second subparagraph of Article 19(1) TEU – Obligation of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law – Public procurement – Directive 89/665/EEC – Article 1(1) and (3) – Article 47 of the Charter of Fundamental Rights of the European Union – Judgment of a Member State's highest administrative court declaring inadmissible, in breach of the case-law of the Court of Justice, an action brought by a tenderer excluded from a public procurement procedure – No remedy against that judgment before the highest court in that Member State's judicial order – Principles of effectiveness and equivalence

Azienda USL Valle d'Aosta (local health agency of the Valle d'Aosta region, Italy) launched a procedure for the purpose of awarding a public contract to an employment agency for the temporary supply of personnel. Randstad Italia SpA ('Randstad') was among the tenderers which participated in that procedure. Following the evaluation of technical offers, Randstad was excluded, the marks for its offer having failed to reach the minimum threshold set.

Randstad brought an action before the competent administrative court of first instance seeking, first, to challenge its exclusion from the tendering procedure and, second, to demonstrate the irregularity of that procedure. The action was declared admissible but was dismissed on the merits. However, the Consiglio di Stato (Council of State, Italy), before which an appeal was brought, held that the pleas challenging the regularity of the procedure should have been declared inadmissible, since Randstad did not have the necessary standing to raise them. Accordingly, it amended the judgment delivered at first instance in that respect. Randstad appealed against that judgment to the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which stated, regarding the substance, that the refusal by the Council of State to examine the pleas relating to the irregularity of the tendering procedure undermines the right to an effective remedy, within the meaning of EU law. However, it noted that Italian constitutional law, [9] as interpreted by the Corte costituzionale (Constitutional Court, Italy), [10] requires such an appeal to be declared inadmissible. Appeals in cassation against decisions of the Council of State are permitted only for reasons of jurisdiction, whereas in the present case Randstad's appeal was based on a plea alleging an infringement of EU law.

Against that background, the Supreme Court of Cassation decided to refer the matter to the Court of Justice in order to clarify, in essence, whether EU law [11] precludes a provision of domestic law which, according to national case-law, does not allow individual parties to challenge, by means of an appeal in cassation to that court, the conformity with EU law of a judgment of the highest administrative court.

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[9] Eighth paragraph of Article 111 of the Costituzione (Constitution).

[10] Judgment No 6/2018 of 18 January 2018 concerning the interpretation of the eighth paragraph of Article 111 of the Constitution (ECLI:IT:COST:2018:6).

[11] Article 4(3) and Article 19(1) TEU, and Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

The Court of Justice, sitting in the Grand Chamber, rules that such a provision is consistent with EU law.

Findings of the Court

In the light of the principle of procedural autonomy, the Court observes that, provided there are EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for remedies to ensure effective legal protection, within the meaning of Article 19 TEU, for individual parties in the fields covered by EU law. However, it is necessary to ensure that those rules are not less favourable than in similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). Thus, EU law, in principle, does not preclude Member States from restricting or imposing conditions on the pleas which may be relied on in proceedings in an appeal in cassation, provided that those two principles are respected.

As regards the principle of equivalence, the Court notes that, in this case, the jurisdiction of the referring court to hear and determine appeals against judgments of the Council of State is limited according to the same rules, regardless of whether the appeals are based on provisions of national law or of EU law. Consequently, observance of that principle is ensured.

As to the principle of effectiveness, the Court recalls that EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless no legal remedy exists that would make it possible to ensure respect for the rights that individuals derive from EU law. Provided that, in the present case, the referring court finds that such a legal remedy does exist, which seems on the face of it to be the case, it is entirely open – from the point of view of EU law – to the Member State concerned to confer jurisdiction on the highest court in its administrative order to adjudicate on a dispute at last instance, in relation both to the facts and to points of law, and consequently to prevent that dispute from being open to further substantive examination in an appeal in cassation before the highest court in its judicial order. Thus, the national provision at issue also does not undermine the principle of effectiveness and reveals nothing from which it could be concluded that Article 19 TEU has been infringed. That conclusion does not conflict with the provisions of Directive 89/665 under which, in the field of public procurement, the Member States are obliged to guarantee the right to an effective remedy. [12]

However, the Court notes that, in the light of the right to an effective remedy guaranteed by that directive and by Article 47 of the Charter, the Council of State was wrong to have found the action brought by Randstad before the administrative courts to be inadmissible. In that regard, the Court recalls, first, that it is sufficient, in order for that action to be declared admissible, that there is a possibility that the contracting authority will, should the review be successful, have to restart the public procurement procedure. Second, under that directive, the action may be brought only by a tenderer who has not yet been definitively excluded from the tendering procedure, and the exclusion of a tenderer is definitive only if it has been notified to that tenderer and has been 'considered lawful' by an independent and impartial tribunal. [13]

In the present case, the Council of State disregarded that rule, in so far as both at the time when Randstad brought the action before the court of first instance and at the time when the latter gave its ruling, the decision of the procurement committee to exclude that tenderer from the procedure had not yet been considered lawful by that court or by any other independent review body.

However, in a situation such as that in the present case, where national procedural law in itself permits interested persons to bring an action before an independent and impartial tribunal and to assert before it, effectively, that EU law, and provisions of national law transposing EU law into the

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[12] Article 1(1) and (3) of Directive 89/665.

[13] Article 2a(2) of Directive 89/665, interpreted in the light of Article 47 of the Charter.

domestic legal order, have been infringed, but where the highest court in the administrative order of the Member State concerned, adjudicating at last instance, wrongly makes the admissibility of that action subject to conditions that have the effect of depriving those interested persons of their right to an effective remedy, EU law does not require that that Member State make provision – for the purpose of addressing the infringement of that right to an effective remedy – for the possibility of lodging an appeal before the highest court in the judicial order against such inadmissibility decisions from the highest administrative court.

Lastly, the Court points out that that outcome is without prejudice to the right of individuals who may have been harmed by the infringement of their right to an effective remedy as a result of a decision of a court adjudicating at last instance to hold the Member State concerned liable, provided that the conditions laid down by EU law to that effect are satisfied, in particular the condition relating to the sufficiently serious nature of the infringement of that right.

III. INSTITUTIONAL PROVISIONS: ACCESS TO DOCUMENTS

Judgment of the General Court (Ninth Chamber) of 1 December 2021, JR v Commission, T-265/20

Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the oral test in a competition – Partial refusal of access – Method for rounding scores – Weightings assigned to the different parts and sub-parts of the oral test – Secrecy of the selection board's proceedings – Regulation (EU) 2018/1725 – No need to adjudicate in part

Following the oral test of a competition, [14] the European Commission informed the candidate JR that she was not included on the reserve list. JR had obtained a score of 13 points out of 20 in the oral examination, whereas the minimum score required for inclusion on that list was 14 points. In accordance with the competition notice, the oral test was assessed on the basis of two parts (interview and structured presentation) and the part relating to the interview was assessed on the basis of two sub-parts (professional experience and motivation). JR was assessed as 'strong' in respect of professional experience, 'strong' in respect of motivation and 'good' in respect of her structured presentation. The selection board concluded that the overall assessment for JR's oral examination was 'good'.

JR applied to the Commission for access to documents and information relating in particular to the weightings assigned to the different parts and sub-parts of the oral test.

The Commission refused access to the document containing the weightings, taking the view that they were covered by the secrecy of the selection board's proceedings. [15]

In an action for annulment, the General Court annuls that decision on the ground that the weightings are not covered by the secrecy of the selection board's proceedings and, on this occasion, sets out the conditions for the application of that secrecy as an exception to the right of access to documents.

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[14] Internal competition COM/03/AD/18 (AD 6) – 1 – Administrators, bearing the reference number 35-20/11/2018.

[15] In accordance with Article 6 of Annex III to the Staff Regulations of Officials of the European Union.

Thus, the case arises where the functions of the civil service intersect with access to documents and gives the Court the opportunity to address the principle of the secrecy of the selection board's proceedings, in the context of an action for annulment concerning access to documents, in order to ensure the principle of transparency in the proceedings of the EU institutions.

Findings of the Court

First of all the Court recalls that any person has a right of access to documents of the EU institutions. [16] That access must be as wide as possible, whilst being subject to certain limits on grounds of public or private interest. [17]

Under the exception relating to the protection of the decision-making process, [18] the institutions are to refuse access to a document where it contains opinions for internal use as part of deliberations and preliminary consultations within the institution concerned if disclosure of the document would seriously undermine that institution's decision-making process, unless there is an overriding public interest in disclosure.

Since the issues in dispute fall within the specific field of the civil service of the European Union, that exception must be interpreted having regard to the principle of the secrecy of the selection board's proceedings. Thus, the Court examines the conditions of such secrecy as an exception to the right of access to documents.

In that regard, the Court recalls that observance of the secrecy of the selection board's proceedings precludes the disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates.

It states that the stage of the proceedings of a selection board involving the examination of the abilities of the candidates for the posts to be filled is primarily comparative in character and is accordingly covered by secrecy. Moreover, the criteria for marking form an integral part of the comparative assessments and are therefore covered by the secrecy of the proceedings in the same way as the selection board's assessments.

The Court also points out that the selection board enjoys a wide discretion in conducting its proceedings. Where a competition notice does not specify the weighting of each assessment criterion applicable to a given test, the selection board is competent to determine the weighting of those criteria.

In the present case, the selection board adopted a weighting for each component of the oral test. However, those weightings were not established on the basis of an assessment of the candidates in the competition since the selection board decided on them before starting the proceedings relating to the oral test and without having any information as to the identity of the candidates and their performance at the previous stage. Moreover, they were applied uniformly to all candidates admitted to the oral test. Accordingly, the Court notes that the weightings are not part of the attitudes adopted by individual members of the selection board.

Similarly, the Court points out that the weightings are not criteria for marking either. The decision by the selection board to weight the components of a test must be distinguished from the assessments it makes regarding the abilities of the candidates. Such weighting is not a personal or comparative assessment of the candidates' respective merits since its adoption does not entail any value judgement on the part of the selection board of their knowledge and abilities. On the contrary, the weight of each component of the oral test is determined objectively, prior to that test, according to

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[16] Pursuant to Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union.

[17] In accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

[18] That exception is provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001.

the importance which the selection board attributes to it in the light of the requirements attaching to the posts to be filled. The fact that the determination of the weighting of each part of a test falls within the wide discretion enjoyed by the selection board does not mean that that weighting must remain secret.

Since they do not contain personal or comparative assessments, the weightings cannot be covered by the secrecy of the selection board's proceedings. Consequently, the Commission should have granted access to the document containing the weightings assigned to the components of the oral test.

IV. PROCEEDINGS OF THE EUROPEAN UNION: LEGAL REPRESENTATION BEFORE THE EU COURTS

Order of the General Court (Fifth Chamber) of 7 December 2021, Daimler v EUIPO - Volkswagen (IQ), T-422/21

Link to the complete text of the order

Action for annulment – EU trade mark – Lack of representation by a lawyer authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement – Manifest inadmissibility

By application lodged at the Registry of the General Court on 12 July 2021, Daimler AG brought an action against the decision of the Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 7 May 2021. Daimler stated that it was represented by two lawyers who were authorised to practise before the courts or tribunals of the United Kingdom.

The withdrawal agreement [19] provides for a transition period which ended on 31 December 2020.

By its order, the General Court dismissed Daimler's action as manifestly inadmissible. It ruled, for the first time, on the issue of the admissibility of an action which was brought by an applicant which was represented by lawyers who were authorised to practise before the courts or tribunals of the United Kingdom against a decision of a Board of Appeal of EUIPO which had been adopted after the end of the transition period.

Findings of the Court

In the first place, the Court pointed out that only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Courts of the European Union. [20] In that regard, the withdrawal agreement provides for various situations in which a lawyer who is authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Courts of the European Union. [21]

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[19] 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; 'the withdrawal agreement').

[20] Fourth paragraph of Article 19, of the Statute of the Court of Justice of the European Union.

[21] Article 91(1) and (2) of the withdrawal agreement.

In the second place, the Court held that the present action was not covered by any of the situations set out in the withdrawal agreement, with the result that the applicant's lawyers could not represent it before the Courts of the European Union.

It pointed out that, since the application had been lodged after the end of the transition period, the provision in the withdrawal agreement relating to proceedings that were pending before the Courts of the European Union before the end of that period was not applicable. Likewise, in the light of the fact that the contested decision had been adopted after the end of the transition period, the provision regarding decisions adopted by institutions, bodies, offices and agencies of the European Union before the end of that period also did not apply. [22]

Furthermore, the Court held that the present case did not concern proceedings for failure to fulfil obligations which had been brought by the Commission, [23] an administrative procedure concerning compliance with EU law by the United Kingdom, by persons residing or established there, or concerning compliance with EU law relating to competition, [24] a European Anti-Fraud Office procedure or a State aid procedure. [25] The case was likewise not covered by Article 97 of the withdrawal agreement, because that provision relates solely to representation in ongoing proceedings before EUIPO, and not before the Court.

V. FREEDOM OF MOVEMENT: FREE MOVEMENT OF CAPITAL

Judgment of the Court (Fifth Chamber) of 21 December 2021, Finanzamt V (Succession – Partial allowance and deduction of reserved portions), C-394/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Free movement of capital – Articles 63 and 65 TFEU – National legislation on inheritance tax – Immovable property situated on national territory – Limited tax liability – Different treatment of residents and non-residents – Right to an allowance on the taxable value – Proportionate reduction in the case of limited tax liability – Liabilities arising from reserved portions – No deduction in the case of limited tax liability

XY, an Austrian national living in Austria, is the sole legatee of her father, an Austrian national who also lived in Austria and who died in 2018. His wife and son were entitled to the reserved portions.

As the estate comprised, inter alia, immovable property situated in Germany, XY, as a person with limited tax liability in that Member State, submitted an inheritance tax return to the tax authorities, seeking to deduct liabilities arising from those reserved portions, amounting to 43% of their total, as debts under the succession. [26]

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22 Article 91(1) and (2) of the withdrawal agreement, read in conjunction with Article 95(1) of that agreement.

23 Article 91(1) of the withdrawal agreement, read in conjunction with Article 87 of that agreement.

24 Article 91(2) of the withdrawal agreement, read in conjunction with Article 92(1) of that agreement.

25 Article 91(2) of the withdrawal agreement, read in conjunction with Article 93 of that agreement.

26 According to XY, the proportion of immovable property assets subject to inheritance tax in Germany represented 43% of the total value of the assets in the estate, which also included capital assets and immovable property in Spain.

When calculating [27] the inheritance tax payable by XY, applying only to immovable property situated in Germany, the tax authorities refused to deduct the liabilities arising from the reserved portions as debts under the succession. They have no economic connection with the immovable property included in the estate. In addition, for the purposes of calculating the inheritance tax, the tax authorities applied a lower allowance than that provided, in principle, for the children of the deceased.

Challenging the calculation of that inheritance tax, XY brought an action before the referring court. That court is unsure as to the compatibility of the provisions of the FEU Treaty on the movement of capital with legislation of a Member State prescribing, in the event of acquisition of immovable property situated on the national territory, where, at the date of death, neither the deceased nor the heir resided in that Member State, different rules as to the amount of the personal allowance that the heir may claim and to the deductibility of liabilities arising from the reserved portions, from those applying where at least one of them resided on that date in that Member State. [28]

Findings of the Court

After finding that inheritance tax such as that charged in the present case falls within the scope of the provisions of the FEU Treaty on the movement of capital, the Court examines, first, whether legislation such as that at issue, in so far as it reduces the allowance on the taxable value in a situation such as that in the main proceedings, constitutes a restriction on the free movement of capital and, if so, whether that restriction may be justified.

Under the national legislation, persons with unlimited tax liability may benefit from the full allowance where the tax charge to which the allowance relates extends to the whole of the estate acquired. By contrast, for persons with limited tax liability, the allowance is reduced in proportion to the share of the estate that is not subject to tax in the Member State in question. Since such legislation leads to a heavier tax burden for the latter, it constitutes a restriction on the movement of capital.

The Treaty allows a distinction to be made between resident and non-resident taxpayers, provided that it does not constitute a means of arbitrary discrimination or a disguised restriction. Accordingly, the difference in treatment must relate to situations which are not objectively comparable or which are justified by an overriding reason in the public interest.

In that regard, the Court notes that the criteria according to which the amount of inheritance tax relating to immovable property in Germany is calculated do not depend on the place of residence. Moreover, for the purposes of collecting inheritance tax relating to immovable property situated in Germany, national law considers the beneficiary of an inheritance between non-residents, such as that of an inheritance involving at least one resident, to be liable, the determination of the class and rate of taxation following from the same rules. The only distinction the national legislation makes between residents and non-residents concerns determination of the taxable enrichment of the heir. The Court infers from this that the national legislature itself considered that, in the light of the detailed rules and conditions governing taxation, there is no objective difference in the situation between the two categories of heirs and finds that the difference in treatment relating to the benefit of the allowance at issue concerns comparable situations.

Next, the Court examines whether the restriction caused by that difference in treatment may be justified by an overriding reason in the public interest, in this instance the need to ensure the coherence of the tax system. Such a justification requires, in particular, a direct link between the

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[27] On the basis of provisions of national law relating to inheritance tax.

[28] To that effect, first, the allowance on the taxable value is reduced, in relation to the allowance applied where at least one of them was resident, on the same date, in that Member State, by an amount corresponding to the share that represents the value of the asset that is not subject to taxation in that Member State in relation to the value of the whole estate, and, secondly, the liabilities arising from the reserved portions are not deductible from the value of the inheritance, as debts under the succession, whereas those liabilities may be deducted in full if at least one of them resided, on that date, in that Member State.

granting of the tax advantage concerned and the offsetting of that advantage by a particular tax charge. In the light of the objective pursued by the national legislation, namely to ensure that a part of the family estate is exempted by a reduction in the total amount of the inheritance, the Court finds that that legislation establishes a direct link between the allowance that the heir may rely on and the extent of the tax jurisdiction exercised in relation to the enrichment arising from the inheritance. Since that direct link is appropriate for ensuring attainment of the objective pursued by the legislation in question and does not go beyond what is necessary to achieve that objective, the Court considers the restriction on the movement of capital resulting from such legislation, in so far as it concerns the allowance on the taxable value, to be justified by the need to preserve the coherence of the tax system and compatible with the provisions of the Treaty relating to the free movement of capital.

Secondly, the Court examines whether national legislation such as that at issue restricts movements of capital in that it does not allow the liabilities arising from the reserved portions to be deducted from the value of the inheritance, as debts under the succession, where, at the date of death, neither the deceased nor the heir resided in the Member State concerned, whereas those liabilities may be deducted in full if at least one of them resided, on the same date, in that Member State.

The Court finds, first, that such legislation means that inheritances between non-residents relating to immovable property situated on national territory are subject to a heavier tax burden than those involving at least one resident and has the effect of reducing the value of the inheritance for the first category of heirs. Such legislation therefore constitutes a restriction on the movement of capital.

Examining whether that restriction may be justified where the difference in treatment concerns situations that are not objectively comparable or meets an overriding reason in the public interest, the Court then notes, as regards the amount of inheritance tax payable in respect of immovable property situated in Germany, that there is no objective difference between, respectively, inheritances involving persons who, at the time of death, are not resident in that Member State and inheritances involving persons at least one of whom resides, on that date, in that State. The difference in treatment relating to the deductibility of the liabilities in question therefore concerns objectively comparable situations.

Finally, the Court rejects the justifications put forward by Germany, namely, first, the need to preserve the coherence of the German tax system and, secondly, the application of the principle of territoriality and the need to ensure a balanced allocation of the Member States' power to impose taxes. Legislation such as that at issue which provides that, in the event of acquisition of immovable property situated on national territory, where, at the date of death, neither the deceased nor the heir resided in that Member State, the debts arising from reserved portions are not deductible, as debts under the succession, from the value of the inheritance, whereas those debts may be deducted in full if at least one of them resided, on that same date, in that Member State, is therefore incompatible with the provisions of the Treaty relating to the free movement of capital.

VI. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 1215/2012 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Judgment of the Court (Grand Chamber) of 21 December 2021, Gtflix Tv, C-251/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Article 7(2) – Special jurisdiction in matters relating to tort, delict or quasi-delict – Publication on the internet of allegedly disparaging comments concerning a person – Place where the harmful event occurred – Courts of each Member State in which content placed online is or has been accessible

Gtflix Tv ('the applicant') is a company established in the Czech Republic which produces and distributes adult audiovisual content. DR, who is domiciled in Hungary, is another professional in that field.

The applicant, which alleges that DR made disparaging comments about it on a number of websites, brought proceedings against him before the French courts, seeking, first, the removal of those comments and the rectification of the published information and, secondly, compensation for the damage suffered as a result of those comments. Both at first instance and on appeal, those courts declared that they had no jurisdiction to rule on those claims.

Before the Cour de cassation (Court of Cassation, France), the applicant challenged the judgment delivered by the cour d'appel (Court of Appeal, France), which, according to the applicant, disregarded the rule of special jurisdiction laid down in Article 7(2) of Regulation No 1215/2012 [29] in favour of the courts 'for the place where the harmful event occurred or may occur', by excluding the jurisdiction of the court seised on the ground that it is not sufficient that the comments deemed to be disparaging which were published on the internet are accessible within the jurisdiction of that court, but that those comments must also be liable to cause damage there.

The referring court, considering, inter alia, that the applicant's centre of interests was established in the Czech Republic and that DR is domiciled in Hungary, held that the French courts had no jurisdiction to hear the application for the removal of the allegedly disparaging comments and the rectification of the published information. It nevertheless decided to ask the Court of Justice whether the French courts have jurisdiction to rule on the claim for compensation in respect of the damage allegedly caused to the applicant in the Member State of those courts, even though those courts do not have jurisdiction to rule on the application for rectification and removal.

In its judgment, the Court, sitting as the Grand Chamber, provides clarification as regards the determination of the courts having jurisdiction to rule on an action for compensation concerning damage which materialised on the internet.

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[29] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). More specifically, under Article 7(2) of that regulation: 'A person domiciled in a Member State may be sued in another Member State … in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

Findings of the Court

The Court holds that a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments concerning him or her on the internet, seeks not only the rectification of information and the removal of the content placed online concerning him or her but also compensation for the damage resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal.

In reaching that conclusion, the Court notes that, according to its case-law, the rule of special jurisdiction laid down in Article 7(2) of Regulation No 1215/2012 in favour of the courts 'for the place where the harmful event occurred or may occur' is intended to cover both the place where the damage occurred and the place of the event giving rise to it, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings.

As regards allegations of infringement of personality rights by means of content placed on a website, the Court also notes that a person who considers that his or her rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his or her interests is based. That person may also, instead of an action for liability seeking compensation in respect of all the damage caused, bring an action before the courts of each Member State in which content placed online is or has been accessible. However, those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

Consequently, in accordance with Article 7(2) of Regulation No 1215/2012, as interpreted by the previous case-law, a person who considers that he or she has been harmed by the placing of information on a website may, for the purposes of rectifying that information and removing the content placed online, bring proceedings before the courts with jurisdiction to rule on the entirety of an application for compensation for the damage suffered – namely either the court of the place of establishment of the publisher of that content or the court within whose jurisdiction the centre of interests of that person is situated – on the basis of the place where the damage occurred.

In that regard, the Court specifies that an application for rectification of information and removal of content placed online cannot be brought before a court other than the court with jurisdiction to rule on the entirety of an application for compensation for damage, because it constitutes a single and indivisible application.

By contrast, an application for compensation may seek either full or partial compensation. Accordingly, it is not justified to exclude, on that same ground, the possibility for the applicant to claim partial compensation before any other court within whose jurisdiction he or she considers that he or she has suffered damage.

Nor, moreover, does the sound administration of justice require the exclusion of that possibility, since a court which has jurisdiction to rule solely on the damage at issue in its own Member State appears perfectly capable of assessing, in the context of proceedings conducted in that Member State and in the light of the evidence gathered there, the existence and the extent of the alleged damage.

Lastly, the attribution to the courts concerned of jurisdiction to rule solely on the damage caused in their own Member State is subject to the sole condition that the harmful content must be accessible or have been accessible in that Member State, since Article 7(2) of Regulation No 1215/2012 does not impose any additional condition in that regard. The addition of further conditions could, in practice, lead to the exclusion of the option, for the person concerned, to bring an action for partial compensation before the courts of the place where that person considers that he or she suffered damage.

VII. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Tenth Chamber), 1 December 2021, Schmid v EUIPO - Landeskammer für Land- und Forstwirtschaft in Steiermark (Steirisches Kürbiskernöl g.g.A), T-700/20

Link to the complete text of the judgment

EU trade mark – Invalidity proceedings – EU figurative mark Steirisches Kürbiskernöl g. g. A GESCHÜTZTE GEOGRAFISCHE ANGABE – Absolute ground for refusal – Mark which includes badges, emblems or escutcheons – Emblem of one of the areas of action of the European Union – Protected geographical indications – Article 7(1)(i) of Regulation (EC) No 207/2009 (now Article 7(1)(i) of Regulation (EU) 2017/1001)

Ms Schmid is the proprietor of an EU trade mark, registered in respect of the product 'Pumpkin seed oil, corresponding to the protected geographical indication Styrian pumpkin seed oil'. That figurative mark includes the EU symbol for 'protected geographical indications' ('the PGI symbol'). For that reason, an application for a declaration of invalidity was filed with the European Union Intellectual Property Office (EUIPO) by the Landeskammer für Land- und Forstwirtschaft in Steiermark (Regional Chamber of Agriculture and Forestry of Styria, Austria).

The Cancellation Division of EUIPO declared the contested mark invalid. The Board of Appeal of EUIPO confirmed that invalidity on the ground that the contested mark included the PGI symbol in its entirety and that neither the right nor the obligation to use that symbol covered the right to have it protected as an element of a trade mark.

The General Court annuls the decision of the Board of Appeal. It considers that the Board of Appeal should have examined whether, taken as a whole, the trade mark including an emblem protected by Article 7(1)(i) of Regulation No 207/2009 [30] was likely to mislead the public as to the connection between, on the one hand, its proprietor or user and, on the other, the authority to which the emblem in question relates. It states that the various elements of which such a trade mark consists must be taken into account in that assessment.

Findings of the Court

First of all, the Court notes that the prohibition laid down in Article 7(1)(i) of Regulation No 207/2009 applies when three cumulative conditions are fulfilled:

– the badge, emblem or escutcheon in question is of particular public interest, the existence of a connection with one of the activities of the European Union being sufficient to show that a public interest attaches to its protection;

– the competent authority has not consented to the registration;

– the trade mark including the badge, emblem or escutcheon in question is likely to mislead the public as to the connection between, on the one hand, its proprietor or user and, on the other, the authority to which the element in question relates.

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[30] Article 7(1)(i) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) prohibits the registration of trade marks which include badges, emblems or escutcheons other than those referred to in Article 7(1)(h) of that regulation, that is to say, other than those of States or international intergovernmental organisations that have been duly communicated to States which are parties to the Convention for the Protection of Industrial Property signed in Paris on 20 March 1883, last revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, vol. 828, No 11851, p. 305; 'the Paris Convention'), where they are of particular public interest, unless consent has been given to such registration by the competent authority.

As regards that third condition, it stems from the fact that the extent of the protection conferred by Article 7(1)(i) of Regulation No 207/2009 cannot be greater than that of the protection conferred upon the emblems of international intergovernmental organisations that have been duly communicated to the States which are parties to the Paris Convention. [31] Such emblems are protected only when, taken as a whole, the trade mark which includes such an emblem suggests, in the public mind, a connection between, on the one hand, its proprietor or user and, on the other, the international intergovernmental organisation in question. [32]

Thus, Article 7(1)(i) of Regulation No 207/2009 is applicable where the public may believe that the goods or services designated originate from the authority to which the emblem reproduced in the trade mark refers, or that they have the approval or warranty of that authority, or that they are connected in some other way with that authority.

Next, the Court finds that the Board of Appeal failed to examine the third condition and thus erred in law. It did not assess the way in which the public would perceive the PGI symbol as a component of the contested mark, taken as a whole, or whether that perception might lead the public to believe that the goods covered by such a mark had the warranty of the European Union.

Lastly, the Court clarifies that EUIPO must not only examine whether the emblem concerned is reproduced in whole or in part in the trade mark into which it is incorporated. The various elements of which such a trade mark consists must also be taken into account in that assessment. That obligation to carry out a specific overall examination is not called into question by the fact that the grant of protection under trade mark law to the PGI symbol is, as a general rule, such as to affect adversely the system of protected geographical indications established by the European Union.

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31 Pursuant to Article 7(1)(h) of Regulation No 207/2009.

32 That condition stems from Article 6ter(1)(c) of the Paris Convention.

VIII. JUDGMENTS PREVIOUSLY DELIVERED

1. COMPETITION: ARTICLE 101 TFEU

Judgment of the Court (Second Chamber) of 11 November 2021, Stichting Cartel Compensation and Equilib Netherlands, C-819/19

Reference for a preliminary ruling – Articles 81, 84 and 85 EC – Article 53 of the EEA Agreement – Agreements, decisions and concerted practices – Conduct of undertakings in the context of air transport between the European Economic Area (EEA) and third countries that occurred under Articles 84 and 85 EC – Claim for compensation for damage suffered – Jurisdiction of national courts to apply Article 81 EC and Article 53 of the EEA Agreement

By decision of 17 March 2017, the European Commission found that, by coordinating various elements of their pricing relating to airfreight services, 19 airlines had infringed Article 101 TFEU and/or Article 53 of the Agreement on the European Economic Area ('the EEA Agreement'), [33] as well as Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ('the Swiss Agreement'), [34] which prohibit cartels and trade practices that restrict competition. [35]

Taking the view that the applicable rules did not allow it to penalise those airlines' practices from their inception on routes which were not confined to the European Economic Area (EEA), the Commission set the starting date of the infringement period at different times depending on the routes concerned. While the infringement period used for routes between airports within the EEA ranged from December 1999 to February 2006, the starting date of the infringement period was set at 1 May 2004 for routes between airports within the European Union and airports outside the EEA. For routes between airports in countries that are contracting parties to the EEA Agreement but are not Member States and third countries, that date was set at 19 May 2005, and for routes between EU airports and airports in Switzerland it was set at 1 June 2002.

Following the adoption of that decision, Stichting Cartel Compensation ('SCC') and Equilib Netherlands, two legal persons specialising in the recovery of compensation for damage resulting from infringements of competition law, brought several actions before the rechtbank (District Court, Amsterdam, Netherlands) seeking, first, a declaration that the 19 airlines, by coordinating, between 1999 and 2006, their pricing relating to airfreight services, acted unlawfully with regard to the shippers that purchased those services and, secondly, an order requiring those airlines to pay compensation for the harm which those shippers suffered as a result of that conduct.

However, the rechtbank (District Court, Amsterdam), has doubts as to whether, in a dispute governed by private law, it has jurisdiction to apply Article 81 EC (now Article 101 TFEU) or Article 53 of the EEA Agreement to the conduct at issue of the 19 airlines on routes not confined to the EEA, in so far as

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[33] Agreement on the European Economic Area (OJ 1994 L 1, p. 3), Article 1(1).

[34] Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 in Luxembourg and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission, as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1).

[35] Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight).

that conduct took place before the starting dates of the infringement periods set in the Commission decision. It therefore decided to refer that question to the Court of Justice for a preliminary ruling.

Assessment of the Court

As regards the anti-competitive practices of airlines on routes between airports within the European Union and those in third countries, the Court notes, first of all, that, as regards air transport on those routes, the provisions adopted by the Council pursuant to Article 83(1) EC (now Article 103(1) TFEU) with a view to organising the implementation of Article 81 EC did not enter into force until 1 May 2004. Consequently, only the arrangements provided for in Articles 84 and 85 EC (now Articles 104 and 105 TFEU), under which, in the absence of provisions adopted pursuant to Article 83(1) EC, the (administrative) authorities of the Member States are responsible for implementing the principles contained in Article 81 EC, are applicable to those services before that date. The same applies, moreover, in relation to the conduct of the airlines that took place between 1999 and the date of entry into force of the Swiss Agreement, that is to say 1 June 2002, in so far as that conduct directly related to air transport services between airports in the European Union and those in Switzerland.

However, that finding entails neither that air transport services between airports in the European Union and those in third countries or in Switzerland were excluded from the application of Article 81 EC until 1 May 2004, in the case of third countries, or until 1 June 2002, in the case of Switzerland, nor that national courts are precluded from applying that provision in the absence of a decision of the competent national authorities or a Commission decision finding an infringement before those dates

It is clear from the Court's case-law that air transport has been subject to the general rules of the Treaties, including the rules on competition, since the entry into force of those Treaties.

The Court also recalls that Article 81(1) EC produces direct legal effects in relations between individuals and directly creates rights for individuals which national courts must protect. Accordingly, national courts have jurisdiction to apply Article 81 EC in particular in disputes governed by private law, this jurisdiction deriving from the direct effect of that article.

That jurisdiction is not affected by the application of Articles 84 and 85 EC, since neither of those two provisions limits the application of Article 81 EC by the national courts, in particular in disputes governed by private law.

Nevertheless, the exercise by national courts of their jurisdiction to apply Article 81 EC in disputes governed by private law may be limited, inter alia, by the principle of legal certainty, in particular by the need to ensure that those courts and the entities responsible for the administrative implementation of EU competition rules do not adopt conflicting decisions, as well as by the need to preserve the decision-making or legislative powers of the EU institutions responsible for implementing those rules and to ensure that their acts have binding force.

Nonetheless, as regards the anti-competitive practices of airlines on routes between airports in the European Union and those in third countries or in Switzerland that occurred before the starting dates set by the Commission in its decision of 17 March 2017 for the infringement periods, there is no risk that a national court's decision in a dispute governed by private law might conflict with an administrative decision implementing EU competition rules or interfere with the decision-making or legislative powers of the EU institutions.

As regards, lastly, the application of Article 53 of the EEA Agreement to the conduct of the 19 airlines in question, the Court notes that that agreement, which is intended, inter alia, to extend the internal market established within the European Union to the States of the European Free Trade Association, forms an integral part of EU law. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the FEU Treaty are interpreted uniformly within the Member States.

It follows that, since Article 53 of the EEA Agreement is in essence identical to Article 81 EC, the former must be interpreted in the same way as the latter.

Accordingly, in the light of all of the foregoing, the Court confirms that a national court, such as the rechtbank (Amsterdam), has jurisdiction, in a dispute governed by private law, to apply Article 81 EC and Article 53 of the EEA Agreement to the anti-competitive practices of airlines on routes between airports in the European Union and those in third countries or in Switzerland that occurred before the

dates on which, respectively, the provisions adopted by the Council pursuant to Article 83(1) EC, which became applicable to the first routes, and the Swiss Agreement entered into force.

2. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Order of the General Court (Second Chamber) of 25 October 2021, 4B Company v EUIPO - Deenz [Pendentif (bijou)], T-329/20

Link to the complete text of the order

Community design – Invalidity proceedings – Registered Community design representing a pendant (jewellery) – Maintenance of the Community design in an amended form – Article 25(6) of Regulation (EC) No 6/2002 – Interest in bringing proceedings – Inadmissibility

A was the holder of the right to a Community design representing a pendant in the shape of a heart on which the word 'pianegonda' was engraved.

4B Company Srl filed an application for a declaration of invalidity of that design with the European Union Intellectual Property Office (EUIPO), on the ground that in that design an earlier distinctive sign was used. [36] That application was based on the use of its EU word mark PIANEGONDA registered for goods falling within the category of jewellery.

In the invalidity proceedings, A requested that the contested design be maintained in an amended form, in accordance with Article 25(6) of Regulation No 6/2002, [37] without the engraving of the word corresponding to the word mark PIANEGONDA. 4B Company opposed the maintenance of the design in an amended form on the ground that, in its view, the removal of the mark did not make it possible to retain the identity of the design. That design was subsequently assigned to Deenz Holding Ltd.

The Invalidity Division of EUIPO dismissed the application to have the contested design maintained in an amended form and declared it invalid in its entirety. Following the appeal brought by Deenz Holding, the Board of Appeal of EUIPO declared the contested design invalid in so far as it used the word mark PIANEGONDA and granted the application for maintenance in an amended form.

The Court dismisses the action brought by 4B Company on the ground that it has no interest in bringing proceedings in an application for maintenance of the registration of the contested design, following the annulment of that design.

Findings of the Court

First of all, the Court notes that the system put in place for the registration of Community designs is based on the principle that all applications which satisfy formal requirements are to be entered in the Register of Community designs. It is only following an application for a declaration of invalidity of a Community design which has been registered that that design may be declared invalid, inter alia, if use is made of an earlier distinctive sign, on application by the holder of the right to that sign.

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[36] Under Article 25(1)(e) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), according to which a Community design is to be declared invalid if, in that design, an earlier distinctive sign is used.

[37] Under Article 25(6) of Regulation No 6/2002, a registered Community design which has been declared invalid pursuant to Article 25(1)(e) of that regulation may be maintained in an amended form, if in that form it complies with the requirements for protection and the identity of the design is retained.

Next, the Court observes that Article 25(6) of Regulation No 6/2002 allows registration of a Community design to be maintained by removing the element vitiated by irregularity. That possibility, as an alternative solution to the invalidity of the design in its entirety, ensures that the sanction is proportionate. The maintenance of the contested design, to the extent to which that maintenance is conditional on a partial disclaimer, is intended both to protect the interests of the holder of the right to that design and those of the holder of the right to the sign the use of which has led to the design being annulled.

Finally, the Court finds that the Invalidity Division ruled on two applications:

the application for a declaration of invalidity brought by 4B Company, which was upheld;

the application by the holder of the right to the contested design to maintain it in an amended form, which was dismissed. That part of the decision cannot be regarded as a decision granting an application made by 4B Company.

Therefore, the decision of the Invalidity Division could be the subject of an appeal only by the party whose claims had not been upheld, namely Deenz Holding. The Board of Appeal also acceded to 4B Company's request. Accordingly, the action before the Court cannot procure any advantage for it.

Furthermore, 4B Company cannot seek annulment of the decision of the Board of Appeal in so far as it upheld the application for the contested design to be maintained in an amended form. To allow such a possibility would amount to allowing 4B Company to interfere in the part of the proceedings concerning the application of the holder of the right to the contested design. By claiming an infringement of Article 25(6) of Regulation No 6/2002, whereas its application for a declaration of invalidity had been based on Article 25(1)(e) of that regulation, 4B Company seeks to alter the subject matter of its application for a declaration of invalidity and the grounds relied on in support of that application.

In addition, the fact that 4B Company would like to have the design declared invalid in its entirety cannot constitute a vested and present interest in having the decision of the Board of Appeal annulled.

Consequently, the Court finds that 4B Company has no interest in having that decision annulled.

3. SOCIAL POLICY: TEMPORARY AGENCY WORKERS

Judgment of the Court (Second Chamber) of 11 November 2021, Manpower Lit, C-948/19

Reference for a preliminary ruling – Social policy – Temporary agency work – Directive 2008/104/EC – Article 1 – Scope – Concepts of 'public undertaking' and 'being engaged in economic activities' – European Union agencies – European Institute for Gender Equality (EIGE) as a 'user undertaking' within the meaning of Article 1(2) of that directive – Article 5(1) – Principle of equal treatment – Basic working and employment conditions – Concept of 'the same job' – Regulation (EC) No 1922/2006 – Article 335 TFEU – Principle of administrative autonomy of an EU institution – Article 336 TFEU – Staff Regulations of Officials of the European Union and Conditions of Employment of Other Servants of the European Union

Manpower Lit, a Lithuanian temporary-work agency, assigned five workers to the European Institute for Gender Equality (EIGE), a European Union agency established in Vilnius (Lithuania), four as assistants and one as an IT support worker. Following termination of their employment relationships with Manpower Lit between April and December 2018, those workers, considering that they were owed arrears of remuneration, brought proceedings before the Valstybinės darbo inspekcijos Vilniaus teritorinio skyriaus Darbo ginčų komisija (Labour disputes commission of the Vilnius territorial section of the employment inspectorate, Lithuania) seeking payment of those arrears.

By decision of 20 June 2018, that commission, having regard to the provision of the Labour Code transposing into Lithuanian law the principle of equal treatment for temporary agency workers laid

down by Directive 2008/104, [38] ordered the recovery of those arrears, finding that the workers in question did in fact perform the functions of permanent members of staff of the EIGE and that their pay conditions should correspond to those that the EIGE applied to its contract agents.

Its action against that decision having been dismissed both at first instance and on appeal, Manpower Lit brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania).

That court decided to refer questions to the Court of Justice seeking clarification on whether the principle of equal treatment for temporary agency workers laid down by Directive 2008/104 applies in the main proceedings, in the light of the fact that the user of temporary personnel services is an agency of the European Union.

In its judgment, the Court confirmed that Directive 2008/104, including the provisions seeking to ensure observance of the principle of equal treatment, does apply to the dispute in the main proceedings.

Findings of the Court

The Court analysed, first, the scope of Directive 2008/104. The Court stated in that respect that the EIGE must satisfy three conditions [39] in order for the directive to apply, that is to say, it must fall within the definition of 'public and private undertakings', must be a 'user undertaking' and must be engaged in 'economic activities'.

As regards whether the EIGE can be regarded as a 'user undertaking', [40] the Court noted that the employees in question worked temporarily, as temporary agency workers, for the EIGE and under its supervision and direction. Moreover, that European Union agency must be regarded as a 'legal person' within the meaning of the directive. The Court concluded from the foregoing that the EIGE is, in this context, a 'user undertaking'.

Since the terms 'public and private undertakings' and 'economic activities' are not defined in the directive, in order to determine their meaning the Court examined whether the EIGE is engaged in any activity consisting in offering goods or services on a given market.

It found in that respect, first, that the activities of that European Union agency do not fall within the exercise of public powers and are therefore not excluded from classification as economic activity. Thereafter, having regard to certain activities of the EIGE, listed in Regulation No 1922/2006, [41] there are markets in which commercial undertakings operate in competition with the EIGE. The fact that, when it is engaged in those activities, the EIGE is not operating for gain is immaterial. Lastly, the EIGE's revenue includes in particular [42] payments received for services rendered, thereby confirming that the EU legislature envisaged that it would act, in part at least, as a market player.

Accordingly, the Court found that the EIGE must be regarded as being engaged, at least in part, in an activity consisting in offering goods or services on a given market and, therefore, that the assignment by a temporary-work agency of persons who have concluded an employment contract with that agency to the EIGE for the performance of work does fall within the scope of Directive 2008/104.

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38 Article 5 of 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).

39 Set out in Article 1(2) of that directive. Under that article, the directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.

40 Within the meaning of Article 3(1)(d) of the directive, that is to say, 'any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily'.

41 Article 3(1) of Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality (OJ 2006 L 403, p. 9) which makes reference in particular, in Article 3(1)(g), to organising conferences, campaigns and meetings at European level.

42 In accordance with Article 14(3)(b) of Regulation No 1922/2006.

Secondly, the Court examined whether the post occupied by a temporary worker assigned to the EIGE can be regarded as being 'the same job' within the meaning of Directive 2008/104 given that, according to that directive, [43] the basic working and employment conditions of temporary agency workers must, for the duration of their assignment at a user undertaking, be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

As regards whether the working and employment conditions of temporary workers can be compared with those of EIGE staff employed under the Staff Regulations of Officials, the Court rejected the argument of the European Commission that such a comparison may infringe Article 335 TFEU, under which the European Union enjoys the most extensive legal capacity accorded to legal persons under their laws, and Article 336 TFEU on adoption of the Staff Regulations of Officials by the EU legislature. That comparison does not in any respect have the effect of conferring status as officials on temporary workers. The Court clarified that in the absence of specific rules, where agencies of the European Union use temporary workers under contracts concluded with temporary-work agencies, the principle of equal treatment applies in full to those workers during their assignments within the European Union agency.

The Court found that the job occupied by a temporary agency worker assigned to the EIGE can be regarded as being 'the same job' within the meaning of the directive, even on the assumption that all the jobs for which the EIGE recruits workers directly include tasks that can only be performed by workers employed under the Staff Regulations of Officials of the European Union.

4. ENVIRONMENT: EMISSION ALLOWANCE TRADING

Judgment of the Court (Fifth Chamber) of 25 November 2021, Aurubis, C-271/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Scheme for greenhouse gas emission allowance trading – Scheme for the free allocation of allowances – Decision 2011/278/EU – Article 3(d) – Fuel benchmark sub-installation – Concepts of 'combustion' and 'fuel' – Primary copper production by flash smelting – Request for allocation – Allowances requested and not yet allocated on the date of expiry of a trading period – Possibility of issuing such allowances during the subsequent trading period by way of enforcement of a judicial decision given after that date

Aurubis AG is a company governed by German law that operates a primary copper production installation which is subject to the EU-wide greenhouse gas emission trading scheme ('the ETS') as established by the directive on the scheme for greenhouse gas emission allowance trading. [44] In that context, that installation falls within a sector of activity for which free emission allowances can be allocated under Decision 2011/278. [45]

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43 Article 5(1) of that directive.

44 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('the directive on the scheme for greenhouse gas emission allowance trading').

45 Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1) ('Decision 2011/278'), repealed with effect from 1 January 2021.

Aurubis's primary copper production installation comprises two sub-installations, one of which is a foundry in which primary copper is obtained by using a sulphur-containing copper concentrate as a raw material. The sulphur present in that concentrate is oxidised, successively, in a flash smelting furnace, in a converter and in an anode furnace, which produces non-measurable heat. During that process, the foundry at issue emits carbon dioxide into the atmosphere due to the presence of small quantities of carbon in the copper concentrate.

In 2014, the Deutsche Emissionshandelsstelle (German Emissions Allowance Trading Authority, Germany) ('the DEHSt') allocated a number of free emission allowances to Aurubis for the third trading period (2013 to 2020). However, in 2018, the DEHSt required some of those allowances to be returned, claiming that the production of copper in that foundry did not fulfil the criterion to constitute a 'fuel benchmark sub-installation' within the meaning of Article 3(d) of Decision 2011/278 and had to be attached to a 'process emissions sub-installation' within the meaning of Article 3(h) of that decision. According to the DEHSt, in order for a sub-installation to constitute a 'fuel benchmark sub-installation', first, the primary purpose of the combustion of a material must be the production of heat, and, second, complete combustion of that material has to occur and that material has to be capable of being replaced by other fuels. That is not the case with the copper concentrate, which is both a raw material and a fuel.

Hearing an appeal against the decision of the DEHSt, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) decided to seek a ruling from the Court of Justice on the interpretation, first, of Article 3(d) of Decision 2011/278 and, second, of the temporal scope of that decision in respect of the third trading period, which expired on 31 December 2020.

Findings of the Court

First of all, the Court points out that installations covered by the transitional scheme for the free allocation of emission allowances introduced by Decision 2011/278 must be divided into sub-installations. In that regard, Article 6 of that decision provides for four categories of sub-installation, namely 'product benchmark', 'heat benchmark', 'fuel benchmark' and 'process emissions' sub-installations, that list being hierarchical in nature.

After ascertaining that the foundry at issue does not fall within the first two categories of sub-installation, the Court then examines whether it falls within the concept of a 'fuel benchmark sub-installation', defined in Article 3(d) of Decision 2011/278, which includes 'inputs, outputs and corresponding emissions … relating to the production of non-measurable heat by fuel combustion consumed for the production of products …'.

As regards the scope of that concept, the Court notes, in the first place, that the meaning of the words 'fuel combustion' referred to therein covers any oxidation of fuels. In that respect, it observes that it is not apparent from the directive on the scheme for greenhouse gas emission allowance trading or from Decision 2011/278 that combustion must be excluded from the fuel benchmark where the substances used as fuels are present in the raw material used in the industrial activity concerned or where their carbon content is lower than that of other materials more frequently used. There is nothing in those pieces of legislation to indicate that the application of the transitional scheme for the allocation of allowances must be limited to activities which use a material with a high carbon content and thus generate amounts of emissions exceeding a certain threshold.

In that regard, the Court finds that an approach which is tantamount to adding, to the definition in Article 3(d) of Decision 2011/278, requirements or exclusions that are not provided for therein and which cannot be inferred from that definition would run counter to the principle of legal certainty. In response to the DEHSt's concern regarding the allocation of allowances to Aurubis on the basis of the fuel benchmark which would exceed its needs and allow it to sell a large part of those allowances, the Court adds that the fact that an operator that has reduced its emissions by investing in innovative techniques derives, for that reason, greater profit from allowances received free of charge does not undermine the objective of the ETS.

The Court states, in the second place, that an allocation of allowances on the basis of the fuel benchmark does not require that one of the purposes, let alone the primary purpose of the activity concerned, be the production of heat. It is apparent from the wording itself of Article 3(d) of Decision 2011/278 that the production of that heat is not the purpose of the sub-installations referred to

therein, but rather the necessary means to fulfil the purpose consisting, inter alia, in the production of a product.

In the light of the above, the Court holds that Article 3(d) of Decision 2011/278 must be interpreted as meaning that the concept of a 'fuel benchmark sub-installation' covers, within an installation producing primary copper, a flash smelting foundry that causes sulphur present in a copper concentrate that is used as a raw material to be oxidised.

As regards the temporal scope of Decision 2011/278 in the context of the third trading period (2013 to 2020), the Court finds that that decision must be interpreted as meaning that free allowances to which the operator of an installation is entitled in respect of that period may still be issued to the latter, if they are available, after 31 December 2020 by way of enforcement of a judicial decision given after that date.

5. COMMON COMMERCIAL POLICY

Judgment of the Court (Grand Chamber) of 21 December 2021, Bank Melli Iran, C-124/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Commercial policy – Regulation (EC) No 2271/96 – Protection against the effects of the extraterritorial application of legislation adopted by a third country – Restrictive measures taken by the United States of America against Iran – Secondary sanctions adopted by that third country preventing persons from engaging, outside its territory, in commercial relationships with certain Iranian undertakings – Prohibition on complying with such a law – Exercise of a right of ordinary termination

Bank Melli Iran ('BMI'), which has a branch in Germany, is an Iranian bank owned by the Iranian state. It concluded with Telekom, which is the subsidiary of Deutsche Telekom AG, established in Germany and approximately half of the turnover of which is derived from its business in the United States, several contracts with a view to the provision of telecommunication services which permits it to carry on its commercial activities. In 2018, the United States withdrew itself from the Iranian nuclear deal, signed in 2015, the aim of which was to control Iran's nuclear programme and lift economic sanctions against Iran. As a result of that withdrawal, the United States once again imposed, pursuant to the Iran Freedom and Counter-Proliferation Act of 2012, sanctions against Iran and persons included on a list, [46] one of which was BMI. Since that date, it is once again prohibited for any person to trade, outside the territory of the United States, with any person or entity included in that list.

Following that decision, the European Union adopted Regulation 2018/1100 [47] amending the Annex to Regulation No 2271/96 [48] so that it included the Iran Freedom and Counter-Proliferation Act of 2012. It

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46 Specially Designated Nationals and Blocked Persons List ('the SDN list').

47 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199 I, p. 1).

48 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996 L 309, p. 1), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1), and by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Regulation (EC) No 2271/96 (OJ 2018 L 199 I, p. 1) ('the regulation').

prohibited, in particular, persons concerned from complying with the laws included in the annex or actions resulting therefrom (Article 5, first paragraph), unless an authorisation to be exempt from that prohibition was obtained, which could be granted by the European Commission where non-compliance with those foreign laws would seriously harm the interests of the persons covered by that regulation or those of the European Union (Article 5, second paragraph).

Since German law provided that 'any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law', [49] and Telekom had terminated, with effect from 2018, prior to their expiry, all of the contracts between it and BMI, without express reasons and without authorisation from the Commission, BMI challenged the termination of those contracts before the German courts. At first instance, Telekom was ordered to perform the contracts at issue until expiry of the notice period for ordinary termination. The ordinary termination of the contracts at issue was however regarded as being consistent with Article 5 of the regulation. BMI then appealed to the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), which made a preliminary reference to the Court of Justice requesting an interpretation of the first paragraph of Article 5 of the regulation, having regard, in particular, to Articles 16 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter') and the authorisation mechanism provided for in the second paragraph of Article 5 of the same regulation.

Findings of the Court

The Court, sitting as the Grand Chamber, finding that the first paragraph of Article 5 of the regulation is broadly drafted, holds, in the first place, that the prohibition on complying with the requirements or prohibitions laid down in certain laws adopted by a third country in breach of international law applies even in the absence of an order or instruction directing compliance issued by a administrative or judicial authority. According to the Court, that interpretation is corroborated by the objectives of the regulation, which include protecting the established legal order and the interests of the European Union in general, with a view to achieving, to the greatest extent possible the objective of free movement of capital between Member States and third countries, as well as protecting the interests of the persons concerned. The Court observes that, given the threat of legal consequences that such a law imposes on persons to whom the requirements or prohibitions apply, the regulation would not be capable of counteracting the effects of those laws if the prohibition laid down in the first paragraph of Article 5 of the regulation were made subject to the adoption of orders by a foreign administrative or judicial authority.

In the second place, the Court finds that the prohibition laid down in the first paragraph of Article 5 is drafted in clear, precise and unconditional terms with the result that it may be relied on in civil proceedings, such as the present case. It confirms that a person covered by the regulation who does not have an authorisation granted by the Commission may, having regard to the first paragraph of that Article 5, terminate contracts concluded with a person on the SDN list without providing reasons for that termination. However, in the context of civil proceedings concerning the alleged breach of the prohibition laid down by the regulation, it is the person to whom the prohibition is addressed who has the burden of proving, to the required legal standard, that his or her conduct, in this case the termination of all contracts, did not seek to comply with the American legislation referred to in the regulation where, prima facie, that appears to be the case.

In the present case, the Court observes that the German law permits the party alleging that a legal act is null and void, as a result of the infringement of a statutory prohibition, such as that laid down in the first paragraph of Article 5 of the regulation, to rely on that nullity before the courts. It observes, however, that in this case, the burden of proof would fall, according to German law, entirely on the person alleging that infringement of Article 5 of the regulation, whereas the evidence at issue is not generally accessible to that person, making it difficult for the court seised to make a finding that there

[49] Paragraph 134 du Bürgerliches Gesetzbuch (Civil Code).

was an infringement of the prohibition laid down in the first paragraph of Article 5, thereby undermining its effectiveness.

Lastly, in the third place, the Court holds that Articles 5 and 9 [50] of the regulation, read in the light of Articles 16 and 52 of the Charter, do not preclude the annulment of the termination of a contract, provided that that annulment does not entail disproportionate effects, including economic loss, for the person concerned. In the present case, in the absence of an authorisation within the meaning of the second paragraph of Article 5 of the regulation, the termination at issue, if proven to be contrary to the first paragraph of Article 5, is null and void under German law. However, where such an annulment is liable to entail a limitation of the freedom to conduct a business, it may only be contemplated in compliance with the conditions imposed by Article 52(1) of the Charter.

In that respect, as regards the condition of respect for the essence of the freedom to conduct a business, guaranteed by Article 16 of the Charter, the Court holds that the annulment of the termination of contracts concluded between BMI and Telekom would have the effect, not of depriving the latter of the possibility of asserting its interests generally in the context of a contractual relationship, but rather of limiting that possibility. In addition, the limitation on the freedom to conduct a business resulting from the possible annulment of the termination of a contract contrary to the prohibition laid down in the first paragraph of Article 5 of the regulation would appear, in principle, to be necessary in order to counteract the effects of the foreign laws in question, thereby protecting the established legal order and the interests of the European Union in general.

The Court then invites the referring court, when assessing the proportionality of the limitation on the freedom to conduct a business enjoyed by Telekom, to weigh in the balance, on the one hand, the pursuit of the objectives of the regulation served by the annulment of a termination effected in breach of the prohibition laid down in the first paragraph of Article 5 of that regulation and, on the other hand, the probability that Telekom would be exposed to economic losses and the extent of those losses if it were unable to terminate its commercial relationship with BMI. Likewise, the fact that Telekom did not, subject to verification, apply to the Commission for exemption from the prohibition imposed by the first paragraph of Article 5 of the regulation is, according to the Court, also relevant in the context of that assessment of proportionality.

Order of the General Court (Fourth Chamber) of 30 November 2021, Airoldi Metalli v Commission, T-744/20

Link to the complete text of the order

Dumping – Imports of aluminium extrusions originating in China – Act imposing a provisional anti-dumping duty – Act not open to challenge – Preparatory act – Inadmissibility – Definitive anti-dumping duty – No longer any legal interest in bringing proceedings – No need to adjudicate

Following a complaint lodged by an association representing European producers of aluminium extrusions, the European Commission adopted, as a result of its anti-dumping investigation, an implementing regulation imposing a provisional anti-dumping duty on imports of such products originating in the People's Republic of China ('the contested regulation'). [51]

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[50] Article 9 provides that 'each Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation. Such sanctions must be effective, proportional and dissuasive'.

[51] Commission Implementing Regulation (EU) 2020/1428 of 12 October 2020 imposing a provisional anti-dumping duty on imports of aluminium extrusions originating in the People's Republic of China (OJ 2020 L 336, p. 8).

By application lodged on 21 December 2020, Airoldi Metalli SpA ('the applicant'), an undertaking importing aluminium extrusions, brought an action for annulment of the contested regulation.

Subsequent to the bringing of that action, the Commission adopted an implementing regulation imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of aluminium extrusions originating in the People's Republic of China ('the definitive regulation'). [52]

Before the General Court, the Commission raised an objection of inadmissibility in respect of the action for annulment of the contested regulation on the grounds, inter alia, that such a provisional regulation is not a reviewable act and that the applicant no longer has an interest in challenging it.

In upholding that objection of inadmissibility, the Court finds, for the first time, that a regulation imposing a provisional anti-dumping duty does not constitute an act open to challenge for the purposes of Article 263 TFEU.

Findings of the Court

As regards the classification of a regulation imposing a provisional anti-dumping duty as an act open to challenge for the purposes of Article 263 TFEU, the Court recalls, first of all, that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his or her legal position, and which definitively lay down the position of the institution, may be the subject of an action for annulment. By contrast, provisional measures, intended to pave the way for the final decision, are not reviewable acts. It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the institution to take a decision on the substance of the case and thus produced independent, immediate and irreversible legal effects justifying that those acts or decisions may be the subject of an action for annulment.

A regulation imposing provisional anti-dumping duties constitutes an intermediate stage between the initiation of the anti-dumping proceeding and the termination of that proceeding, which results either in the fixing of definitive duties or in the non-fixing of duties. Such a regulation imposing provisional duties aims, inter alia, to ensure appropriate protection of the European Union once a preliminary examination shows that dumping exists and to prevent injury being caused during the proceeding by provisionally imposing anti-dumping duties which can then be collected retroactively at the time of the termination of the proceeding.

It follows that the contested regulation, in so far as it imposes provisional anti-dumping duties, cannot be regarded as being the culmination of a procedure distinct from that terminated by the definitive regulation. The contested regulation must therefore be categorised as an act preparatory for the definitive regulation and itself open to challenge.

Next, the Court notes that the contested regulation does not immediately and irreversibly affect the applicant's legal situation, either.

In that regard, the Court emphasises that the contested regulation, which gives interested parties, including importers, a possibility to submit comments or to be heard, does not imply any obligation to cooperate in the investigation. Similarly, the contested regulation requires neither importers nor the other economic operators concerned to alter or reconsider their commercial practices. Furthermore, while the contested regulation does impose anti-dumping duties, those are, by definition, provisional and must not, at that stage, be paid by importers.

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[52] Commission Implementing Regulation (EU) 2021/546 of 29 March 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of aluminium extrusions originating in the People's Republic of China (OJ 2021 L 109, p. 1).

The fact that the contested regulation subjects the import of aluminium extrusions originating in the People's Republic of China to the provision of a security deposit equivalent to the amount of the provisional duty does not support a finding that it is reviewable, either. In so far as that obligation is intended to ensure that duties are paid in the event that their collection is ultimately decided, it is dependent on that payment obligation, which will be decided and imposed by the definitive regulation only subsequently. It follows that the obligation to provide security to cover provisional duties did not produce independent and irreversible legal effects at the time of the lodging of the action for annulment, which is also the time at which the admissibility of that action must be assessed.

Finally, the Court notes that to hold that a provisional regulation constitutes a reviewable act would undermine the sound administration of justice and the institutional balance in so far as such an approach would lead to confusion between the administrative and judicial stages in relation to the imposition of anti-dumping duties. Any annulment of the provisional regulation would not necessarily imply an obligation on the part of the Commission to draw the consequences of the annulment judgment for its definitive regulation under Article 266 TFEU. Moreover, the inadmissibility of the action for annulment of the contested regulation does not amount to depriving the applicant of the legal protection to which it is entitled, in so far as it remains open to it, if it considers itself justified in doing so, to bring an action for damages under Article 268 TFEU.

For the sake of completeness, the Court adds that, even conceding that the contested regulation were a reviewable act, following the adoption of the definitive regulation, the applicant lost its interest in seeking its annulment in any event. In that regard, the Court specifies that, while such an interest could exist as regards the amounts secured in application of the contested regulation and discharged because the rate of the definitive duty was lower than the rate of provisional duty, the fact remains that the evidence adduced by the applicant is not capable of establishing actual damage relating to those amounts.

Nota:

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

- Judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034
- Judgment of 20 October 2021, JMS Sports v EUIPO - Inter-Vion (Élastique pour cheveux en spirale), T-823/19, ECLI:EU:T:2021:718
- Judgment of 10 November 2021, Google and Alphabet v Commission (Google Shopping), T-612/17, ECLI:EU:T:2021:763
- Judgment of 1 December 2021, Sopra Steria Benelux and Unisys Belgium v Commission, T-546/20, ECLI:EU:T:2021:846
- Judgment of 15 December 2021, Breyer v REA, T-158/19, ECLI:EU:T:2021:902
- Judgment of 15 December 2021, Oltchim v Commission, T-565/19, ECLI:EU:T:2021:904
- Judgment of 15 December 2021, Stichting Comité N 65 Ondergronds Helvoirt v Commission, T-569/20, ECLI:EU:T:2021:892
- Judgment of 21 December 2021, Apostolopoulou and Apostolopoulou-Chrysanthaki v Commission, T-721/18 and T-81/19, ECLI:EU:T:2021:933
- Judgment of 21 December 2021, Klymenko v Council, T-195/21, ECLI:EU:T:2021:925