COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
May 2022

I. FUNDAMENTAL RIGHTS: PRINCIPALS AND FUNDAMENTAL RIGHTS ENSHRINED IN THE CHARTER

Judgment of the Court (First Chamber) of 5 May 2022, BPC Lux 2 and Others, C-83/20

Reference for a preliminary ruling – Directive 2014/59/EU – Banking union – Recovery and resolution of credit institutions and investment firms – Articles 36, 73 and 74 – Protection of shareholders and creditors – Partial implementation before expiry of the period for transposition – Transposition in stages – Charter of Fundamental Rights of the European Union – Article 17(1) – Right to property

Banco Espírito Santo SA ('BES') was one of the main credit institutions in the Portuguese banking system. On account of its financial situation and the serious and grave risk that it would be in default of its obligations, that credit institution was the subject of a resolution decision taken by Banco de Portugal (Bank of Portugal) on 3 August 2014 ('the resolution action'). That action, which was taken under national legislation on the resolution of credit institutions, [1] as amended by a Decree-Law of 1 August 2014, [2] resulted in the creation of a bridge bank, Novo Banco SA, to which certain assets, liabilities, off-balance sheet items and assets managed by BES were transferred.

The applicants in the main proceedings ('BPC Lux 2 and others') are holders of subordinated bonds issued by BES. Massa Insolvente held, directly and indirectly, shares in the share capital of BES. Before the national administrative courts, BPC Lux 2 and others and Massa Insolvente challenged the resolution action and, in that context, claimed, inter alia, that that action had been taken in breach of EU law.

The Portuguese Supreme Administrative Court, before which two appeals had been brought by BPC Lux 2 and others and Massa Insolvente, had doubts as to the compatibility of the national legislation, under which the BES resolution action had been taken, with EU law, in particular with Directive 2014/59 [3] and Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), [4] on account of the failure to transpose a whole series of requirements set out in that directive.

In addition, that court was uncertain whether the Portuguese legislature was liable seriously to have compromised the result prescribed by Directive 2014/59 [5] by adopting the Decree-Law of 1 August 2014, which transposed that directive only in part prior to the expiry of the period for transposition of that directive set at 31 December 2014.

By its judgment, the Court of Justice finds that the national legislation under which the BES resolution action was taken is compatible with Article 17(1) of the Charter. It also rules that the transposition by a Member State, only in part, of certain provisions of a directive before the expiry of the period

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1 Regime Geral das Instituições de Crédito e Sociedades Financeiras (General Provisions governing Credit Institutions and Finance Companies), as stem from Decree-Law No 31-A/2012 of 10 February 2012.

2 Decree-Law No 114-A/2014 of 1 August 2014.

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

4 Article 17 of the Charter guarantees protection of the right to property.

5 In accordance with the principle established in the line of authority emanating from the judgment of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628), concerning the obligations of Member States during the period for transposition of a directive.

prescribed for its transposition is not, as a matter of principle, liable seriously to compromise the result prescribed by that directive.

Findings of the Court

First of all, the Court examines the applicability to the dispute in the main proceedings of the provisions of Directive 2014/59 [6] relied on. In that regard, it points out that the period for transposition of that directive expired on 31 December 2014. It follows that, on the date on which the resolution action at issue was taken, namely 3 August 2014, the period for transposition had not expired. After recalling its settled case-law in this area, [7] the Court observes that the applicants in the main proceedings cannot rely before the referring court on the provisions of Directive 2014/59, since they are not applicable to the dispute in the main proceedings.

As regards the applicability of Article 17 of the Charter, the Court points out that, under Article 51(1) thereof, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. After noting, first, that the Decree-Law of 10 February 2012 was intended to implement one of the commitments entered into by the Portuguese Republic in the context of a Memorandum of Understanding on economic policy conditionality concluded with the joint mission of the European Commission, the International Monetary Fund and the European Central Bank, and, secondly, that the Decree-Law of 1 August 2014 constitutes a measure for the transposition in part of Directive 2014/59, the Court considers that EU law is being implemented, within the meaning of Article 51(1) of the Charter, with the result that the provisions of the Charter are applicable to the dispute in the main proceedings.

In that regard, the Court notes that Article 17(1) of the Charter contains three distinct rules. The first, which is expressed in the first sentence and is of a general nature, gives concrete expression to the principle of respect for property. The second, set out in the second sentence of that paragraph, refers to a person being deprived of property and subjects that deprivation to certain conditions. The third, which is contained in the third sentence of that paragraph, recognises States' power, inter alia, to regulate the use of property in so far as is necessary for the general interest. The Court adds that these are not unrelated rules, since the second and third rules relate to specific examples of infringements of the right to property, and are to be interpreted in the light of the principle enshrined in the first rule.

In that context, the Court examines, in the first place, whether Article 17(1) of the Charter [8] is applicable to restrictions on the right to ownership of shares or bonds tradeable on capital markets such as those in the present case. After pointing out, first, that the protection conferred by that provision concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit, the Court considers that that is true of those shares or bonds tradeable on capital markets. Secondly, the Court finds that those shares or bonds were acquired lawfully. It follows that they come within the scope of Article 17(1) of the Charter.

In the second place, the Court considers that a resolution action taken under national legislation such as that at issue in the present case does not constitute a deprivation of property within the meaning of the second sentence of Article 17(1) of the Charter. The Court finds that that resolution action did not provide for a formal deprivation or expropriation of the shares or bonds concerned. In particular,

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6 Namely, Articles 36, 73 and 74 of Directive 2014/59.

7 Judgments of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 43); of 17 January 2008, *Velasco Navarro* (C-246/06, EU:C:2008:19, paragraph 25 and the case-law cited); and of 27 October 2016, *Milev* (C-439/16 PPU, EU:C:2016:818, paragraph 30 and the case-law cited).

8 As set out in Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

that action did not forcibly, wholly and definitively deprive their holders of the rights deriving from those shares or bonds.

In the third place, the fact remains that taking resolution action under the legislation at issue in the main proceedings, which provides, inter alia, for the transfer of a credit institution's assets to a bridge bank, amounts to regulating the use of property, within the meaning of the third sentence of Article 17(1) of the Charter, which is liable to infringe the right to property of the credit institution's shareholders, whose economic position is affected, and that of creditors, such as bondholders whose debt instruments have not been transferred to the bridge institution.

As is clear from the wording of that provision, the use of property may be regulated by law in so far as is necessary for the general interest. After examining in turn the conditions laid down in that provision, the Court holds that, in the light of the discretion enjoyed by the Member States when adopting decisions on economic matters, the third sentence of Article 17(1) of the Charter does not preclude national legislation, such as that at issue in the main proceedings, which does not contain any express provision ensuring that shareholders do not bear greater losses than they would have incurred if the institution had gone into liquidation at the date on which the resolution action was taken (the 'no creditor worse off' principle).

In the fourth place and lastly, the Court examines whether the transposition by a Member State in part, in national legislation relating to the resolution of credit institutions, of certain provisions of Directive 2014/59 before the expiry of the period prescribed for its transposition is liable seriously to compromise the result prescribed by that directive, within the meaning of the judgment in *Inter-Environnement Wallonie*.

To that end, it notes that the period for transposing Directive 2014/59 expired on 31 December 2014, with the result that it cannot be complained that the Portuguese Republic failed to adopt measures implementing that directive in its legal system at the date on which the resolution action was taken, namely 3 August 2014. The fact remains that, during the period prescribed for the transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the result prescribed by that directive. That obligation to refrain, which is incumbent on all the national authorities, must be understood, first, as referring to the adoption of any measure, general or specific, liable to produce such a compromising effect. Secondly, from the date on which a directive has entered into force, the courts of the Member States must refrain, as far as possible, from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

In that regard, the Court states that, admittedly, it is for the national court to assess whether the national provisions whose legality is challenged are liable seriously to compromise the result prescribed by a directive, and that that determination must necessarily be made on the basis of an overall assessment, taking into account all the policies and measures adopted in the national territory concerned. Nevertheless, the Court has jurisdiction to rule on whether the transposition by a Member State in part of certain provisions of a directive before the expiry of the period prescribed for its transposition is, as a matter of principle, liable seriously to compromise the result prescribed by that directive.

In that regard, the Court points out, first of all, that it has previously held that Member States may adopt transitional provisions or implement a directive in stages. In such situations, the incompatibility of transitional provisions of national law with that directive or the failure to transpose certain provisions of the directive would not necessarily compromise the result prescribed by the directive. The Court considers that, in such a situation, that result would always be capable of being achieved by the full and definitive transposition of that directive within the prescribed period.

Next, the obligation to refrain referred to by the Court, in particular in paragraph 45 of the judgment in *Inter-Environnement Wallonie*, must be understood as referring to the adoption of any measure, general or specific, liable seriously to compromise the result prescribed by the directive in question. Where the adoption by a Member State of a measure is intended to transpose, even if only in part, an EU directive, and that transposition is correct, the adoption of such a partial transposition measure cannot be regarded as liable to produce such a compromising effect, since it necessarily aligns the national legislation with the directive which that legislation transposes, and thereby contributes to attaining the objectives of that directive.

Judgment of the Court (First Chamber) of 5 May 2022, Direction départementale des finances publiques de la Haute-Savoie, C-570/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Fraudulent concealment of tax due – Penalties – National legislation which provides for an administrative penalty and a criminal penalty for the same acts – Charter of Fundamental Rights of the European Union – Article 49 – Article 50 – Principle *ne bis in idem* – Article 52(1) – Limitations to the principle *ne bis in idem* – Requirement to provide for clear and precise rules – Possibility of taking into account the interpretation of national legislation by national courts – Need to provide for rules ensuring the proportionality of all of the penalties imposed – Penalties of different kinds

BV, a natural person resident for tax purposes in France, practised as an accountant as a sole trader until 14 June 2011. On that basis, he was automatically liable for value added tax (VAT). Following audits of his accounts, the tax authorities lodged a complaint against him with the public prosecutor's office in Annecy (France), alleging inter alia that he had evaded, by means of irregular accounting and declarations, an amount of EUR 82 507 in VAT. Summoned to appear before the tribunal correctionnel d'Annecy (Criminal Court, Annecy, France) to be tried for tax evasion offences, BV was sentenced to 12 months' imprisonment and the publication of the judgment at his own expense.

BV brought an appeal against that judgment, claiming that his criminal conviction was contrary to the principle that no one is to be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law (*ne bis in idem*), guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union. [9] He maintains that he had already been the subject of a tax adjustment procedure which resulted in the imposition of final tax penalties in respect of the same acts, amounting to 40% of the charges evaded. Before the Cour de cassation (Court of Cassation, France), the referring court in the present case, BV submits that the national legislation at issue in the main proceedings does not satisfy the requirement of clarity and foreseeability with which a duplication of prosecutions and penalties of a criminal nature must comply. Furthermore, he maintains that that legislation does not provide for rules to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.

The referring court notes that, in accordance with the interpretative reservations laid down by the constitutional case-law, [10] the French legislation limits criminal proceedings to offences of a certain level of seriousness, in respect of which the national legislature has provided for a custodial sentence in addition to a fine. It also points out that the possibility of combining penalties is limited by the prohibition on exceeding the maximum amount of one of the penalties incurred. However, that limitation concerns only penalties of the same kind, namely financial penalties, with the result that it does not apply in the case of a combination of tax-related financial penalties and a custodial sentence.

Hearing the present case, the referring court asks the Court of Justice to clarify whether the legislation at issue, as interpreted by the national courts, satisfies the requirement of the clarity and the foreseeability of the circumstances in which concealments in returns relating to VAT may be the subject of a duplication of criminal proceedings and penalties, laid down by EU law, and whether the

9 'the Charter'.

10 Conseil constitutionnel (Constitutional Council, France), decisions of 24 June 2016, No 2016-545 QPC and No 2016-546 QPC, of 22 July 2016, No 2016-556 QPC, and of 23 November 2018, No 2018-745 QPC.

requirement of the necessity and the proportionality of the duplication of such penalties is satisfied by that legislation.

By its judgment, the Court holds that the fundamental right guaranteed by Article 50 of the Charter, read in conjunction with Article 52(1) thereof, [11] does not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature to the most serious cases of fraudulent concealment or omissions from a return relating to VAT is based only on settled case-law, provided that such duplication is reasonably foreseeable at the time when the offence was committed. However, those articles of the Charter preclude national legislation which does not ensure, in cases of the duplication of a financial penalty and a custodial sentence, by clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.

Findings of the Court

The Court points out first of all that, according to settled case-law, the Charter, and in particular the principle *ne bis in idem* laid down in Article 50 thereof, applies to administrative penalties imposed by national tax authorities and criminal proceedings initiated in relation to VAT offences. In that regard, the Court notes that, in the present case, the duplication of proceedings consisting of criminal proceedings and a final administrative penalty of a criminal nature constitutes a limitation of the fundamental right enshrined in that principle.

The Court then determines whether that limitation of the fundamental right concerned may be justified. It notes that, in this case, the possibility of combining criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature is provided for by law. In that context, the principle of proportionality requires that that law be strictly necessary and provide for rules that are sufficiently clear and precise to allow individuals to predict the legal consequences of their conduct.

Furthermore, any provision authorising double punishment must comply with the requirements associated with the principle that offences and penalties must have a proper legal basis, guaranteed by Article 49(1) of the Charter, in order to prevent the punitive element resulting from the duplication of penalties of a criminal nature from going beyond that provided for by law in respect of the conduct complained of. That said, that principle is compatible with the circumstance that the conditions required for a duplication of proceedings and penalties of a criminal nature derive not only from legislative provisions but also from their interpretation by national courts. Such gradual clarification of the rules of criminal liability by judicial interpretation is therefore not precluded, provided that the result was reasonably foreseeable at the time the offence was committed. The scope of the foreseeability thus required depends to a considerable degree on the content of the text in question, the field it covers and the number and status of those to whom it is addressed.

In that regard, the Conseil constitutionnel (Constitutional Council, France) has held that the duplication of proceedings and penalties provided for by French law may apply only in the most serious cases of fraudulent concealment or omissions from a tax return, while specifying that that seriousness may arise from the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances in which those actions occurred. The Court finds that that interpretation does not appear, in itself, to be unforeseeable, which it is for the referring court to ascertain in the present case. However, the Court notes that legislation which provides, in respect of the combination of a criminal fine and a financial administrative penalty of a criminal nature, that the recovery of the former is limited to the part exceeding the amount of the latter, without also

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11 According to Article 52(1) of the Charter: 'Any limitation on the exercise of the rights and freedoms recognised by [the] Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

providing for such a rule in respect of the combination of a financial administrative penalty of a criminal nature and a custodial sentence, does not comply with the requirement of proportionality.

II. CITIZENSHIP OF THE UNION: DERIVED RIGHT OF RESIDENCE OF THIRD-COUNTRY NATIONALS WHO ARE FAMILY MEMBERS OF A CITIZEN OF THE UNION

Judgment of the Court (Fourth Chamber) of 5 May 2022, Subdelegación del Gobierno en Toledo (Residence of a family member –Insufficient resources), C-451/19 and C-532/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 20 TFEU – Citizenship of the European Union – Union citizen who has never exercised his or her right of free movement – Application for a residence card for his or her family member who is a third-country national – Refusal – Obligation for spouses to live together – Minor child who is a Union citizen – National legislation and practice – Genuine enjoyment of the substance of the rights conferred on EU nationals – Deprivation

XU is a child who was born in Venezuela to a Venezuelan mother who has sole custody of him. He resides in Spain with his mother, with the Spanish national whom she married and with the child whom she had with that Spanish national. The latter child is a Spanish national. QP, who is a Peruvian national, married a Spanish national with whom he had a child who is a Spanish national. XU and QP each are family members of a Union citizen who is a national of the State in which they reside and who has never exercised his or her right of free movement in another Member State.

XU and QP had their applications for a residence card as a family member of a Union citizen [12] refused on the ground that that Union citizen did not have, for himself or herself and for the members of his or her family, sufficient financial resources. [13] Only the economic situation of the stepfather, in XU's case, and the spouse, in XP's case, was taken into account by the competent authority, namely the Subdelegación del Gobierno en Toledo (Provincial Office of the Government, Toledo, Spain).

As the actions brought against those decisions were upheld, the authority brought an appeal before the referring court against the judgments given in that regard.

The referring court is uncertain as to whether a practice of automatically refusing the family reunification of a third-country national with a Spanish national, who has never exercised his or her right to move freely, solely on the ground of his or her economic situation is compatible with EU law. [14] Such a practice could lead to that Spanish national having to leave the territory of the European Union. According to that court, that could be the situation in both cases, in view of the obligation to live together imposed by the Spanish legislation applicable to marriage. [15]

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12 In the present case, for XU, his stepfather and, for QP, his wife.

13 So as not to become a burden on the Spanish social assistance system, as provided for by Spanish legislation.

14 Article 20 TFEU relating to Union citizenship.

15 In Case C-532/19, the refusal to grant a right of residence to QP would force his wife to leave the territory of the European Union. In Case C-451/19, the refusal to grant a right of residence to XU would lead to the departure of XU and his mother from the territory of the European Union, and would force not only her husband, but also the minor child, a Spanish national born to them, to leave that territory.

In its judgment, the Court of Justice holds, in essence, that EU law precludes a Member State from refusing an application for family reunification made for the benefit of a third-country national, who is family member of a Union citizen, the latter being a national of that Member State and who has never exercised his or her right of freedom of movement, solely on the ground that that Union citizen does not have, for himself or herself and that family member, sufficient resources, without there having been an examination of whether there exists, between that Union citizen and his or her family member, a relationship of dependency of such a nature that, in the event of a refusal to grant a derived right of residence to that third-country national family member, the Union citizen would be forced to leave the territory of the European Union as a whole and would thereby be deprived of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen. The Court then provides a number of clarifications in order to determine whether, in each case, there is a relationship of dependency capable of justifying the grant to the third-country national of a derived right of residence under EU law.

Findings of the Court

As regards family reunification and the requirement to have sufficient resources, as a preliminary point, the Court states that EU law does not apply, in principle, to an application for family reunification of a third country national with a member of his or her family who is a national of a Member State and who has never exercised his or her right of freedom of movement, and that EU law therefore does not preclude, in principle, legislation of a Member State which makes such family reunification subject to a condition of sufficient resources. However, the systematic imposition of such a condition, without exception, may infringe the derived right of residence which must be granted, in very specific situations, under Article 20 TFEU, to a third-country national who is a family member of a Union citizen, in particular if the refusal of such a right forced that citizen to leave the territory of the European Union, thereby depriving him or her of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen. That is the case if there exists, between that third-country national and the Union citizen, who is a member of his or her family, a relationship of dependency of such a nature that it would lead to the Union citizen being forced to accompany the third-country national in question and to leave the territory of the European Union as a whole.

As regards the existence of a relationship of dependency in Case C-532/19, the Court states, first, that a relationship of dependency, capable of justifying the grant of a derived right of residence under Article 20 TFEU, does not exist solely on the ground that the national of a Member State who is an adult and who has never exercised his or her right of freedom of movement, and his or her spouse, an adult and third-country national, are required to live together, in accordance with the rules of the Member State of which the Union citizen is a national and in which the marriage was entered into.

The Court then goes on to examine whether such a relationship of dependency may exist where that national and his or her spouse, a national of a Member State who has never exercised his or her right of freedom of movement, are the parents of a minor who is a national of the same Member State and who has not exercised his or her right of freedom of movement.

In order to assess the risk that the child concerned, a Union citizen, might be forced to leave the territory of the European Union if his or her parent, a third-country national, were to be refused a derived right of residence in the Member State concerned, it must be determined whether that parent is the primary carer of the child and whether there is an actual relationship of dependency between them, taking into account the right to respect for family life [16] and the obligation to take into consideration the child's best interests. [17]

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16 Set out in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

17 Recognised in Article 24(2) of the Charter, which includes the right for that child to maintain on a regular basis a personal relationship and direct contact with both parents, enshrined in Article 24(3) of the Charter.

The fact that the other parent, a Union citizen, is genuinely able and willing to assume sole responsibility for the actual day-to-day care of the child is not a sufficient ground for a finding that there does not exist, between the third-country national parent and the child, a relationship of dependency of such a nature that the child would be forced to leave the territory of the European Union if that third-country national were refused a right of residence. Such a finding must be based on the taking into account, in the best interests of the child concerned, of all the circumstances of the case. [18]

Thus, the fact that the parent, who is a third-country national, lives with the minor child who is a Union citizen, is relevant for a determination as to whether there is a relationship of dependency between them, but is not a necessary condition. Furthermore, where the Union citizen minor lives on a stable basis with both of his or her parents, and the custody of that child and the legal, emotional and financial burden in relation to that child are therefore shared on a daily basis by those two parents, there is a rebuttable presumption that there is a relationship of dependency between that Union citizen minor and his or her parent, who is a third-country national, irrespective of the fact that the other parent of that child has, as a national of the Member State in which that family is established, an unconditional right to remain in that Member State.

As regards the existence of a relationship of dependency in Case C-451/19, in the first place, the Court points out that, since the derived right of residence which may be granted to a third-country national under Article 20 TFEU is subsidiary in scope, the referring court must examine, inter alia, whether XU, who was a minor on the date on which the application for a residence permit was refused and whose mother, a third-country national, held such a permit on Spanish territory, was entitled, on that date, to a right of residence in that territory under Directive 2003/86. [19]

In the second place, in the event that XU does not hold any residence permit under secondary EU law or national law, the Court examines whether Article 20 TFEU may permit the grant of a derived right of residence to that third-country national.

In that regard, it is necessary to determine whether, on the date on which the application for a residence permit for XU was refused, his forced departure could, in practice, have required his mother to leave the territory of the European Union because of the relationship of dependency between them and, if so, whether the departure of XU's mother would also, in practice, have forced her minor child, a Union citizen, to leave the territory of the European Union because of the relationship between that Union citizen and his mother.

The assessment, for the purposes of the application of Article 20 TFEU, of the existence of a relationship of dependency between a parent and his or her child, both being third-country nationals, is based, *mutatis mutandis*, on the same criteria as those set out above. Where it is a third-country national minor who is refused a residence permit and is likely to be forced to leave the territory of the European Union, the fact that his or her other parent could actually take care of him or her from a legal, financial and emotional point of view, including in his or her country of origin, is relevant, but is not sufficient to conclude that the parent who is a third-country national and resident in the territory of that Member State would not be forced, in practice, to leave the territory of the European Union.

If, on the date on which the application for a residence permit for XU was refused, his forced departure from the Spanish territory would, in practice, have forced not only his mother, a third-country national, but also her other child, who is a Union citizen, to leave the territory of the European

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18 Including the child's age, physical and emotional development, the extent of his or her emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

19 Article 4(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12). Even though that directive provides that it does not apply to family members of a Union citizen, in view of its objective, which is to promote family reunification, and in view of the protection which it seeks to grant to third country nationals, in particular minors, its application in favour of a third-country national minor cannot be excluded merely because his or her parent, who is a third-country national, is also the parent of a Union citizen who was born to that third-country national and a national of a Member State.

Union, which it is for the referring court to ascertain, a derived right of residence should have been granted to his half-brother, XU, under Article 20 TFEU, in order to prevent that Union citizen from being deprived, by his departure, of the enjoyment of the essence of the rights which he holds by way of his status.

III. PROCEEDINGS OF THE EUROPEAN UNION: REFERENCES FOR A PRELIMINARY RULING

Judgment of the Court (Grand Chamber) of 3 May 2022, CityRail, C-453/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 267 TFUE – Concept of 'court or tribunal'– Criteria relating to the body's constitution and function – Exercise of judicial or administrative functions – Directive 2012/34/EU – Articles 55 and 56 – Single national regulatory body for the railway sector – Independent regulatory authority for the sector – Entitlement to act on an *ex-officio* basis – Power to impose penalties – Decisions that are open to challenge before the courts – Inadmissibility of the request for a preliminary ruling

Správa železnic, a public body established by law, is responsible for the management, in the Czech Republic, of a railway network and the associated service facilities. It drew up and published a network statement, within the meaning of Directive 2012/34 establishing a single European railway area, [20] which sets out, inter alia, the conditions governing access to certain installations as from 1 April 2020.

On the basis of the Law on railways, [21] CityRail, a railway undertaking, challenged those conditions before the Transport infrastructure access authority ('the Authority') [22] in its capacity as a national regulatory body for the railway sector, on the ground that they are contrary to the rules laid down by Directive 2012/34.

Since it is uncertain whether those conditions are compatible with Directive 2012/34 or whether the national law applicable to the dispute in the main proceedings is compatible with that directive, the Authority decided to make a reference to the Court of Justice for a preliminary ruling.

Ruling as the Grand Chamber, the Court dismisses as inadmissible the request for a preliminary ruling made by the Authority on the ground that, in the context of the dispute in the main proceedings, that body exercises functions not of a judicial but of an administrative nature. Consequently, the Authority cannot be regarded as being a 'court or tribunal' within the meaning of Article 267 TFEU.

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20 Article 3(26) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32), as amended by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 352, p. 1).

21 Article 34e of Law No 266/1994 on railways.

22 In the Czech Republic, the Úřad pro přístup k dopravní infrastruktuře (Transport infrastructure access authority) forms part of the central authorities of the administration of the State. It was established by Law No 320/2016 on the Transport infrastructure access authority.

Findings of the Court

The Court begins by recalling its settled case-law on the matter, [23] under which, in order to determine whether the body making the reference at issue is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether that body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. [24]

The question whether a body is entitled to refer a question to the Court is therefore determined on the basis of criteria relating both to the constitution of that body and to its function. Thus, a national body may be classified as a 'court or tribunal' within the meaning of Article 267 TFEU when it is performing judicial functions, but not when exercising other functions, inter alia functions of an administrative nature. According to the Court, it follows that, in order to establish whether a national body, entrusted by law with different categories of function, must be classified as a 'court or tribunal' within the meaning of Article 267 TFEU, it is necessary to ascertain the specific nature of the functions which it exercises in the particular legal context in which it is called upon to make a reference to the Court. [25]

The Court points out that that verification is of particular importance in the case of administrative authorities whose independence is a direct consequence of the requirements arising from provisions of EU law which confer on them powers of scrutiny in the sector and powers to supervise markets. Although those authorities may satisfy the criteria set out above, stemming from the judgment in *Vaassen-Göbbels*, the activity of scrutiny in the sector and supervision of the markets is essentially administrative in nature, in that it involves the exercise of powers which are unrelated to those conferred on the courts.

However, in *Westbahn Management*, [26] relied on by the Authority, the Court, when hearing a request for a preliminary ruling made by the Schienen-Control Kommission (Railway Supervisory Commission, Austria), examined only the criteria arising from the judgment in *Vaassen-Göbbels* and thus did not examine whether that body exercised functions of a judicial nature in the context of the proceedings which gave rise to that request.

In that regard, the Court states that the power to initiate proceedings *ex officio* and to impose, also *ex officio*, penalties in matters within its jurisdiction constitute evidence that the body in question exercises not judicial but administrative functions. Moreover, the question whether the proceedings which gave rise to a request for a preliminary ruling were initiated on the initiative of an interested party is not of decisive importance when those proceedings could have been initiated *ex officio*. The Court further states that the role and place of a body in the national legal system are also relevant for the purposes of assessing the nature of its functions.

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23 See, to that effect, judgment of 30 June 1966, *Vaassen-Göbbels* (61/65, EU:C:1966:39, p. 273; 'the judgment in *Vaassen-Göbbels*').

24 Order of 26 November 1999, *ANAS* (C-192/98, EU:C:1999:589, paragraph 21), and judgment of 31 January 2013, *Belov* (C-394/11, EU:C:2013:48, paragraph 39).

25 Order of 26 November 1999, *ANAS* (C-192/98, EU:C:1999:589, paragraphs 22 and 23), and judgment of 31 January 2013, *Belov* (C-394/11, EU:C:2013:48, paragraphs 40 and 41).

26 Judgment of 22 November 2012, *Westbahn Management* (C-136/11, EU:C:2012:740).

In the present case, the Court first of all examines, in essence, the nature and function of a regulatory body, such as the Authority, in the system for managing and regulating rail activities established by Directive 2012/34. [27]

It thus follows from the relevant provisions of Directive 2012/34 [28] that the efficient management and fair and non-discriminatory use of railway infrastructure, provided for by that directive, require the establishment of an authority which is responsible, at the same time, for overseeing, on its own initiative, the application by the stakeholders in the railway sector of the rules laid down by that directive and for acting as an appeal body. That combination of functions means that, where an action is brought before a regulatory body, [29] that fact is without prejudice to the competence of that body to take, if necessary *ex officio*, appropriate measures to remedy any infringement of the applicable rules and to enforce its decisions with penalties, if it deems this necessary, which confirms the administrative nature of its functions. Furthermore, Directive 2012/34 [30] provides that Member States are to ensure that decisions taken by the regulatory body are open to judicial review, which is also indicative of the administrative nature of such decisions.

In the light of those considerations, the Court next examines whether, notwithstanding the administrative nature of a supervisory body such as the Authority, it must be regarded, in the specific context of the functions which it carries out in the main proceedings, as a 'court or tribunal' within the meaning of Article 267 TFEU.

To that end, the Court points out that the Authority's power to initiate the proceedings which gave rise to the present request for a preliminary ruling, also *ex officio*, like its power to investigate irregularities discovered during those proceedings on its own initiative, are particularly relevant indications, capable of supporting the finding that that body, in the main proceedings, exercises not judicial but administrative functions.

Furthermore, it is apparent from the information provided by the Authority that the decisions of that body may be subject to judicial review. Where, in accordance with the rules on the division of powers which are set out in the Codes of Civil Procedure and Administrative Justice, the administrative courts have jurisdiction to hear an action against a decision of the Authority, the latter has the status of defendant. In addition, it is apparent from the Code of Civil Procedure [31] that, before the civil courts which, according to the Authority, have jurisdiction inter alia to hear actions against decisions adopted in the procedure referred to in Article 34e of the Law on railways, as is the case in the main proceedings, the Authority has the right to submit observations, without being a party to the proceedings. Such participation by the Authority in review proceedings, calling into question its own decision, is evidence that, where it adopts that decision, the Authority does not have the status of a third party in relation to the interests involved and thus does not exercise judicial functions.

In the light of those factors, the Court finds that, in the dispute in the main proceedings, the Authority carries out functions which are not judicial, but administrative in nature. Consequently, it cannot be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU, so that the request for a preliminary ruling which it has made is inadmissible.

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27 Articles 55 and 56 of Directive 2012/34 make provision for the existence, in all the Member States, of national regulatory bodies in the railway sector, lay down the principles governing their organisation and determine the powers conferred on them.

28 Articles 55 and 56 of Directive 2012/34, read in the light of recital 76 thereof.

29 Established under Article 55 of Directive 2012/34.

30 Article 56(10) of Directive 2012/34.

31 Article 250c(2) of the Code of Civil Procedure.

IV. JUDICIAL COOPERATION IN CRIMINAL MATTERS: RIGHT TO BE PRESENT AT THE TRIAL

Judgment of the Court (Fourth Chamber) of 19 May 2022, Spetsializirana prokuratura and Others (Trial of an absconded accused person), C-569/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Article 8 – Right to be present at the trial – Information regarding the holding of the trial – Inability to locate the accused person notwithstanding the reasonable efforts of the competent authorities – Possibility of a trial and a conviction *in absentia* – Article 9 – Right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case

Criminal proceedings were brought in Bulgaria against IR, who was accused of having participated in a criminal organisation with a view to committing tax offences punishable by custodial sentences. A first indictment was served on IR in person and he indicated an address at which he could be contacted. When the judicial stage of the proceedings commenced, he could not, however, be found there, with the result that the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria; 'the referring court') could not summon him to the hearing. Nor did the lawyer appointed by that court of its own motion enter into contact with him. Furthermore, as the indictment that had been served on IR was vitiated by an irregularity, it was declared void and the proceedings were closed. After a new indictment had been drawn up and the proceedings had been reopened, IR, once again, was sought but could not be located. The referring court finally inferred from this that IR had absconded and that, in those circumstances, the case could be heard in his absence.

However, in order that the person concerned be correctly informed of the procedural safeguards available to him, the referring court enquires as to which case provided for by Directive 2016/343 [32] covers the situation of IR who absconded after having been notified of the first indictment and before the commencement of the judicial stage of the criminal proceedings. [33]

The Court of Justice states in reply that Articles 8 and 9 of Directive 2016/343 must be interpreted as meaning that an accused person whom the competent national authorities, despite their reasonable efforts, do not succeed in locating and to whom they accordingly have not managed to give the information regarding his or her trial may be tried and, as the case may be, convicted *in absentia*. In that case, that person must nevertheless, in principle, be able, after notification of the conviction, to rely directly on the right, conferred by that directive, to secure the reopening of the proceedings or access to an equivalent legal remedy resulting in a fresh examination, in his or her presence, of the merits of the case. The Court makes clear, however, that that person may be denied that right if it is

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32 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

33 More specifically, Article 8 of Directive 2016/343 deals with the right to be present at one's own trial. Under Article 8(2), Member States may provide that a trial which can result in a decision on the guilt or innocence of the person concerned can be held in his or her absence, provided that he or she has been informed, in due time, of the trial and of the consequences of non-appearance or, having been informed of the trial, is represented by a lawyer mandated by him or her or appointed by the State. Under Article 8(4) of the directive, where Member States provide for the possibility of holding trials in the absence of the person concerned but it is not possible to comply with the conditions laid down in Article 8(2) because he or she cannot be located despite reasonable efforts having been made, Member States may nevertheless provide that a decision can be taken and enforced. In such cases, Member States are to ensure that when the persons concerned are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9 of the directive. In particular, under Article 9, suspects or accused persons must have the right to a new trial where they were not present at their trial and the conditions laid down in Article 8(2) of the directive were not met.

apparent from precise and objective indicia that he or she received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial.

Findings of the Court

The Court points out, first of all, that Article 8(4) and Article 9 of Directive 2016/343, concerning the field of application and the extent of the right to a new trial, must be regarded as having direct effect. That right is restricted to persons whose trial is conducted *in absentia* even though the conditions laid down in Article 8(2) of the directive are not met. On the other hand, the power given to the Member States by Directive 2016/343 to conduct a trial *in absentia* when the conditions laid down in Article 8(2) are met and to enforce the decision without providing for the right to a new trial is based on the premiss that the person concerned, having been duly informed, has voluntarily and unequivocally foregone exercise of the right to be present at the trial.

That interpretation ensures observance of the aim of Directive 2016/343, which consists in enhancing the right to a fair trial in criminal proceedings, so as to increase the trust of Member States in each other's criminal justice systems, and to ensure that the rights of the defence are respected, while preventing a person who, although informed of a trial, has unequivocally foregone being present at it from being able, after a conviction *in absentia*, to claim a new trial and thereby improperly hinder the effectiveness of the prosecution and the sound administration of justice. As for the information relating to the holding of the trial and to the consequences of non-appearance, the Court states that it is for the national court concerned to check whether an official document, referring unequivocally to the date and place fixed for the trial and, in the absence of representation by a mandated lawyer, to the consequences of any non-appearance, has been issued for the attention of the person concerned. It is, in addition, incumbent upon that court to check whether that document has been served in due time so as to enable the person concerned, if he or she decides to take part in the trial, to prepare his or her defence effectively.

As regards, more specifically, accused persons who have absconded, the Court holds that Directive 2016/343 precludes national legislation which rules out the right to a new trial solely on the ground that the person concerned has absconded and the authorities have not succeeded in locating him or her. It is only where it is apparent from precise and objective indicia that the person concerned, while having been officially informed that he or she is accused of having committed a criminal offence, and therefore aware that he or she is going to be brought to trial, takes deliberate steps to avoid receiving officially the information regarding the date and place of the trial that that person may be deemed to have been informed of the trial and to have voluntarily and unequivocally foregone exercise of the right to be present at it, a situation which is covered by Article 8(2) of Directive 2016/343. [34] Such precise and objective indicia may, inter alia, be found to exist where that person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated. Furthermore, in considering whether the information which has been provided to the person concerned has been sufficient, particular attention is to be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the latter in order to receive that information.

The Court states, furthermore, that that interpretation upholds the right to a fair trial, laid down in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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[34] Subject to the particular needs of the vulnerable persons referred to in recitals 42 and 43 of Directive 2016/343.

V. COMPETITION

1. ABUSE OF A DOMINANT POSITION (ARTICLE 102 TFEU)

Judgment of the Court (Fifth Chamber) of 12 May 2022, Servizio Elettrico Nazionale and Others, C-377/20

Reference for a preliminary ruling – Competition – Dominant position – Abuse – Article 102 TFEU – Effect of a practice on the well-being of consumers and on the structure of the market – Abusive exclusionary practice – Whether the practice is capable of producing an exclusionary effect – Use of means other than those coming within the scope of competition on the merits – Hypothetical as-efficient competitor unable to replicate the practice – Existence of an anticompetitive intent – Opening up of the market for the sale of electricity to competition – Transfer of commercially sensitive information within a group of undertakings in order to preserve a dominant position inherited from a statutory monopoly – Imputability of a subsidiary's conduct to the parent company

This case has arisen in the context of the progressive liberalisation of the market for the sale of electricity in Italy.

Although, since 1 July 2007, all users of the Italian electricity network, including households and small and medium-sized enterprises, have been able to choose their supplier, a distinction was drawn initially between, on the one hand, customers that were eligible to choose a supplier on the free market and, on the other, customers in the protected market, the latter consisting of private individuals and small businesses that continued to be covered by a regulated regime referred to as the servizio di maggior tutela (enhanced protection service), which included special protection of prices in particular. It was only subsequently that customers in the latter category were allowed access to the free market.

For the purposes of that liberalisation of the market, ENEL, an undertaking that, until that point, had been vertically integrated, had held the monopoly in electricity generation in Italy and had also been active in the distribution of electricity, underwent an unbundling of its distribution and sales activities and its trade marks. Following that procedure, the activities relating to the various stages of the distribution process were attributed to separate subsidiaries. Accordingly, E-Distribuzione was entrusted with distribution services, Enel Energia with the supply of electricity on the free market and Servizio Elettrico Nazionale ('SEN') with management of the enhanced protection service.

Following an investigation conducted by the Autorità Garante della Concorrenza e del Mercato (AGCM) as national competition authority, that authority adopted, on 20 December 2018, a decision in which it held that, during the period from January 2012 to May 2017, SEN and Enel Energia, coordinated by their parent company, ENEL, had abused their dominant position in breach of Article 102 TFEU and consequently imposed a fine of over EUR 93 million jointly and severally on those companies. The conduct complained of consisted in an exclusionary strategy intended to transfer the customer base of SEN, as incumbent manager of the protected market, to Enel Energia, which operates on the free market, in order to mitigate the risk of a large-scale departure of SEN's customers to new suppliers on the subsequent opening to competition of the market concerned. To that end, according to the AGCM's decision, the customers in the protected market were, inter alia, asked by SEN to give their consent to receive commercial offers relating to the free market using discriminatory methods with respect to the offers of ENEL's competitors.

The fine was reduced to approximately EUR 27.5 million in compliance with judgments delivered at first instance in the context of actions brought by ENEL and its two subsidiaries against the AGCM's decision. Those companies have brought appeals against those judgments before the Consiglio di Stato (Council of State, Italy), which has asked the Court questions relating to the interpretation and application of Article 102 TFEU in cases relating to exclusionary practices.

By its judgment, the Court sets out the conditions under which the conduct of an undertaking can be regarded, on the basis of its anticompetitive effects, as constituting abuse of a dominant position

when such conduct stems from the use of resources or means inherent to the holding of such a position in the context of the liberalisation of a market. In that judgment, the Court defines the relevant assessment criteria and the scope of the burden of proof on the relevant national competition authority that has adopted a decision under Article 102 TFEU.

Findings of the Court

Answering the questions relating to the interest protected by Article 102 TFEU, the Court sets out, in the first place, the elements constituting abuse of a dominant position. To that end, it observes, first, that the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position within the internal market or a substantial part of that market. Therefore, a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could adversely affect, by using resources or means other than those governing normal competition, the effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers. The dominant undertaking concerned can nevertheless escape the prohibition laid down in Article 102 TFEU by showing that the exclusionary effect that could result from the practice at issue is counterbalanced or even outweighed by positive effects on consumers.

Second, the Court recalls that the conduct of an undertaking in a dominant position is to be characterised as abusive only if that conduct is shown to be capable of restricting competition and, in the case in question, of producing the alleged exclusionary effects. However, that characterisation does not require it to be proved that the desired result of such conduct seeking to exclude the undertaking's competitors from the market concerned has been achieved. In those circumstances, evidence produced by an undertaking in a dominant position demonstrating that there are no actual exclusionary effects cannot be regarded as sufficient in itself to preclude the application of Article 102 TFEU. However, that factor can constitute evidence that the conduct at issue is incapable of producing the alleged exclusionary effects, provided that it is supported by other evidence seeking to demonstrate such incapability.

In the second place, as regards the doubts expressed by the national court as to whether the intention of the undertaking in question should be taken into consideration, the Court recalls that the existence of an abusive exclusionary practice by an undertaking in a dominant position must be assessed on the basis of whether that practice is capable of producing anticompetitive effects. It follows that a competition authority is not required to demonstrate that the undertaking in question has the intention of excluding its competitors by means or by making use of resources other than those governing competition on the merits. The Court does, however, specify that evidence of such intention is nevertheless a factor that may be taken into account for the purposes of establishing abuse of a dominant position.

In the third place, the Court provides interpretative guidance requested by the national court for the purpose of applying Article 102 TFEU in order to distinguish, among the practices implemented by an undertaking holding a dominant position which are based on lawful use, outside of the domain of competition law, of resources or means inherent to the holding of such a position, between those which are potentially not covered by the prohibition laid down in that article because they are characteristic of normal competition and those which, by contrast, are to be regarded as 'abusive' within the meaning of that provision.

In that connection, the Court recalls, first of all, that the abusive nature of those practices presupposes that they are capable of producing the exclusionary effects described in the decision at issue. Admittedly, undertakings in a dominant position, irrespective of the reasons for which they have such a position, may defend themselves against their competitors, but they must nonetheless do so by using means of 'normal' competition alone, that is to say, competition on the merits. A practice that could not be adopted by a hypothetical competitor that is as efficient on the market in question because it relies on the use of resources or means inherent to the holding of a dominant position cannot be regarded as competition on the merits. In those circumstances, when an undertaking loses the legal monopoly it had previously held on a market, that undertaking must refrain, during the entire liberalisation phase of the market, from using means available to it on account of its former monopoly and which, on that basis, are not available to its competitors for the

purposes of maintaining, other than by its own merits, a dominant position on the recently liberalised market in question.

That said, such a practice can nevertheless escape the prohibition laid down in Article 102 TFEU if the relevant undertaking in a dominant position proves that that practice was either justified objectively by circumstances external to the undertaking and is proportionate to that justification, or that it is counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers.

In the fourth and last place, the Court, having been asked by the national court to set out the conditions for imputing liability for the conduct of a subsidiary to its parent company, holds that, when a dominant position is abused by one or several subsidiaries belonging to one economic unit, the existence of that unit is sufficient to regard the parent company as being also liable for that abuse. There must be a presumption that such a unit exists if, at the material time, almost all of the capital of those subsidiaries was held, directly or indirectly, by the parent company. In such circumstances, the competition authority is not required to provide any additional evidence unless the parent company shows that, despite holding such a percentage of the capital of those companies, it did not have the power to define their conduct and those companies were acting independently.

2. CONCENTRATIONS

Judgment of the General Court (Sixth Chamber) of 18 May 2022, Canon v Commission, T-609/19

Link to the complete text of the judgment

Competition – Concentrations – Manufacturing of medical instruments – Decision imposing fines for implementing a concentration prior to notification and clearance – Article 4(1), Article 7(1) and Article 14 of Regulation (EC) No 139/2004 – Interim transaction and ultimate transaction – Parking structure – Single concentration – Rights of the defence – Legitimate expectations – Principle of legality – Proportionality – Amount of fines – Mitigating circumstances

In 2016, Canon Inc. ('the applicant'), a Japanese multinational company specialising in the manufacture of optical and image processing products, took over Toshiba Medical Systems Corporation ('TMSC'), a wholly owned subsidiary of Toshiba Corporation ('Toshiba').

That acquisition was carried out in two steps, through a securitisation vehicle (MS Holding) created specifically for that purpose. In the first step, on 17 March 2016, MS Holding acquired certain voting shares of TMSC for approximately EUR 800, while the applicant, in consideration for payment of the full price agreed for the purchase of TMSC (approximately EUR 5 280 000 000), acquired call options on all the remaining voting shares in TMSC. In addition, the applicant acquired the one non-voting share in TMSC for approximately EUR 40 ('the interim transaction').

In a second step, on 19 December 2016, after obtaining merger clearance from the European Commission, the applicant exercised its options to acquire the underlying voting shares of TMSC, while TMSC purchased its voting shares held by MS Holding as well as the non-voting share held by the applicant ('the ultimate transaction'). By those two transactions, TMSC became a wholly owned subsidiary of the applicant.

The rationale for the staged acquisition was that the sale of TMSC would be recognised as a capital contribution in Toshiba's accounts by 31 March 2016 at the latest, without the applicant formally acquiring control until it had obtained the necessary clearances from the relevant competition authorities.

Following a pre-notification sent by the applicant in March 2016, the concentration was notified to the Commission in August and cleared by the Commission in September of the same year.

However, in parallel, the Commission opened an investigation into possible violations of the obligation to notify and the standstill obligation under the Merger Regulation. [35] Under those obligations, undertakings involved in a concentration with a European dimension must notify their plans to the Commission for examination before they are implemented ('obligation to notify') [36] and may not implement the notified operation before obtaining clearance from the Commission ('standstill obligation'). [37]

By its decision of 27 June 2019, [38] the Commission found that the applicant had infringed those obligations in that it had prematurely implemented its acquisition of TMSC. In essence, the Commission considered that, by proceeding with the interim transaction, the applicant had partially implemented the single concentration consisting of the acquisition of TMSC and had thereby infringed the standstill obligation and obligation to notify. For that reason, the Commission imposed two fines totalling EUR 28 million.

The applicant brought an action for annulment of that decision, which was dismissed in its entirety by the Sixth Chamber of the Court.

The Court's assessment

The Court begins by rejecting the applicant's argument that the interim transaction did not result in the acquisition of control of TMSC and therefore did not constitute an infringement of the obligation to notify and the standstill obligation under the Merger Regulation.

Referring to the settled case-law of the Court of Justice, [39] the General Court notes in that respect that a concentration is implemented as soon as the parties to the concentration carry out operations which contribute to a lasting change of control over the target undertaking. Any partial implementation of a concentration thus falls within the scope of the standstill obligation, which meets the requirement of ensuring effective merger control. With that in mind, the Merger Regulation treats closely related transactions as a single concentration, with the sole exception of cases where such transactions are not necessary to achieve a change of control over the target undertaking and therefore do not have a direct functional link with the implementation of the concentration.

The Commission was therefore right to observe that the Court of Justice's case-law distinguishes between the concepts of 'concentration' and 'implementation of a concentration'. While a 'concentration' is only deemed to have been implemented when a lasting change of control takes place, the 'implementation' of a concentration can take place as soon as the parties to a concentration implement operations contributing to a lasting change of control of the target undertaking, that is to say possibly before the acquisition of control of such an undertaking.

Therefore, the test for determining whether the obligation to notify and the standstill obligation were infringed by the applicant is not whether there was an acquisition of control of TMSC prior to the clearance of the concentration, but whether the contested actions contributed, in whole or in part, in fact or in law, to the change of control of that undertaking before that date.

In that context, the General Court also rejects the applicant's argument that the Commission's control of the merger was not at any time and in any way impeded, since the applicant acquired control of

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35 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1) ('the Merger Regulation').

36 Merger Regulation, Article 4(1).

37 Merger Regulation, Article 7(1).

38 Commission Decision C(2019) 4559 final of 27 June 2019 imposing fines for failing to notify a concentration in breach of Article 4(1) of Council Regulation (EC) No 139/2004 and for implementing a concentration in breach of Article 7(1) of that regulation (Case M.8179 – Canon/Toshiba Medical Systems Corporation).

39 Judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371).

TMSC only after it had obtained all the clearances from the competition authorities concerned. According to the applicant, as long as control is not acquired, the concentration cannot be implemented in advance. A partial implementation of a concentration would thus require the acquisition of partial control. However, according to the Court, either control is acquired, when an entity has the possibility to exercise decisive influence over the target company, or it is not. Therefore, an alleged 'partial control' cannot be the condition for a partial implementation of the concentration. The Court also notes that, in order to be effective, the Commission's control must be carried out before the merger is implemented, even partially.

Referring to its own case-law, [40] the Court also rejects the applicant's argument that the interim transaction did not constitute a partial implementation of the concentration.

In that regard, the Court notes that a concentration may be implemented in the presence of a number of formally distinct legal transactions and that in such a case it is for the Commission to assess whether those transactions constitute a single concentration in that they are unitary in nature. In the presence of several legally distinct transactions, it is thus for the Commission to identify, in the light of the factual and legal circumstances of each case, the economic purpose pursued by the parties, by examining whether the undertakings concerned would have been prepared to enter into each transaction in isolation or whether, on the contrary, each transaction constitutes only one element of a more complex operation, without which it would not have been entered into by the parties.

In that context, the Commission did not err in classifying the interim transaction as a partial implementation of the concentration. It was right to find that, from the date of the interim transaction, and irrespective of the outcome of the merger clearance, the applicant had acquired the possibility of exercising a certain degree of influence over TMSC since, following the completion of that transaction, it had sole power to determine the identity of the ultimate purchaser of the latter.

The Court also disputes the applicant's argument that the interim transaction did not have a direct functional link with the change of control of TMSC and therefore did not contribute to the change of control. The Court considers that, without the two-step transaction structure proposed by the applicant, Toshiba would have been unable to relinquish control of TMSC and irreversibly collect payment from TMSC before the end of March 2016. Moreover, under that two-step structure, the interim transaction was a necessary step to achieve a change of control of TMSC. In fact, the objective of that two-step structure was that the interim transaction would allow, first, an intermediate buyer to purchase all the voting securities of TMSC and, secondly, the applicant to pay the price of TMSC to Toshiba in an irreversible manner while obtaining the greatest certainty as to whether it would ultimately acquire control of TMSC.

The Court dismisses the action in its entirety and orders the applicant to pay the costs.

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40 Judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission* (T-282/02, EU:T:2006:64).

3. STATE AID

Judgment of the General Court (Tenth Chamber, Extended Composition) of 4 May 2022, Wizz Air Hungary v Commission (TAROM; Rescue Aid), T-718/20

Link to the complete text of the judgment

State aid – Air transport – Support measure taken by Romania – Rescue aid to TAROM – Decision not to raise any objections – Action for annulment – Status as a party concerned – Safeguarding of procedural rights – Admissibility – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Measure aiming to prevent social hardship or to address market failure – 'One time, last time' principle – Effect of earlier aid granted before Romania's accession to the European Union – Serious difficulties – Obligation to state reasons

On 19 February 2020, Romania notified to the European Commission a project to grant rescue aid to TAROM, a Romanian airline mainly active in the domestic and international transport of passengers, cargo and mail. The notified measure consisted of a loan to finance TAROM's liquidity needs in the amount of approximately €36 660 000, repayable at the end of a six-month period with an option to repay part of the loan early.

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission, by decision of 24 February 2020, [41] classified the notified State aid measure as compatible with the internal market under Article 107(3)(c) TFEU and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty. [42]

The airline Wizz Air Hungary Zrt. ('the applicant') brought an action for annulment against that decision, which is dismissed by the Tenth Chamber (Extended Composition) of the General Court. In its judgment, the General Court provides clarifications on the examination as to whether rescue and restructuring aid is compatible with the internal market in the light of the condition, laid down in the Guidelines, according to which such aid must contribute to an objective of common interest. The General Court also analyses, in an unprecedented manner, the 'one time, last time' condition governing aid for rescuing and restructuring undertakings in difficulty, laid down in those guidelines.

Findings of the General Court

The General Court rejects, in the first place, the pleas in law for annulment alleging that the Commission erred in law by deciding not to initiate the formal investigation procedure despite the doubts that it should have harboured during the preliminary assessment as to whether the notified aid was compatible with the internal market.

In that regard, the applicant submitted, inter alia, that the finding that the notified aid was compatible with the internal market was contrary to two of the conditions laid down in the Guidelines in order for rescue aid to an undertaking in difficulty to be regarded as compatible with the internal market, namely: (1) the condition relating to the contribution of the aid measure to an objective of common interest; and (2) the 'one time, last time' condition governing rescue and restructuring aid. According to the applicant, failure to comply with those conditions was indicative of the doubts which should have led the Commission to initiate the formal investigation procedure.

41 Decision C(2020) 1160 final of the Commission of 24 February 2020 concerning State Aid SA.56244 (2020/N) – Romania – Rescue aid to TAROM (OJ 2020 C 310, p. 3).

42 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines').

First of all, the General Court recalls that, when notified aid raises doubts as to its compatibility with the internal market, the Commission is required to initiate the formal investigation procedure.

Next, as regards the first condition applicable to the rescue and restructuring aid, the infringement of which was relied on, namely that relating to the pursuit of an objective of common interest, the General Court notes that it is apparent from point 43 of the Guidelines that, in order to be declared compatible with the internal market on the basis of the Guidelines, the notified aid must pursue an objective of common interest, in that it must aim to prevent social hardship or address market failure. This is confirmed by point 44 of those guidelines, according to which Member States must demonstrate that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure, in particular by showing that there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in.

According to the General Court, it follows from those points of the Guidelines that, although the Member State concerned must demonstrate that the aid aims to prevent social hardship or address market failure, it is not required to establish that, in the absence of the aid measure, certain negative consequences would necessarily arise, but only that such consequences might arise.

With regard to whether the Commission should have harboured doubts as to the existence of a risk that, in the absence of the notified aid measure, social hardship or market failure would have arisen, or whether that measure was intended to prevent or address them, the General Court states that, taking into account the poor condition of Romanian road and rail infrastructure, the Commission was entitled to find that regional connectivity by means of domestic air routes and international connectivity provided by TAROM constituted an important service, the disruption of which could involve serious social hardship or constitute a market failure within the meaning of point 44(b) of the Guidelines.

In that context, the General Court clarifies, in addition, that, although, when the existence and legality of State aid are being examined, it may be necessary for the Commission, where appropriate, to go beyond a mere examination of the facts and points of law brought to its notice, it cannot be inferred from this that it is for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain.

In the light of those clarifications, the General Court, by examining the various arguments put forward by the applicant, concludes that those arguments are not such as to call into question the Commission's analysis confirming TAROM's importance for the connectivity of regions in Romania and the very substantial impact on those regions if TAROM were to fail. It follows that the Commission was entitled to conclude, without harbouring any doubts, on that basis alone, that the notified aid met the requirements laid down in points 43 and 44 of the Guidelines.

Lastly, as regards the second condition applicable to the rescue and restructuring aid, the infringement of which was relied on by the applicant, namely the 'one time, last time' condition, the General Court recalls that, according to point 70 of the Guidelines, such aid should be granted to undertakings in difficulty in respect of only one restructuring operation. In that context, point 71 of the Guidelines provides, inter alia, that, when an undertaking has already received rescue or restructuring aid, the Commission will only allow further aid if at least 10 years have elapsed (1) since the earlier aid was granted; (2) since the earlier restructuring period came to an end; or (3) since the implementation of the earlier restructuring plan was halted.

In that regard, the General Court observes that, although TAROM had received, up to 2019, the implementation of restructuring aid in the form of a loan and several guarantees in respect of other loans taken out by TAROM, the fact remains that that aid had been granted between 1997 and 2003 and that all the loan guarantees had been called immediately after they had been granted. Since the actual transfer of the resources is not decisive in determining the date on which the aid was granted, the first situation provided for in point 71 of the Guidelines, namely the expiry of a period of at least 10 years from the date on which the earlier restructuring aid was granted, was, consequently, established.

As regards the second and third situations provided for in point 71 of the Guidelines, namely the expiry of a period of at least 10 years after the earlier restructuring period ends or after the

implementation of the earlier restructuring plan is halted, the General Court notes that the concept of a 'restructuring period' refers to the period during which the restructuring measures are taken, which is separate, in principle, from that during which a State aid measure accompanying those measures is implemented. In disregard of the burden of proof that falls on it in that regard, the applicant has not provided any evidence or indication that the earlier restructuring period had ended less than 10 years before the notified aid measure was granted.

With regard to the concept of a 'restructuring plan', the General Court clarifies, in addition, that the fact that restructuring aid is linked to a restructuring plan does not mean that that aid, as such, forms part of that restructuring plan, since the existence of the restructuring plan constitutes, on the contrary, an essential condition for such aid to be considered compatible with the internal market. Thus, the General Court also rejects the applicant's argument according to which the fact that the restructuring aid granted to TAROM between 1997 and 2003 was implemented up to 2019 means that the restructuring plan, which was linked to that aid, also lasted up to 2019.

In the light of the foregoing, the General Court also rejects the applicant's complaints alleging that the Commission erred in law by deciding not to initiate the formal investigation procedure despite the doubts that it should have harboured during the preliminary assessment of the 'one time, last time' condition governing rescue and restructuring aid.

In the second place, the General Court rejects the plea in law alleging infringement of the Commission's obligation to state reasons and, consequently, dismisses the action in its entirety.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 18 May 2022, Ryanair v Commission (Condor; Rescue Aid), T-577/20

Link to the complete text of the judgment

State aid – German air transport market – Loan granted by Germany to Condor Flugdienst – Decision declaring the aid compatible with the internal market – Article 107(3)(c) TFEU – Guidelines on State aid for rescuing and restructuring undertakings in difficulty – Intrinsic difficulties that are not the result of an arbitrary allocation of costs within the group – Difficulties that are too serious to be dealt with by the group itself – Risk of disruption to an important service

On 25 September 2019, the airline Condor Flugdienst GmbH ('Condor'), which provides air transport services mainly to tour operators from a number of German airports, filed for insolvency owing to Thomas Cook Group plc ('the Thomas Cook group'), which fully owns that airline, being placed into liquidation.

On the same day, the Federal Republic of Germany notified the European Commission of a rescue aid measure in favour of Condor, restricted to a period of six months. The notified aid was intended to maintain orderly air transport and to limit the negative consequences for Condor and its passengers and staff arising from the liquidation of its parent company by enabling Condor to continue operating until it reached a settlement with its creditors and, depending on the circumstances, until it was sold.

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission, by decision of 14 October 2019 ('the contested decision'), [43] classified the notified

[43] Commission Decision C(2019) 7429 final of 14 October 2019 on State aid SA.55394 (2019/N) – Germany – Rescue aid to Condor (OJ 2020 C 294, p. 3).

measure as State aid that was compatible with the internal market under Article 107(3)(c) TFEU and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty. [44]

The action for annulment of that decision, brought by the airline Ryanair DAC ('the applicant'), is dismissed by the Tenth Chamber (Extended Composition) of the General Court. In this instance, the court, inter alia, provides clarification regarding the assessment of the compatibility of rescue and restructuring aid with the internal market in the light of the rule, laid down by the Guidelines, that a company belonging to a larger business group is eligible for such aid only if that company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and if those difficulties are too serious to be dealt with by the group itself.

Findings of the Court

The Court rejects, in the first place, the pleas for annulment alleging that the Commission erred in law in deciding not to initiate the formal investigation procedure despite the doubts which it should have had during the preliminary examination of the compatibility of the notified aid with the internal market.

In that regard, the applicant argued, more specifically, that the finding that the notified aid was compatible with the internal market was contrary to point 22, point 44(b) and point 74 of the Guidelines, which is indicative of doubts that should have led the Commission to initiate the formal investigation procedure.

While confirming that the Commission is under an obligation to initiate the formal investigation procedure where there are doubts as to the compatibility of notified aid with the internal market, the Court rejects, first of all, the complaint alleging that the Commission infringed point 22 of the Guidelines.

In accordance with point 22, 'a company belonging to … a larger business group is not normally eligible for aid under [the Guidelines], except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself'.

As regards the part of the sentence 'except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group', it is apparent, according to the Court, from a textual, teleological and contextual interpretation of point 22 of the Guidelines that that part of the sentence merely sets out one and the same condition which is to be interpreted as meaning that the difficulties of an undertaking belonging to a group must be regarded as being intrinsic if they are not the result of an arbitrary allocation of costs within the group.

In that regard, the Court notes that the purpose of point 22 of the Guidelines is to prevent a group of undertakings from offloading its costs, debts or liabilities onto an entity within the group, thus making it eligible for rescue aid, whereas it would not be otherwise. By contrast, the objective of that point is not to exclude from the scope of rescue aid an undertaking belonging to a group solely on the ground that that undertaking's difficulties have been caused by the difficulties faced by the rest of the group or by another company in the group, in so far as those difficulties have not been created artificially or allocated arbitrarily within that group.

In the present case, since the applicant did not succeed in rebutting the Commission's findings that Condor's difficulties were the result mainly of the Thomas Cook group being placed into liquidation and not of an arbitrary allocation of costs within the group, it failed to demonstrate the existence of doubts as to the compatibility of the notified aid measure with the condition set out in point 22 of the Guidelines.

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44 OJ 2014 C 249, p. 1; 'the Guidelines'.

That conclusion is not called into question by the finding that Condor's difficulties were, in that context, connected with the write-off of significant amounts of receivables held by Condor as against the Thomas Cook group in the context of the pooling of that group's cash. The pooling of cash within a group is a common and widespread practice within groups of companies, which is intended to facilitate financing of the group while enabling companies in that group to make savings in respect of financing costs. In addition, in the present case, that cash-pooling system had been implemented by the Thomas Cook group several years previously and was not the cause of that group's difficulties.

In the absence of any concrete evidence to establish the arbitrary nature of the Thomas Cook group's cash-pooling system, it was not for the Commission to investigate, on its own initiative, the fairness of that system.

Nor, furthermore, did the applicant succeed in demonstrating the existence of doubts in respect of the examination of the condition laid down in point 22 of the Guidelines, according to which the difficulties of an undertaking which, like Condor, belongs to a group, must be too serious to be dealt with by the group itself. In that regard, the Court notes, first, that the Thomas Cook group was itself in liquidation and had ceased trading. It states, second, that the Commission was not obliged to await the outcome of discussions concerning a possible sale of Condor with a view to resolving its financial difficulties, given the urgency surrounding any rescue aid and the uncertainty that is inherent in any ongoing commercial negotiations.

Next, the Court rejects the complaint alleging that the Commission should have had doubts as to whether the notified aid met the requirements set out in point 44(b) of the Guidelines, which details the ways in which Member States may establish that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure.

In accordance with point 44(b) of the Guidelines, Member States may adduce such proof by demonstrating that 'there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in (for example, a national infrastructure provider)'.

In order for a service to be regarded as 'important', it is not necessary, according to the Court, that the undertaking providing that service play a systemic role which is important for the economy of a region of the Member State concerned; nor is it necessary that it be entrusted with a service of general economic interest or with a service that is of national importance. Accordingly, in view of the fact that the immediate repatriation of 200 000 to 300 000 Condor passengers distributed across 50 to 150 different destinations could not have been carried out at short notice by other, competing airlines, the Commission had correctly concluded that there was a risk of disruption to an important service which was hard to replicate, with the result that Condor's exit from the market was likely to involve a severe failure of that market.

Lastly, the Court also rejects as unfounded the applicant's complaint that the Commission carried out an incomplete and insufficient examination of the one time, last time condition for rescue aid laid down in point 74 of the Guidelines.

In the second place, the Court rejects the plea alleging that the Commission failed to fulfil its obligation to state reasons and, consequently, dismisses the action in its entirety.

VI. FISCAL PROVISIONS: COMMON SYSTEM OF TAXATION APPLICABLE IN THE CASE OF COMPANIES OF DIFFERENT MEMBER STATES

Judgment of the Court (Second Chamber) of 12 May 2022, Schneider Electric and Others., C-556/20

Reference for a preliminary ruling – Approximation of laws – Directive 90/435/EEC – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Article 4 and Article 7(2) – Prevention of economic double taxation of dividends

The company Schneider Electric SE and other companies, which all have their residence for tax purposes in France, redistributed to their shareholders, in the period from 2000 to 2004, dividends received from subsidiaries established, inter alia, in other Member States.

On account of that redistribution, those companies were subject to an advance payment of tax mentioned in the administrative comments. Taking the view that those administrative comments repeated provisions of national law [45] that were incompatible with the Parent-Subsidiary Directive, [46] they brought before the Conseil d'État (Council of State, France) an action for their annulment. According to the national legislation, the advance payment of tax was payable in the event of a distribution of profits giving rise to the allocation of a tax credit, where those profits had not been subject to corporation tax at the ordinary rate at the level of the parent company. In that regard, the Conseil d'État (Council of State) inferred from the *Accor* judgment [47] that the company in receipt of the dividends is entitled to a tax credit which ensures that dividends originating from companies established in France and those originating from companies established in another Member State are given the same tax treatment, a tax credit which may be set off against the advance payment of tax.

Ruling on a question referred by that court for a preliminary ruling, the Court of Justice holds that the Parent-Subsidiary Directive [48] precludes such national legislation – which provides that a parent company is liable for an advance payment of tax in the event of redistribution to its shareholders of profits paid by its subsidiaries, where those profits have not been subject to corporation tax at the ordinary rate – where the sums due in respect of that advance payment of tax exceed the 5% ceiling provided for in that directive. Furthermore, such an advance payment of tax is not covered by the provision of the Parent-Subsidiary Directive according to which that directive is not to affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends. [49]

Findings of the Court

The Court notes, first of all, that the Parent-Subsidiary Directive seeks to ensure the fiscal neutrality of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State. In order to achieve that objective, that directive aims to avoid

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45 Article 223e of the code général des impôts français (French General Tax Code), in the version applicable to the facts in the main proceedings.

46 Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6) ('the Parent-Subsidiary Directive').

47 Judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

48 Article 4(1) of the Parent-Subsidiary Directive.

49 Article 7(2) of the Parent-Subsidiary Directive.

economic double taxation of profits, in other words, to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company. [50] In that regard, the Court states that the Parent-Subsidiary Directive prohibits Member States from taxing the parent company in respect of the profits distributed by the subsidiary to its parent company, without distinction as to whether the taxable event of the taxation is the receipt of those profits or their redistribution.

Next, the Court finds that taxation of the profits distributed by a subsidiary to its parent company by the Member State of the parent company at the level of that company when they are redistributed, which would have the effect of subjecting those profits to taxation exceeding the 5% ceiling provided for in the Parent-Subsidiary Directive, [51] would result in double taxation at the level of the parent company, which is prohibited by that directive. In that regard, the Court observes that the application of the advance payment of tax, which corresponded to the tax credit applied to the dividends redistributed by the parent company to its shareholders, meant that those dividends were subject to taxation exceeding the 5% ceiling, which is prohibited by the Parent-Subsidiary Directive.

Lastly, the Court rules out a tax credit for parent companies which have received dividends from a subsidiary established in another Member State – granted to remedy the incompatibility of national legislation with EU law – from being able to remedy the effects of national legislation that are incompatible with the Parent-Subsidiary Directive. In such a case, the obtention of the tax credit is subject to the initiation of administrative and judicial procedures and to the production of evidence by the taxpayer, whereas that directive does not allow for the imposition of such conditions. Furthermore, the taking into account of the tax credit leads to an imputation method being applied to the dividends, whereas the Member State has opted for the exemption method, and does not exclude the possibility that a balance in respect of the advance payment of tax may remain.

As for the question of whether the advance payment of tax is covered by Article 7(2) of the Parent-Subsidiary Directive, the Court notes that that provision allows only for the preservation of the application of domestic or agreement-based systems which are consistent with the purpose of that directive and which are designed to eliminate or lessen economic double taxation of dividends alone. In the light of that objective, a tax levy could fall within the scope of that provision if its application did not nullify the effects of domestic or agreement-based provisions designed to eliminate or lessen that double taxation.

In that regard, the Court observes that, even though the advance payment of tax was part of the national provisions designed to prevent economic double taxation of dividends at national level, the application of that advance payment of tax was liable to have the effect of subjecting the profits received by a parent company from its subsidiaries established in another Member State to economic double taxation at the time of their redistribution. The Court adds that the application of national legislation which results in such double taxation cannot be compatible with the objective of the Parent-Subsidiary Directive, even where the effects of that double taxation may be lessened by a subsequent claim for repayment of the amounts wrongly paid in the form of a tax credit granted by the courts.

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50 Article 4(1), first indent, of the Parent-Subsidiary Directive.

51 Article 4(2) of the Parent-Subsidiary Directive.

VII. ECONOMIC AND MONETARY POLICY: PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the General Court (Second Chamber, Extended Composition) of 11 May 2022, Fininvest and Berlusconi v ECB, T-913/16

Economic and monetary policy – Prudential supervision of credit institutions – Specific supervisory tasks assigned to the ECB – Assessment of acquisitions of qualifying holdings – Opposition to the acquisition of a qualifying holding – Non-retroactivity – *Res judicata* – Application of national transposing measures – Rights of the defence – Right of access to the file – Right to be heard – New plea – Primacy of EU law – Right to effective judicial protection

In 2015, the financial holding company Mediolanum was absorbed by its subsidiary, Banca Mediolanum. Taking into account its shareholding in Mediolanum, Fininvest, a holding company incorporated under Italian law of which Silvio Berlusconi was a majority shareholder (together, 'the applicants'), became a shareholder of Banca Mediolanum. Specifically, that merger by absorption consisted of an exchange of shares by which Fininvest legally acquired shares in that credit institution.

Previously, in 2014, Banca d'Italia (Bank of Italy) had decided, first, to order the suspension of the applicants' voting rights in Mediolanum and the transfer of their shares in that institution exceeding 9.99% and, second, to reject their application for authorisation relating to a qualifying holding in that institution, on the ground that Mr Berlusconi no longer met the reputation requirement due to his conviction for tax fraud in 2013. That decision of the Bank of Italy was annulled by the judgment of the Consiglio di Stato (Council of State, Italy) of 3 March 2016.

Following the absorption of Mediolanum by Banca Mediolanum and the judgment of the Council of State of 3 March 2016, the Bank of Italy and the European Central Bank (ECB) initiated a new procedure for assessing the applicants' acquisition of a qualifying holding in Banca Mediolanum. At the end of that procedure, the ECB, having received a proposal from the Bank of Italy in that regard, took a decision by which it refused to authorise the acquisition of a qualifying holding in that credit institution. [52] One of the reasons it provided in order to justify its decision was that Mr Berlusconi did not meet the reputation requirement applicable to those with qualifying holdings. [53]

The action for annulment of the ECB's decision is dismissed by the Second Chamber (Extended Composition) of the General Court. In its judgment, the General Court provides important clarifications concerning the acquisition of a qualifying holding in a credit institution by a person who does not meet the reputation criterion.

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52 Decision ECB/SSM/2016 – 7LVZJ6XRIE7VNZ4UBX81/4 of 25 October 2016.

53 Within the meaning of Article 23(1)(a) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

Findings of the Court

First of all, after recalling the provisions of EU law governing the procedure for assessing acquisitions of qualifying holdings, [54] the General Court rules on the concept of 'acquisition of a qualifying holding'.

First, the General Court states that that concept must be regarded as an autonomous concept of EU law, which must be interpreted in a uniform manner throughout the Member States.

Secondly, in the absence of a definition of that concept in EU law, it must be interpreted as taking into account, first, the general context of its use and its usual meaning in everyday language and, second, the objectives pursued by the provisions of EU law governing the procedure for authorising acquisitions of qualifying holdings as well as the effectiveness of those provisions.

Thus, in the usual sense, the concept of acquisition of securities or shareholdings may cover different types of transactions, including share exchange transactions. Next, as regards the context in which the procedure for authorising acquisitions of a qualifying holding is conducted and its objectives, the General Court recalls that a prior assessment of the suitability of any new owner prior to the purchase of a stake in a credit institution is an indispensable tool for ensuring the suitability and financial soundness of those institutions' owners. Furthermore, in order to ensure their prudential soundness, credit institutions are expected to comply with a set of EU rules in that area, and that compliance is also directly contingent on the suitability of their owners and of any new owner prior to the purchase of a significant stake in those institutions. Lastly, the procedure for authorising acquisitions of qualifying holdings is intended to ensure sound and prudent management of the institution concerned by the proposed acquisition, as well as the suitability of the proposed acquirer and the financial soundness of the proposed acquisition, having regard to the likely influence of that acquirer on the institution in question. Consequently, the concept of 'acquisition of a qualifying holding' cannot be interpreted restrictively, since that would have the effect of enabling the assessment procedure to be circumvented by removing certain types of acquisition of qualifying holdings from the ECB's control and, therefore, of jeopardising those objectives.

Furthermore, the procedure for assessing acquisitions of qualifying holdings in a credit institution applies to both direct and indirect acquisitions. [55] Thus, where an indirect qualifying holding becomes direct or where the degree of indirect control of that qualifying holding is altered, in particular where a holding indirectly owned through two companies becomes indirectly owned through one company, the way in which the qualifying holding itself is held is altered in terms of its legal structure, with the result that such a transaction must be regarded as the acquisition of a qualifying holding.

Thirdly, under the relevant provisions of EU law in the present case, [56] the applicability of the procedure for authorising the acquisition of a qualifying holding is not subject to a change in the likely influence that the proposed acquirer may have on the credit institution. Such influence is one of the factors to be taken into account for the sole purpose of assessing the suitability of that acquirer and of the financial soundness of the proposed acquisition. [57] However, that factor is not relevant for the purpose of characterising a transaction as an acquisition of a qualifying holding.

Next, in the light of those considerations, the General Court recognises that the merger at issue, following the judgment of the Council of State of 3 March 2016, had the effect of altering the legal

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54 Article 15 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) ('the SSM Regulation'), Articles 85 to 87 of Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities ('the SSM Framework Regulation') (OJ 2014 L 141, p. 1), and Article 22(1) of Directive 2013/36.

55 Article 22(1) of Directive 2013/36.

56 Combined reading of Article 15 of the SSM Regulation and of Article 22(1) and Article 23(1) of Directive 2013/36.

57 Article 23(1) of Directive 2013/36.

structure of the applicants' qualifying holding in the credit institution in question. Thus, the ECB was fully entitled to conclude that the merger at issue constituted an acquisition of a qualifying holding.

Furthermore, the General Court rejects the applicants' arguments relating to the ECB's failure to assess the criterion of the likely influence of the proposed acquirer on the credit institution in question. The General Court clarifies, in that regard, that the reputation of the proposed acquirer does not depend on the extent of its likely influence on that institution. Since the ECB was not required to examine that criterion when assessing the reputation of the proposed acquirer, it cannot be accused of infringing the obligation to state reasons in respect of that criterion.

Lastly, the General Court rejects the applicants' allegations concerning the unlawfulness of a provision of the SSM Framework Regulation, under which the applicants were given a short time limit of three working days within which to provide their comments on the draft contested decision. [58] In that regard, the General Court notes that, in the context of a prudential supervisory procedure, such as the procedure for assessing the acquisition of a qualifying holding, there are several procedural arrangements which enable the parties concerned to be heard. Those parties may put forward all the relevant information in their application for the authorisation of an acquisition of a qualifying holding and have the opportunity to make their views on the ECB's notification known effectively. Moreover, observance of their right to be heard may also be ensured, where appropriate, by the ECB exercising its option to organise a meeting. It is for the ECB to use all the means at its disposal to ensure, in each specific case, that the right to be heard is observed.

VIII. SOCIAL POLICY: EQUAL TREATMENT IN EMPLOYMENT AND SOCIAL SECURITY

Judgment of the Court (First Chamber) of 5 May 2022, BVAEB, C-405/20

Reference for a preliminary ruling – Social policy – Article 157 TFEU – Protocol (No 33) – Equal treatment of men and women in matters of employment and occupation – Directive 2006/54/EC – Article 5(c) and Article 12 – Prohibition of indirect discrimination on grounds of sex – Occupational social security scheme applicable after the date referred to in those provisions – Retirement pensions of civil servants – National legislation providing for an annual adjustment of retirement pensions – Adjustment on a reducing scale depending on the amount of the retirement pension, with no adjustment at all above a certain amount – Justifications

EB, DP and JS, three male Austrian federal civil servants, retired between 2000 and 2013. In 2017, the gross monthly amount of their retirement pension was EUR 6 872.43, EUR 5 713.22 and EUR 4 678.48 respectively.

They each applied to the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (Insurance fund for civil servants and officials of the public authorities, the railways and the mining sector, Austria; 'the BVAEB') for an increase in the amount of their retirement pension with effect from 1 January 2018.

The BVAEB dismissed EB and DP's applications on the ground that, under the Austrian social security law applicable inter alia to federal civil servants, [59] no retirement pension was increased for 2018,

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58 Article 31(3) of the SSM Framework Regulation.

59 Paragraph 711(1), point (4) and final sentence of the Allgemeines Sozialversicherungsgesetz (General Law on social security), in conjunction with Paragraph 41(4) of the Pensionsgesetz 1965 (Law on Pensions 1965), in the versions in force at the material time.

where the total amount of that pension exceeded the upper limit of EUR 4 980 per month. Since JS's pension had not yet reached that upper limit, its amount was increased by 0.2989% on the basis of the same legislation, providing for an adjustment on a reducing scale of the amount of the retirement pensions, depending on that amount.

All three appellants brought an action before the Austrian courts, claiming, on the basis of a statistical analysis indicating that there is a higher representation of men among the recipients of pensions exceeding that upper limit, that that legislation indirectly discriminates against them on grounds of sex.

Following the dismissal of their actions, they brought an appeal on a point of law (*Revision*) before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). That court decided to ask the Court of Justice as regards the interpretation, in particular, of Protocol No 33 [60] in order to determine whether the appellants could rely on the principle of equal treatment of men and women and whether that principle [61] precludes an annual adjustment of retirement pensions such as that provided for by the Austrian legislation at issue.

In that context, the Court rules that the limitation of the temporal effects of that principle does not apply to such legislation and that that principle does not preclude that legislation, provided that the legislation in question pursues, in a consistent and systematic manner, the objectives of ensuring the long-term funding of retirement pensions and of narrowing the gap between State-funded pension levels, without going beyond what is necessary to attain those objectives.

Findings of the Court

As a first step, the Court takes the view that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in Protocol No 33 and Article 12 of the Directive on Equality between Men and Women does not apply to an annual adjustment of retirement pensions in so far as, as in the present case, such a mechanism does not have the effect of calling into question acquired rights or payments made before the reference date laid down in those provisions.

In that regard, the Court relies, in particular, on the wording of those provisions, the fact that that limitation constitutes a derogation from the general rule laid down by the FEU Treaty and that it is necessary to interpret it strictly, the clear link between the wording of that protocol and the judgment in *Barber*, [62] and the overriding considerations of legal certainty taken into account in that judgment, precluding legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many pension schemes. Such a limitation cannot, in the present case, be relied on against the appellants, who retired after 1 January 1994, the reference date applicable to the Republic of Austria, pursuant to Article 12(3) of the Directive on Equality between Men and Women.

As a second step, the Court rules that Article 157 TFEU and Article 5(c) of the Directive on Equality between Men and Women do not preclude such national legislation.

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60 In accordance with Protocol (No 33) concerning Article 157 TFEU, annexed to the FEU Treaty ('Protocol No 33'), for the purposes of the application of Article 157 TFEU, benefits under occupational social security schemes are not to be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990. Article 12(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23; 'the Directive on Equality between Men and Women') provides also that all benefits under occupational social security schemes derived from periods of employment subsequent to that date are to be covered by the measures implementing Title II, Chapter 2, of that directive, relating to equal treatment in those schemes.

61 As enshrined in Article 157 TFEU and Article 5 of the Directive on Equality between Men and Women, prohibiting all direct or indirect discrimination on grounds of sex in occupational social security schemes as regards the calculation of benefits.

62 Judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), pursuant to which the direct effect of Article 119 of the EEC Treaty (later, after amendment, Article 141 EC, now Article 157 TFEU) may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of delivery of that judgment.

If the statistics available to the referring court were to show indirect discrimination on grounds of sex, in the event that that legislation is to the disadvantage of a significantly greater proportion of male beneficiaries as compared with female beneficiaries, that discrimination could be justified by the legitimate social policy objectives pursued, consisting of ensuring the long-term funding of retirement pensions and narrowing the gap between State-funded pension levels.

In addition, the Court states that the legislation at issue is implemented in a consistent and systematic manner, in so far as the annual adjustment of retirement pensions applies to all recipients of State pensions, which is, however, a matter for the referring court to ascertain.

In view of the broad discretion enjoyed by the Member States in the choice of measures capable of attaining the objectives of their social policy, the consistency of that legislation cannot be called into question either by the fact that other social policy instruments seeking to attain the objective of supporting low incomes are already in place or by the fact that the pensions of private occupational social security schemes and the salaries of civil servants in active employment have not been the subject of the same adjustment measure.

Lastly, nor does the legislation at issue appear to go beyond what is necessary to attain the objectives pursued, in the light of the fact that it takes account of the ability to contribute of the persons concerned, as the limits on the increase of pensions are staggered according to the amounts of benefits granted and the increase is precluded only as regards the highest pensions.

IX. CONSUMER PROTECTION

Judgment of the Court (Third Chamber) of 5 May 2022, Victorinox, C-179/21

Link to the complete text of the judgment

Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Article 6(1)(m) – Distance contract between a consumer and a trader – Obligation of the trader to inform the consumer of the existence and the conditions of a manufacturer's commercial guarantee – Conditions under which such an obligation arises – Content of the information to be provided to the consumer about the manufacturer's commercial guarantee – Impact of Article 6(2) of Directive 1999/44/EC

The company absoluts -bikes and more- GmbH & Co. KG ('absoluts') offered for sale, on the internet platform Amazon, a product made by a Swiss manufacturer. The Amazon page offering that product for sale contained no information on any guarantee provided by absoluts or a third party for that product, but contained, under the subheading 'Further technical information', a link by means of which the user could access an information sheet designed by the manufacturer.

Taking the view that absoluts did not provide sufficient information on the guarantee offered by the manufacturer, a competitor brought an action in accordance with the German legislation on unfair competition for an order requiring absoluts to cease offering such goods. With the case now before the Bundesgerichtshof (Federal Court of Justice, Germany), that court had doubts as to whether, under the Consumer Rights Directive, [63] a trader in absoluts' situation is required to inform the consumer of the existence of a manufacturer's commercial guarantee. That court also raised the question of the scope of such an obligation and the conditions under which it arose.

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63 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64; 'the Consumer Rights Directive').

In its judgment, the Court of Justice finds that, under the Consumer Rights Directive, a trader is required to provide the consumer with pre-contractual information concerning the manufacturer's commercial guarantee where the consumer has a legitimate interest in obtaining that information in order to decide whether to enter into a contractual relationship with the trader. The Court also finds that that information must include all details relating to the conditions of application and implementation of such a guarantee, enabling the consumer to make such a decision.

Findings of the Court

In the first place, as regards the question of whether the trader is required to inform the consumer of the existence of a manufacturer's commercial guarantee, [64] the Court makes clear that, where the subject matter of the contract relates to goods manufactured by a person other than the trader, that obligation must cover all essential information about those goods so that the consumer can decide whether he or she wishes to be contractually bound to the trader. According to the Court, that information includes the main characteristics of the goods [65] and, in principle, all guarantees inherently linked to those characteristics, including the commercial guarantee offered by the manufacturer. However, the Court notes that, although the communication of information on the manufacturer's commercial guarantee ensures a high level of protection for the consumer, an unconditional obligation to provide such information, in all circumstances, seems to be disproportionate. Such an obligation would require the trader to carry out considerable work collecting and updating information on such a guarantee, even though he or she does not necessarily have a direct contractual relationship with the manufacturer and the commercial guarantee from that manufacturer does not, in principle, fall within the scope of the contract which the trader intends to conclude with the consumer.

Consequently, the Court considers that, in weighing up a high level of consumer protection and the competitiveness of enterprises, the trader is required to provide the consumer with pre-contractual information relating to the manufacturer's commercial guarantee only if the consumer has a legitimate interest in obtaining that information in order to decide whether to enter into a contractual relationship with the trader. That obligation on the part of the trader therefore arises not merely through the existence of that guarantee, but through the presence of such a legitimate interest on the part of the consumer. In that regard, the Court specifies that that interest is established if the trader makes the manufacturer's commercial guarantee a central or decisive element of his or her offer, in particular where that guarantee has been made for sales purposes in such a way as to improve the competitiveness and attractiveness of its offer in comparison with his or her competitors' offers.

The Court adds that, in order to determine whether the manufacturer's commercial guarantee constitutes a central or decisive element of the trader's offer, account must be taken of the content and general layout of the offer with regard to the goods concerned, the importance of referring to the manufacturer's commercial guarantee for sales or advertising purposes, the space occupied by that reference in the offer, the likelihood of mistake or confusion which that reference might trigger in the mind of the average consumer, who is reasonably well informed and reasonably observant and circumspect with respect to the different rights which he or she may exercise under a guarantee or to the real identity of the guarantor, of whether there might be explanations relating to other guarantees covering the goods, and of any other element capable of establishing an objective need to protect the consumer.

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64 Article 6(1)(m) of the Consumer Rights Directive. Under that provision, before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader must provide him, in a clear and comprehensible manner, with information relating to the existence and the conditions of after-sale customer assistance, after-sales services and commercial guarantees.

65 That obligation is laid down in Article 6(1)(a) of the Consumer Rights Directive.

In the second place, as regards the question of what information must be provided to the consumer with regard to the 'conditions of' the manufacturer's commercial guarantee, [66] the Court finds that the trader is required to provide to the consumer, in order to meet the consumer's legitimate interest in obtaining information on the manufacturer's commercial guarantee allowing him or her to decide whether to enter into a contractual relationship with the trader, any information relating to the conditions of application and implementation of the commercial guarantee concerned. In addition to the duration and territorial scope of the guarantee expressly referred to in the second indent of Article 6(2) of the directive on the sale of consumer goods and associated guarantees, [67] those elements may include not only the place of reparation in the event of damage or any guarantee restrictions, but also, depending on the circumstances, the name and address of the guarantor.

Judgment of the Court (Grand Chamber) of 17 May 2022, Ibercaja Banco, C-600/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Mortgage enforcement proceedings – Unfairness of the term setting the nominal rate for default interest, and of the advanced repayment term in the loan agreement – Force of *res judicata* and time-barring – Loss of the possibility of relying on the unfairness of a contractual term before a court – Power of review by the national court of its own motion

Judgment of the Court (Grand Chamber) of 17 May 2022, SPV Project 1503 and Others., C-693/19 and C-831/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Payment order and attachment proceedings against third parties – Force of *res judicata* implicitly covering the validity of the terms of an enforceable instrument – Power of the court hearing the enforcement proceedings to examine of its own motion the potential unfairness of a term

Judgment of the Court (Grand Chamber) of 17 May 2022, Impuls Leasing România, C-725/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Enforcement proceedings in respect of a leasing contract constituting an enforceable instrument – Objection to enforcement – National legislation not allowing the court hearing that objection to determine whether the terms of an enforceable instrument are unfair – Power of the court hearing the enforcement proceedings to examine of its own motion whether a term is

66 That concept appears in Article 6(1)(m) of the Consumer Rights Directive.

67 Directive 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

unfair – Existence of an action under ordinary law allowing the review of whether those terms were unfair – Requirement of a security in order to suspend the enforcement proceedings

Judgment of the Court (Grand Chamber) of 17 May 2022, Unicaja Banco, C-869/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Mortgage agreement – Unfairness of the 'floor clause' in the agreement – National rules concerning the judicial appeal procedure – Limitation of the temporal effects of the declaration that an unfair term is void – Restitution – Power of review by the national appeal court of its own motion

The Court has received five requests for a preliminary ruling, from Spanish courts (*Ibercaja Banco*, C-600/19, and *Unicaja Banco*, C-869/19), an Italian court (*SPV Project 1503*, C-693/19 and C-831/19) and a Romanian court (*Impuls Leasing România*, C-725/19), all concerning the interpretation of the Directive on unfair terms. [68]

Those requests form part of different types of proceedings. Thus, the request in *Ibercaja Banco* concerns mortgage enforcement proceedings in which the consumer did not lodge any objection and the right of ownership of the mortgaged property had already been transferred to a third party. In *Unicaja Banco*, the request was made in appeal proceedings brought following the judgment in *Gutiérrez Naranjo and Others*. [69] For their part, the requests for a preliminary ruling in the Joined Cases *SPV Project 1503* concern enforcement proceedings based on enforceable instruments which have acquired the force of *res judicata*. Lastly, the request in *Impuls Leasing România* has been made in the context of enforcement proceedings on the basis of a leasing contract forming an enforceable instrument.

By its four Grand Chamber judgments, the Court of Justice develops its case-law on the obligation and power of national courts to examine of their own motion whether contractual terms are unfair under the Directive on unfair terms. In that regard, the Court clarifies the interaction between the principle of *res judicata* and time-barring, on the one hand, and the review of unfair terms by the courts, on the other. The Court also rules on the scope of that review in accelerated proceedings for the recovery of consumer debt and on the relationship between certain procedural principles enshrined in national law relating to appeals and the power of a national court to examine of its own motion whether contractual terms are unfair.

Findings of the Court

In the first place, the Court clarifies the relationship between the principle of *res judicata* and the power of the court hearing the enforcement proceedings to examine of its own motion, in the course of order for payment proceedings, whether a contractual term forming the basis of that order is unfair.

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68 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, 'the Directive on unfair terms').

69 Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980). In that judgment, the Court of Justice essentially held that the case-law of the Tribunal Supremo (Supreme Court, Spain) imposing a temporal limitation on the repayment of amounts that consumers wrongly paid to banks on the basis of an unfair term known as a 'floor clause', was contrary to Article 6(1) of the Directive on unfair terms and that those consumers are, therefore, entitled to repayment in full of those amounts pursuant to that provision.

In that regard, the Court finds that the Directive on unfair terms [70] precludes national legislation under which, where an order for payment has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not review the potential unfairness of the contractual terms on which that order is based, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms. More specifically, legislation under which an examination of the court's own motion of the unfairness of contractual terms is deemed to have taken place and to have the force of *res judicata*, even where there is no statement of reasons to that effect in the decision issuing the order for payment, is liable to render meaningless the national court's obligation to examine of its own motion the potential unfairness of those terms. In such a case, the requirement of effective judicial protection necessitates that the court hearing the enforcement proceedings is able to assess, including for the first time, whether the contractual terms which served as the basis for the order for payment are unfair. The fact that, at the time when the order became final, the debtor was unaware that he or she could be classified as a 'consumer', within the meaning of that directive, is irrelevant in that regard.

In the second place, the Court examines the interaction between the principle of *res judicata*, time-barring and the power of a national court to examine of its own motion whether a contractual term is unfair in the course of mortgage enforcement proceedings.

First, the Court finds that the Directive on unfair terms [71] precludes national legislation which, by virtue of the effect of *res judicata* and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings. That interpretation of the directive is applicable where those terms have already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the decision authorising the mortgage enforcement does not contain any express reference or grounds concerning that examination, nor state that such an examination could no longer be called into question if an objection were not lodged. Since the consumer was not informed of the existence of an examination by the court of its own motion of the unfairness of the contractual terms, in the decision authorising the mortgage enforcement, he or she was unable to assess, with full knowledge of the facts, whether it was necessary to bring proceedings against that decision. An effective review of the possible unfairness of contractual terms could not be guaranteed if the force of *res judicata* extended also to judicial decisions which do not indicate such a review.

Secondly, the Court finds, on the other hand, that national legislation which does not allow a national court, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms once the mortgage security has been realised, the mortgaged property sold and the ownership rights in that property transferred to a third party, is compatible with the Directive on unfair terms. [72] That conclusion is, however, subject to the condition that the consumer whose mortgaged property has been sold can assert his or her rights by means of subsequent proceedings with a view to obtaining compensation for the financial damage caused by the application of the unfair terms.

In the third place, the Court examines the relationship between certain national procedural principles governing appeal proceedings, such as the principle of the delimitation of the subject matter of an action by the parties, the principle of the correlation between the claims put forward in the action and the rulings contained in the operative part, and the principle of the prohibition of *reformatio in peius*, and the national court's power to examine of its own motion whether a term is unfair.

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70 In particular, Article 6(1) and Article 7(1) of that directive.

71 Idem.

72 Idem.

In that regard, the Court considers that the Directive on unfair terms [73] precludes the application of such national procedural principles, under which a national court, hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, cannot raise of its own motion a ground relating to the infringement of a provision of that directive and order the repayment of those sums in full, where the failure of the consumer concerned to challenge that temporal limitation cannot be attributed to his or her complete inaction. As regards the case in the main proceedings before the referring court, the Court states that the fact that the consumer concerned did not bring an appeal within an appropriate period might be attributable to the fact that the period within which she could bring an appeal had already expired when the Court delivered the judgment in *Gutiérrez Naranjo and Others*, by which it held that national case-law temporally limiting the restitutory effects connected with the finding of unfairness of a contractual term by a court was incompatible with that directive. Consequently, in the case in the main proceedings, the consumer concerned had not displayed complete inaction in failing to bring an appeal. In those circumstances, the application of the national procedural principles depriving her of the means enabling her to assert her rights under the Directive on unfair terms is contrary to the principle of effectiveness, since it is liable to make the protection of those rights impossible or excessively difficult.

In the fourth and last place, the Court considers the power of the national court to examine of its own motion whether the terms of an enforceable instrument are unfair when hearing an objection to enforcement of that instrument.

In that regard, the Court finds that the Directive on unfair terms [74] and the principle of effectiveness preclude national legislation which does not allow the court hearing the enforcement proceedings in respect of a debt, before which an objection to enforcement has been lodged, to assess, of its own motion, or at the request of the consumer, whether the terms of a contract which constitutes an enforceable instrument are unfair, where the court having jurisdiction to rule on the substance of the case, which may be seised of a separate action under the ordinary law with a view to an assessment as to whether the terms of that contract are unfair, may only suspend the enforcement proceedings until a decision has been given on the substance if a security is paid, calculated for example on the basis of the value of the subject matter of the action, at a level that is likely to dissuade the consumer from bringing and maintaining such an action. As regards that security, the Court states that the costs which legal proceedings would entail in relation to the amount of the disputed debt must not be such as to discourage the consumer from bringing an action before the court. However, it is likely that a debtor in default does not have the financial resources necessary to provide the guarantee required. That is all the more so if the value of the actions brought greatly exceeds the total value of the contract, as would appear to be the case in the action in the main proceedings.

X. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (Tenth Chamber, Extended Composition) of 4 May 2022, CRIA and CCCMC v Commission, T-30/19 and T-72/19

Link to the complete text of the judgment

Dumping – Subsidies – Imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in China – Definitive anti-dumping duty – Definitive countervailing duty – Action for annulment – *Locus standi* – Direct concern – Individual concern –

73 In particular, Article 6(1) of that directive.

74 In particular Article 6(1) and Article 7(1) of that directive

Regulatory act which does not entail implementing measures – Interest in bringing proceedings – Injury to the EU industry – Objective examination – Causal link – Calculation of the price undercutting and the injury margin – Fair comparison of prices – Constructed import prices – Prices charged to first independent buyers – Difference in the level of trade – Complex economic assessments – Intensity of judicial review – Injury indicators – Weighting of the data – Access to non-confidential investigation data – Rights of the defence

After receiving several complaints, the European Commission adopted, following an investigation, two implementing regulations [75] ('the contested regulations') imposing, respectively, a definitive anti-dumping duty and a definitive countervailing duty on imports into the European Union of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 ('the product concerned'), originating in the People's Republic of China.

The associations China Rubber Industry Association (CRIA) and China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC; 'the applicants'), acting on behalf of some of their members, brought two actions for partial annulment of the contested regulations.

By upholding those actions, the General Court recognises, for the first time, that exporting producers which are not identified by name in anti-dumping and anti-subsidy regulations, annulment of which is sought, have standing to bring proceedings. In addition, it applies and clarifies the case-law relating to the Commission's obligation to carry out a fair comparison, when calculating undercutting of import prices subject to anti-dumping and anti-subsidy investigations, of prices at the same level of trade with a view to assessing whether injury has been suffered by the EU industry on account of those imports.

Findings of the Court

Regarding, first of all, the admissibility of the actions, the Court holds that the applicants, as representative associations, have standing to bring proceedings under the third limb of the sentence in the fourth paragraph of Article 263 TFEU against the definitive anti-dumping and countervailing duties imposed on imports of the products manufactured by the companies Weifang Yuelong Rubber and Hefei Wanli Tire ('the companies in question'), even though those companies are not identified by name in the contested regulations.

In that regard, the Court recalls that, for an action to be admissible under that provision, three cumulative conditions must be fulfilled: the contested measure must (i) be of a regulatory nature, (ii) be of direct concern to the applicant and (iii) not entail implementing measures.

Regarding the contested regulations, the Court finds, in the first place, that they are regulatory acts in so far as they are of general application and were not adopted following an ordinary or special legislative procedure.

In the second place, those regulations are of direct concern to the companies in question as exporting producers of the product concerned, as they impose definitive anti-dumping and countervailing duties on imports of the products manufactured by 'all the companies other than' those they identify by name, including the companies in question, thereby affecting their legal position.

In the third and last place, the Court confirms that those regulations do not entail implementing measures with regard to the companies in question. Although there are implementing measures with

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75 Commission Implementing Regulation (EU) 2018/1579 of 18 October 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163 (OJ 2018 L 263, p. 3) and Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Implementing Regulation 2018/1579 (OJ 2018 L 283, p. 1).

regard to the importers in the form of measures adopted by national authorities setting the amount of the anti-dumping and countervailing duties for the purpose of recovering those duties, there are no implementing measures, by contrast, in respect of the exporting producers.

Regarding, next, the substance of the case, the applicants had raised several pleas alleging various infringements of the basic anti-dumping regulation [76] and the basic anti-subsidy regulation, [77] including a plea alleging errors committed by the Commission in determining the effects on prices and the elimination level of the injury suffered by the EU industry.

In that regard, the Court recalls that the obligation to carry out an objective examination of the existence of injury suffered by the EU industry due to dumped or subsidised imports, laid down in Article 3(2) of the basic anti-dumping regulation and Article 8(1) of the basic anti-subsidy regulation, respectively, requires a fair comparison to be made, that is, at the same level of trade, between the price of the product concerned and the price of the like product of the EU industry when sold in the territory of the European Union.

However, it is apparent from the evidence adduced that, in the case of the same sales model characterised by the use of related selling entities, the Commission treated differently the sales of EU producers and those of Chinese exporting producers by taking into consideration, for the former, prices of resale to first independent buyers and, for the latter, constructed sales prices at EU frontier level. In those circumstances and given that it has not been established that the selling entities related, respectively, to Chinese exporting producers and to EU producers play different economic roles, the Court finds that Article 3(2) of the basic anti-dumping regulation and Article 8(1) of the basic anti-subsidy regulation have been infringed in so far as the Commission had calculated the undercutting by comparing prices of the product concerned at different levels of trade.

Last, the Court observes that the error found in the calculation of the price undercutting is capable of calling into question the lawfulness of the contested regulations. That error had an impact, first, on the Commission's analysis of the existence of injury and of a causal link and, second, on the calculations of the amount of the definitive anti-dumping and countervailing duties. Therefore, the Court finds that the contested regulations must be annulled to the extent that they concern the companies in question.

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76 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

77 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55).

Order of the General Court (Fourth Chamber) of 2 May 2022, Airoldi Metalli v Commission, T-328/21

Link to the complete text of the order

Action for annulment – Dumping – Imports of aluminium extrusions originating in China – Act imposing a definitive anti-dumping duty – Importer – Regulatory act entailing implementing measures – Act not of individual concern – Inadmissibility

Following a complaint lodged by an association representing European producers of aluminium extrusions ('the product concerned'), the European Commission adopted, after its anti-dumping investigation, an implementing regulation imposing a definitive anti-dumping duty on imports of the product concerned originating in the People's Republic of China. [78]

Airoldi Metalli SpA ('the applicant'), which is an importer of the product concerned, brought an action for annulment of the contested regulation.

The Commission raised an objection of inadmissibility against that action, on the ground that the applicant did not have standing to bring proceedings under the fourth paragraph of Article 263 TFEU, since the contested regulation entailed implementing measures with regard to it and was not of individual concern to it.

That objection of inadmissibility is upheld by the General Court, which, in the light of the applicant's arguments concerning the automation of customs procedures following an amendment to the customs legislation, clarifies its case-law in accordance with which regulations imposing definitive anti-dumping duties entail implementing measures within the meaning of the fourth paragraph of Article 263 TFEU.

Findings of the Court

As a preliminary point, the General Court observes that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person (first limb) or which is of direct and individual concern to them (second limb), and against a regulatory act which is of direct concern to them and does not entail implementing measures (third limb).

After finding that, in the circumstances of the present case, the applicant was not the addressee of the contested regulation and noting that, in accordance with settled case-law, such regulations are of direct concern to an importer such as the applicant, the Court examines whether the applicant had standing to bring proceedings against the contested regulation under the second or third limb of the fourth paragraph of Article 263 TFEU.

As regards, in the first place, the third limb relating to the absence of implementing measures for the contested regulatory act, the Court notes that, in accordance with settled case-law, brought under the provisions of the 1992 Customs Code [79] and reproduced pursuant to the provisions of the 2013

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78 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 contested regulation').

79 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended ('the 1992 Customs Code').

Customs Code, [80] regulations imposing definitive anti-dumping duties entail implementing measures with regard to importers liable to pay those duties consisting in the communication or notification to the importer of the customs debt to which those duties give rise.

In particular, the Court notes that the provisions of the 2013 Customs Code provide that, inter alia, the amount of duty payable is to be determined by the national customs authorities, that amount is to be notified to the debtor by those authorities and, where the amount of that debt is equal to the amount declared by the importer, release of the goods by the customs authorities is to be equivalent to notifying the debtor of the customs debt. It cannot therefore be inferred from the amendment of the customs legislation that, under the 2013 Customs Code, which is applicable in the present case, regulations imposing definitive anti-dumping duties no longer entail implementing measures with regard to importers. That is all the more so since those provisions of the 2013 Customs Code differ very little from those previously in force.

According to the Court, those considerations are not, first of all, affected by the computerisation of the information exchange system introduced by the 2013 Customs Code. That computerisation concerns exchanges between economic operators and customs authorities and does not as such mean that imports of products and the payment of anti-dumping duties henceforth involve only economic operators without any subsequent involvement by national customs authorities.

Examining, next, the process for making a customs declaration and determining the duty payable, the Court finds that the contested regulation can have effect only after the importer makes a customs declaration in the electronic customs system, which is itself necessarily followed by a measure adopted by the national customs authorities. While it is true that that measure most often takes the form of an electronic communication, the fact remains that it is a measure adopted by the national authorities.

Lastly, the Court observes that to infer from the automation introduced by the 2013 Customs Code that the contested regulation does not entail implementing measures would amount to making assessment of the legal criterion of there being no implementing measures for an act subject to purely technical circumstances. Such a simplification of a substantive nature, even if it remained justified by the national authorities' lack of discretion in their implementation of the contested regulation, cannot have such consequences.

In the light, in particular, of those considerations, the Court concludes that the applicant does not have standing to bring an action for annulment of the contested regulation under the third limb of the fourth paragraph of Article 263 TFEU, in so far as that regulation entails implementing measures with regard to the applicant.

Finding, in the second place, that, in addition, the contested regulation is not of individual concern to the applicant, within the meaning of the second limb of the fourth paragraph of Article 263 TFEU, the Court dismisses the action for annulment as inadmissible.

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80 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the Union Customs Code (OJ 2013 L 269, p. 1), as amended ('the 2013 Customs Code').

XI. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Fourth Chamber) of 18 May 2022, Foz v Conseil, T-296/20

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds – Error of assessment – Proportionality – Right to property – Right to pursue an economic activity – Misuse of powers – Obligation to state reasons – Rights of the defence – Right to a fair trial – Determination of listing criteria

Amer Foz is a businessperson of Syrian nationality. In February 2020, his name was added to the list of persons and entities subject to the restrictive measures adopted against the Syrian Arab Republic by the Council of the European Union [81] and was subsequently maintained on those lists in May 2020 and May 2021. [82] He was included on those lists on the basis that he was a leading businessperson with personal and family business interests and activities in multiple sectors of the Syrian economy who benefits financially from access to commercial opportunities and supports the Syrian regime, while being associated with his brother, Samer Foz, who is also included on those lists. In May 2021, the Council had also stated that Amer Foz was carrying out numerous commercial projects with his brother, in particular in the cable manufacture and solar power sectors, and that the two brothers were carrying on various activities with the Islamic State of Iraq and the Levant ('ISIL') on behalf of the Syrian regime, including the supply of arms and ammunition in exchange for oil and wheat.

Amer Foz's name had been included on the lists at issue on the basis that he met three criteria, namely that of leading businessperson operating in Syria, that of association with the Syrian regime and that of association with a person or entity subject to restrictive measures. [83]

The Court dismisses the action for annulment brought by Amer Foz against the acts which included his name on the lists at issue ('the initial measures', 'the 2020 maintaining acts' and 'the 2021 maintaining acts'), specifying the criteria relating to that inclusion in the event of the simultaneous application by the Council of various listing criteria. In that context, the Court defines, inter alia, the scope of the criterion of association with another person or entity that is already subject to restrictive measures. It also examines, for the first time, the condition requiring there to be sufficient information that the persons included on the lists do not pose a real risk of circumventing the measures adopted. If that condition is met, a person who is associated with another person or entity subject to restrictive measures is then not to be maintained on those lists.

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81 Council Implementing Decision (CFSP) 2020/212 of 17 February 2020 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 43 I, p. 6) and Council Implementing Regulation (EU) 2020/211 of 17 February 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 43 I, p. 1).

82 Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1); Council Decision (CFSP) 2021/855 of 27 May 2021 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2021 L 188, p. 90) and Council Implementing Regulation (EU) 2021/848 of 27 May 2021 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2021 L 188, p. 18).

83 The reasons relate, first, to the criterion of a leading businessperson operating in Syria, defined in Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255, as amended by Decision 2015/1836, and in Article 15(1a)(a) of Regulation No 36/2012, as amended by Regulation 2015/1828, second, to the criterion of association with the Syrian regime defined in Article 27(1) and Article 28(1) of that decision and Article 15(1)(a) of that regulation and, lastly, to the criterion of association with a person or entity subject to restrictive measures, defined in the last phrase of Article 27(2) and Article 28(2) of Decision 2013/255 and in the last phrase of Article 15(1a) of Regulation No 36/2012.

Findings of the Court

The Court notes, first of all, that, for the same person, the reasons for inclusion might overlap while relating, in such a situation, to different criteria. In application, by analogy, of the judgment in *Kaddour* v *Council*, [84] a person may be classified as a leading businessperson operating in Syria and be regarded as being associated, in particular by business links, to another person who is subject to restrictive measures through such operating. Similarly, that person may be associated with the Syrian regime while being associated, for the same reasons, to a person covered by the restrictive measures.

As regards, next, the criterion of Amer Foz's association with a person or entity subject to restrictive measures, [85] the Court points out that Amer Foz's brother was listed because of his status as a leading businessperson operating in Syria and his association with the Syrian regime. Since the Council has not established before the Court [86] that the measures adopted against him should be annulled, those measures enjoy the presumption of legality associated with acts of the EU institutions and therefore continue to produce legal effects until such time as they are withdrawn, annulled or declared invalid. Since the Council does not contend that being a member of the Foz family is an autonomous listing criterion, unlike being a member of the Al-Assad or Makhlouf families, according to Decision 2013/255, the Court finds that the existence of that brotherhood link must be examined as a matter of fact, in particular in the context of the examination of the business links between Amer and Samer Foz.

The Court concludes in that regard that the Council has adduced a set of indicia that is sufficiently specific, precise and consistent with regard to the links between Amer and Samer Foz in the context of those business relations, at the date of adoption of the initial measures, first, through the family business Aman Holding and the company ASM International General Trading, second, through that family business with respect to the 2020 maintaining acts, and, lastly, in respect of the 2021 maintaining acts, on the basis that they carried on activities with ISIL on behalf of the Syrian regime. The existence of business links between the two men is also reflected in a form of concertation in how their share portfolios are managed.

Lastly, in the light of the relevant provisions of Decision 2013/255, as amended by Decision 2015/1836, in view of the privileged position of Samer Foz in the Syrian economy and his influence, the current or past business links between Amer and Samer Foz, the fact that they are brothers, the significance of the family business in which they held shares and occupied positions of responsibility and the fact that it is impossible to rule out concertation between Amer Foz and his brother in the disposal of their shares in various companies, the Court finds that it is reasonable to think that Amer Foz poses a real threat of circumvention of the restrictive measures.

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84 Judgment of 23 September 2020, *Kaddour* v *Council* (T-510/18, EU:T:2020:436, paragraph 77).

85 Article 27(2) and Article 28(2) of Decision 2013/255, as amended by Decision 2015/1836.

86 On that point, see judgment of 24 November 2021, *Foz* v *Council* (T-258/19, not published, EU:T:2021:820).

XII. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: OWN RESOURCES OF THE EUROPEAN UNION

Judgment of the General Court (Sixth Chamber) of 11 May 2022, Czech Republic v Commission, T-151/20

Own resources of the European Union – Financial liability of a Member State – Import duties – Payment to the Commission of amounts corresponding to non-recovered own resources – Action based on unjust enrichment of the European Union – Obligations of a Member State with regard to own resources – Obligation to lodge a security – Exemption from making available amounts corresponding to established entitlements declared irrecoverable

In November 2007, the European Anti-Fraud Office (OLAF) carried out an inspection mission in Laos, in which a representative of the Czech customs authorities participated. The investigation concerned checks on the importation from Laos, into various EU countries, of pocket lighters between 2004 and 2007. According to the final mission report, Baide lighter Industry (LAO) Co., Ltd ('BAIDE') imported pocket lighters originating in China, but presented at customs as originating in Laos, thereby avoiding the anti-dumping duty applicable to pocket lighters of Chinese origin.

On the basis of that report's findings, which covered, inter alia, 28 cases in which pocket lighters were imported by BAIDE into the Czech Republic and released for free circulation, taking place between 2005 and 2007, the competent Czech customs authorities took measures to adjust and recover the tax in those cases. By letter of 20 January 2015, the European Commission informed the Czech Republic, in response to the latter's request to be released from the obligation to put at the Commission's disposal the amounts corresponding to the established entitlements which had proved irrecoverable, that the conditions set out in Article 17(2) of Regulation No 1150/2000 [87] were not satisfied in any of the cases at issue. The Commission called on the Czech Republic to adopt, within a specified time limit, the measures necessary so that its account be credited with the amount of 53 976 340 Czech koruny (CZK).

After paying 75% of that amount into the Commission's account ('the sum at issue'), the Czech Republic brought an action before the General Court seeking an order that the Commission reimburse it the sum at issue on account of the unjust enrichment of the European Union.

The General Court has upheld the action in so far as it concerns the repayment by the Commission of the sum of CZK 17 828 399.66 paid in respect of the European Union's own resources. In that context, it has examined, inter alia, the conditions which must be met by an action based on unjust enrichment, the cooperation between the Member States and the Commission in an investigative mission in a third country and the obligation to lodge a security for the purpose of the recovery of own resources.

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87 Article 17(2) of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 2007/436/EC, Euratom on the system of the European Communities own resources (OJ 2000 L 130, p. 1) provides: 'Member States shall be released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements which prove irrecoverable either (a) for reasons of force majeure; or (b) for other reasons which cannot be attributed to them. …'

Findings of the Court

The Court holds, first of all, that the Czech Republic cannot establish that its claims are well founded, in an action based on the Commission's unjust enrichment, by merely refuting the arguments contained in the letter of 20 January 2015. On the contrary, it has to prove, first, that the Commission's enrichment as a result of the sum at issue being put at its disposal is not justified with regard to the obligations imposed on that Member State under EU law in the area of own resources and, secondly, that the Czech Republic's impoverishment is linked to that unjust enrichment. The Czech Republic's obligations in terms of own resources do not stem from the letter of 20 January 2015, but result directly from the legislation applicable in that field. Thus, that letter cannot constitute the framework for the dispute inasmuch as it limits the Commission's arguments seeking to challenge the fact of unjust enrichment to those contained in that letter.

Secondly, the Court takes the view that the Czech Republic cannot be required, in its action based on unjust enrichment, to establish that the entire procedure in the customs proceedings, the recovery of the claim and the transactions in relation to own resources was executed in accordance with all the rules, correctly, in due time and in compliance with the protection of the financial interests of the European Union, but that it must solely establish, in addition to its impoverishment and the corresponding enrichment, that there was no justification for such enrichment.

In addition, after observing that the Member States' cooperation with the Commission is an essential requirement for complying with the customs legislation in the European Union, the Court notes that, to that end, Community administrative and investigative cooperation missions are carried out in third countries by officials appointed for that purpose by the Member States [88] The information obtained in those missions may be used to enable the prosecution of transactions contrary to the customs legislation, and in legal actions or prosecutions initiated as a result. In particular, they may be invoked as evidence by the competent authorities of the Member States. [89]

In those circumstances, the representative of the Czech customs authority within the inspection mission was fully entitled to request from OLAF the evidence annexed to the minutes and to communicate it to the competent authorities of the Czech Republic so that those authorities could use it as evidence against BAIDE in the proceedings for recovery of the customs debt payable by that company. In the present case, OLAF, which had agreed to communicate to the Czech Republic the evidence collected during its investigative mission at the beginning of 2008, communicated its report, to which such evidence was attached, late. In those circumstances, the Czech Republic cannot be criticised for not being in possession of the evidence necessary for establishing the anti-dumping duty payable by BAIDE on the 28 cases of importation at issue as of the return of the inspection mission and for waiting for the communication of OLAF's report in order to establish the duties payable by that company.

Moreover, as regards the obligation to lodge a security for the purposes of the recovery of own resources, the Court observes that where the customs authorities of the Member States consider that the verification of the customs declaration may result in a higher amount of import duty becoming payable than that resulting from the particulars of the customs declaration, the release of the goods will be authorised after the lodging of a security sufficient to cover the difference between those amounts. [90] The discretion available to those authorities, when they decide on the need to demand such a security, is limited by the principle of effectiveness, [91] under which effective protection of the

88 In accordance with Article 20(2) of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1).

89 In accordance with Article 21(2) of Regulation No 515/97.

90 See the first sentence of Article 74(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), read in conjunction with Article 248 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1).

91 The principle of effectiveness is set out in Article 325(1) TFEU.

European Union's financial interests must be ensured against any fraud or any other illegal activities liable to adversely affect those interests. The scope of the principle of effectiveness, inasmuch as that principle applies to the specific obligation on the Member States to guarantee the effective and full collection of the European Union's own resources constituted by customs duties, cannot be determined in an abstract and fixed manner, since it depends on the characteristics of that fraud or other illegal activity, which may furthermore change over time.

In that regard, the Court finds that the Czech Republic was required to lodge a security for the purposes of the recovery of the anti-dumping duties likely to be payable by BAIDE as of the adoption of the risk profile, from which it was apparent, in particular, that there was a 'reasonable suspicion' of circumvention of the customs legislation, that is, as of 22 March 2006. Contrary to what was maintained by the Czech Republic, the lodging of a security for the purposes of recovering the sum at issue did not require, when the goods at issue were released, certainty that their origin was different from that declared, but only that there were indications that might result, when those goods were checked, in a higher amount of duty being determined than that resulting from the particulars of the customs declaration. In addition, the mere fact that the Laotian authorities confirmed the authenticity of the certificates of origin enclosed by BAIDE in two of the 28 cases of importation at issue could not, in any event, suffice to dispel the doubts that the Czech Republic itself had on the basis of the information communicated by OLAF having regard to all of BAIDE's imports from Laos.

Lastly, the Court takes the view that the cessation by BAIDE of its activity, prior to the filing of OLAF's report, which enabled the customs duties payable by BAIDE actually to be established, could constitute a reason which was not imputable to the Czech Republic [92] which could lawfully release that Member State from its obligation to put the sum at issue at the European Union's disposal. However, since that Member State was required to lodge a security with regard to the sums to be recovered in respect of the anti-dumping duties payable by BAIDE as of 22 March 2006, the Court holds that there was unjust enrichment of the European Union up to the amount of the sum at issue corresponding to the anti-dumping duties payable by BAIDE on the first twelve imports of pocket lighters, carried out before that date.

92 In accordance with Article 17(2)(b) of Regulation No 1150/2000.

XIII. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS: INSTITUTIONS AND BODIES OF THE EUROPEAN UNION

Judgment of the General Court (Ninth Chamber) of 12 January 2022, Verelst v Conseil, T-647/20

Law governing the institutions – Enhanced cooperation on the establishment of the European Public Prosecutor's Office – Regulation (EU) 2017/1939 – Appointment of the European Prosecutors of the European Public Prosecutor's Office – Appointment of one of the candidates nominated by Belgium – Rules applicable to the appointment of European Prosecutors

On 12 October 2017, the Council of the European Union adopted Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. [93] That regulation establishes the European Public Prosecutor's Office as a body of the European Union and sets out rules concerning its functioning.

Under Article 16(1) of Regulation 2017/1939, each Member State which participates in enhanced cooperation on the establishment of the European Public Prosecutor's Office is to nominate three candidates for the position of European Prosecutor. Article 16(2) of that regulation provides that, after receiving the reasoned opinion of the selection panel, which is responsible for drawing up a shortlist of candidates for the position of European Chief Prosecutor, [94] the Council is to select and appoint one of the candidates to be the European Prosecutor of the Member State in question and that, if the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council. Under Article 16(3) of that regulation, the Council, acting by simple majority, is to select and appoint the European Prosecutors for a non-renewable term of six years and may decide to extend the mandate for a maximum of three years at the end of the six-year period.

Under Article 14(3) of Regulation 2017/1939, the Council establishes the selection panel's operating rules and adopts a decision appointing its members on a proposal from the European Commission. On 13 July 2018, the Council adopted Implementing Decision 2018/1696 on the operating rules of the selection panel. [95] In particular, according to the third paragraph of point VII.2 of those rules, found in the annex: 'the selection panel shall rank the candidates according to their qualifications and experience', a ranking which 'shall indicate the selection panel's order of preference and [which] shall not be binding on the Council'.

On 25 January 2019, for the purpose of nominating three candidates for the position of European Prosecutor under Regulation 2017/1939, the Belgian authorities published a call for applications, to which six candidates responded, one of which was the applicant, Mr Jean-Michel Verelst, who, since 2010, has held the position of Deputy Public Prosecutor, Brussels (Belgium), specialising in taxation.

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93 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ 2017 L 283, p. 1).

94 As provided under Article 14(3) of Regulation 2017/1939.

95 Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation 2017/1939 (OJ 2018 L 282, p. 8).

On 27 July 2020, at the end of the various stages of the selection procedure laid down by Regulation 2017/1939, the Council adopted Implementing Decision 2020/1117 appointing the European Prosecutors of the European Public Prosecutor's Office, which appointed Mr Yves van den Berge with effect from 29 July 2020. [96] By letter of 7 October 2020, the Council notified the applicant, and all the other unsuccessful candidates, of that decision and provided them with relevant information about the reasons behind its decision to appoint another candidate, namely Mr van den Berge.

The applicant then asked the Council to send him all documents relating to the conduct of the selection procedure in so far as it affected him. He then brought an action for the annulment of that decision, in so far as it appoints Mr van den Berge as European Prosecutor of the European Public Prosecutor's Office and rejects his own application.

By its judgment, the Court of Justice dismisses the applicant's action. For the first time, the Court examines the legality of Implementing Decision 2020/1117 appointing the European Prosecutors of the European Public Prosecutor's Office, adopted pursuant to Regulation 2017/1939.

Findings of the Court

In the first place, the Court examines whether the Council was able to depart from the order of preference drawn up by the selection panel responsible for assessing the abilities of the candidates nominated by the Member States. In that regard, having recalled the wording of the provisions of the procedure which led to the adoption of the contested decision – the actual conduct of which is not disputed by the applicant – the Court notes, first, that, according to the third paragraph of point VII.2 of the operating rules of the selection panel, the ranking drawn up by that panel on the basis of the qualifications and experience of the three candidates nominated by the Member State in question is not binding on the Council. Secondly, the Court observes that neither Article 16(2) and (3) of Regulation 2017/1939, nor the operating rules of the selection panel precludes the Council, when selecting between the three candidates nominated by a Member State as part of the authority granted to it by Article 16(2) and (3), from taking account of information provided to it by the governments of its Member State representatives, or indeed by the Member State in question itself. Consequently, the Court considers that the contested decision was adopted in compliance with the procedural rules governing the adoption of that decision [97] and with the principle of non-discrimination.

In the second place, the Court examines whether the Council complied with its obligation to state reasons with regard to the applicant whose candidature was rejected. Having recalled the scope of the obligation to state reasons [98] and having examined the legal nature of the contested decision, the Court considers that the reasoning underlying the contested decision, to the extent that it implicitly rejects the applicant's candidature for the position of European Prosecutor for the Kingdom of Belgium, should, in principle, have been sent to him at the same time as the contested decision.

In that regard, the Court notes that the only statement of reasons contained in the contested decision, as published in the *Official Journal of the European Union*, is to be found in recital 13 thereof, which states: 'as regards the candidates nominated by Belgium, Bulgaria and Portugal, the Council did not follow the non-binding order of preference of the selection panel, on the basis of a different assessment of the merits of those candidates which was carried out in the relevant preparatory bodies of the Council'. The Court recalls that it is clear from the third paragraph of point VII.2 of the operating rules of the selection panel that the ranking given by the panel to the three candidates nominated by the Kingdom of Belgium on the basis of the candidates' qualifications and experience

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96 Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office (OJ 2020 L 244, p. 18).

97 In particular, with Articles 14 and 16 of Regulation 2017/1939 and points VI.2 and VII.2 of the operating rules of the selection panel.

98 Obligation laid down in Article 296 TFEU and in Article (41)(2)(c) of the Charter of Fundamental Rights of the European Union.

was not binding on the Council. The Council was therefore free either to use that ranking or to base its decision on a different assessment of the candidates' merits. Therefore, according to the Court, the applicant is wrong to submit that the statement of reasons in the contested decision should have allowed him to understand why the Council had decided not to follow the order of preference drawn up by the selection panel.

Nonetheless, the Court notes that the statement of reasons contained in recital 13 of the contested decision is not, in itself, such as to allow either the applicant or the Court to understand why the Council considered that the candidature of the candidate appointed to the position of European Prosecutor of the Kingdom of Belgium was of greater merit than that of the applicant. However, the Court finds that, in its letter of 7 October 2020, the Council set out in sufficient detail the reasons why it considered the appointed candidate better suited to the performance of the duties of a European Prosecutor than the other two candidates.

Therefore, according to the Court, while it would have been desirable for the applicant to be informed of the supplemental reasons for the rejection of his candidacy at the same time that the contested decision was published in the Official Journal, the Court notes that the applicant was apprised of those reasons by means of the letter from the Council of 7 October 2020, that is, before he brought his action, and that, in the circumstances, a communication of that sort allowed him to understand the justification for the decision and to defend his rights.

In the third and last place, the Court addresses the applicant's arguments in which he alleges that the contested decision is affected by a manifest error of assessment. In that regard, the Court recalls that an institution has a wide discretion when assessing and comparing the merits of the candidates for a vacant post and that the factors on which that assessment is based cover not only the efficiency and vocational aptitude of the applicants but also their character, behaviour and general personality. That is all the more true where the post involves significant responsibilities, such as those undertaken by the European Prosecutors under Regulation 2017/1939. [99]

The Court points out that the European Prosecutors are required to undertake significant responsibilities, which is also confirmed by the fact they are appointed at grade AD 13, which corresponds, according to Annex I to the Staff Regulations of Officials of the European Union, to the function of adviser or equivalent. The function of European Prosecutor therefore sits between the functions of director (AD 15-AD 14) and those of head of unit or equivalent (AD 9-AD 14). Therefore, according to the Court, the Council has a wide discretion when assessing and comparing the merits of the candidates for the position of European Prosecutor of a Member State.

Examining, one by one, the arguments put forward by the applicant concerning the Council's wide power of discretion, the Court finds that the applicant has failed to show that, in the present case, the Council exceeded the limits on its wide power of discretion by selecting and appointing Mr van den Berge to the position of European Prosecutor.

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99 Recital 24, Article 9, Article 12(1), (3) and (5) and Article 104 of Regulation 2017/1939.

2. EU LAW AND NATIONAL LAW

Judgment of the Court (Second Chamber) of 28 April 2022, Gräfendorfer Geflügel- und Tiefkühlfeinkost Produktions and Others, C-415/20, C-419/20 and C-427/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Customs union – Rights to the repayment or to the payment of sums of money levied or refused by a Member State in breach of EU law – Anti-dumping duties, import duties, export refunds and financial penalties – Concept of 'breach of EU law' – Misinterpretation or misapplication of EU law – Finding of a breach of EU law by a Court of the European Union or by a national court – Right to the payment of interest – Period covered by that payment of interest

The German customs authorities imposed on three companies established in Germany the payment of various sums of money in connection with, respectively, the export of poultry carcasses to third countries, the import of metal fasteners and the import of bolt hooks into the European Union. In various actions, the German courts subsequently found that the measures adopted by the customs authorities in respect of those three companies were based on an interpretation of provisions of EU law which did not correspond to the Court's case-law or on an incorrect application of those provisions.

Following those decisions, the competent customs authority paid the first company – Gräfendorfer (Case C-415/20) – the export refunds initially refused to it and repaid it for the financial penalty imposed on it in connection with that refusal, without, however, paying interest on those sums. The other two companies, Reyher (Case C-419/20) and Flexi Montagetechnik (Case C-427/20), obtained, respectively, the repayment of the amounts of anti-dumping duties and of import duties which they had paid. However, the customs authorities paid only part of the interest on those amounts, refusing to pay interest, in the case of the second company, in respect of the period prior to the repayment and, in the case of the third company, for the period prior to the date on which that company brought legal proceedings.

Since none of the three companies obtained full payment of the interest claimed, each of them brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg, Germany). In that context, that court raises several questions on the scope, in the present case, of the principles identified by the Court in its case-law relating to the repayment of sums of money levied by Member States in breach of EU law and to the payment of the corresponding interest.

With requests having been made for a preliminary ruling, the Court rules that those principles apply inter alia, first, in respect of export refunds refused in breach of EU law and granted late and, second, in respect of a financial penalty imposed as a result of such a breach. Furthermore, those principles apply where it follows from a decision of the Court or a national court that the payment of such export refunds, such a financial penalty, or anti-dumping or import duties has been refused or imposed as a result of a breach of EU law, understood as an incorrect interpretation or incorrect application of EU law. In such cases, national law cannot exclude from the payment of interest the period prior to the bringing of legal proceedings seeking the payment or repayment of the sum of money in question. However, under certain conditions, the payment of interest could possibly be conditional on the bringing of such proceedings.

Findings of the Court

First of all, the Court recalls that, under the general principle of recovery of sums paid but not due, any person on whom a national authority has imposed the payment of a tax, duty, charge or other levy in breach of EU law has the right, under EU law, to obtain from the Member State concerned the repayment of the sum of money levied though not due and the payment of interest intended to compensate for the unavailability of that sum.

Those rights thus apply, inter alia, in respect of a financial penalty wrongly imposed by a national authority pursuant to an act of EU law or provisions of national law adopted in order to implement

such an act, to transpose it or to ensure compliance with it. Accordingly, the person concerned has the right to the repayment of such a financial penalty and to the payment of interest. That interest is, by analogy, also owed where export refunds have been paid late to a person, in breach of EU law.

Next, the Court provides clarifications regarding the circumstance which forms the basis for the right to repayment and to the payment of interest, namely the fact that the payment of a sum of money has been imposed or refused by a national authority 'in breach of EU law'. Such a breach may thus relate, inter alia, to the situation in which a national authority has misapplied an EU act or national legislation implementing or transposing such an act when it imposed or refused that payment. Moreover, the existence of a breach of EU law may be established not only by the EU judicature but also by a national court, whether that court is called upon to draw the appropriate conclusions from a finding of illegality or invalidity previously made by the EU judicature or to find that a measure adopted by a national authority is vitiated by an incorrect implementation of EU law.

In the absence of EU legislation, it is for the national legislature to lay down the detailed rules for the payment of interest in the event of the repayment of sums of money levied or refused in breach of EU law, while complying with the principles of equivalence and effectiveness. In particular, a person must also be able to claim and obtain such interest for the period from the date on which the sum of money in question was paid to the Member State concerned or should have been granted to the person on the date on which legal proceedings for the repayment or the grant of those sums of money are brought.

That being so, national legislation which provides that the payment of interest is due only if legal proceedings have been brought is not necessarily precluded. The national court must, however, verify that that condition does not have the effect of making the exercise of the rights which persons derive from EU law excessively difficult or impossible.

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

Order of the General Court (Fourth Chamber, Extended Composition) of 9 March 2022, Kirimova v EUIPO, T-727/20

Link to the complete text of the ordert

Action for annulment – Representation by a lawyer who is not an independent third party with regard to the applicant – Inadmissibility

Ms Kirimova, an Azerbaijani national, was a lawyer in a law firm. In order to be placed on the list of professional representatives at the European Union Intellectual Property Office (EUIPO), she requested an exemption from the requirement to be a national of one of the Member States of the European Economic Area. Following the refusal of that request by the Executive Director of EUIPO, Ms Kirimova brought an action before the General Court. The application was signed by a lawyer who was a member of the same law firm as that in which Ms Kirimova was working when the action was brought.

By its order, the Court, ruling in extended composition, dismissed the action as inadmissible. It notes that the applicant and her lawyer had a particularly close professional relationship and that both the lawyer and the law firm in which the latter works have a direct interest in the outcome of the present case, which relates directly to the profession practised by the applicant in the law firm. Accordingly,

the Court holds that the requirement for the lawyer to be a third party independent of the applicant [100] is manifestly not satisfied.

Findings of the Court

First, the Court recalls that, in order to bring an action before it, a party must use the services of a third party, acting in full independence to best protect and defend the parties' interests, especially their right to effective judicial protection. [101] Legal representation requires a relationship of trust based on a private choice of a contractual nature, the individual is free to choose his or her lawyer, who is free, in principle, to choose his or her clients. In that regard, any intervention in the relationship must be based on serious reasons which reveal a clear and imperative need to protect the applicant from his or her lawyer. Accordingly, the lawyers independence is understood, not as the lack of any connection whatsoever between the lawyer and his or her client, but the lack of connections which have a manifestly detrimental effect on his or her capacity to carry out the task of defending the principal while acting in the principal's interests to the greatest possible extent.

Next, the Court states since the possibility for the EU Courts to dismiss applications as inadmissible is limited solely to cases where lawyers manifestly lack independence. The situations which are capable of preventing the lawyer from representing his or her principal must be of such a nature and degree as to make it obvious that the lawyer, has economic or personal ties, either with the dispute or with one of the parties, that call into question his or her genuine independence. In that regard, the Court points out that each situation must be examined on a case-by-case basis, taking into account the professional environment in which the lawyer works.

Lastly, the Court observes that, in the present case, the applicant and her lawyer had a particularly close professional relationship within the same law firm. In addition, the law firm and the lawyer repeatedly stated their interest in the request made by the applicant to EUIPO and in the outcome of the case, directly related to the career of the applicant within the firm, even claiming that the contested decision caused them damage. Consequently, the applicant's lawyer could not, in such circumstances, be regarded as an independent third party and, therefore, could not present herself as an independent third party 'lawyer'.

Furthermore, the fact that the link between the law firm and the lawyer was broken after the action was brought and that the applicant is now assisted by a second external lawyer has no bearing on the admissibility of the action. The Court points out, first, that the admissibility of the action must be assessed by reference to the situation prevailing when the application was lodged and, second, that the requirement relating to the representation by an authorised lawyer is not one of the requirements which can be rectified after expiry of the time limit for bringing an action. [102]

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[100] That requirement follows from the third paragraph of Article 19 of the Statute of the Court of Justice of the European Union.

[101] As guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

[102] In accordance with Article 78(6) of the Rules of Procedure of the General Court

4. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court (Fifth Chamber) of 10 March 2022, Landkreis Gifhorn, C-519/20

Reference for a preliminary ruling – Immigration policy – Directive 2008/115/CE – Detention for the purpose of removal – Article 16(1) – Direct effect – Specialised detention facility – Concept – Detention in prison accommodation – Conditions – Article 18 – Emergency situation – Concept – Article 47 of the Charter of Fundamental Rights of the European Union – Effective judicial review

In August 2020, K, a Pakistani national staying illegally in Germany, was placed in detention for the purpose of removal in the Langenhagen (Germany) division of the Hanover (Germany) prison facility. That detention, which was initially restricted to the end of September 2020, was extended by decision of the Amtsgericht Hannover (Local Court, Hanover, Germany) until November 2020. That court, before which K brought an action against that decision, is uncertain of the lawfulness of K's detention in view of the requirements of Directive 2008/115. [103] It notes that, during some of the period of detention at issue, the Langenhagen division hosted, in separate buildings, on the one hand, persons detained for the purpose of removal and, on the other hand, ordinary prisoners. The same prison staff deal with both convicted persons and persons detained for the purpose of removal. Furthermore, although that section has its own director, it is attached administratively to the prison facility of Hanover which is entirely under the supervision of the Minister for Justice.

It was in the light of those circumstances that the Local Court, Hanover, decided to refer to the Court of Justice questions for a preliminary ruling on Directive 2008/115. The Court is asked to specify the conditions which a detention facility must satisfy in order to be regarded as a 'specialised detention facility', specific to, in accordance with that directive, the detention of third-country nationals awaiting removal, and the conditions and judicial review required where a Member State, by way of derogation, detains those third-country nationals in a prison facility.

Findings of the Court

In the first place, as regards the concept of 'specialised detention facility', within the meaning of Article 16(1) of Directive 2008/115, the Court notes that detention conditions in such a centre must display some particular features compared with the conditions for enforcing custodial sentences in prison facilities. The detention of a third-country national for the purpose of removal is intended only to ensure the effectiveness of the return procedure and does not pursue any punitive purpose. Therefore, detention conditions in such a centre must be such that they prevent detention, as far as possible, from resembling a closed-prison environment, suitable for detention for punitive purposes. In addition, both the rights guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter') and the rights established in Article 16(2) to (5) and Article 17 of Directive 2008/115 must be respected.

As regards the assessment of the place and conditions of detention in the present case, the Court states that this is a matter for the referring court. That said, the Court points out, in particular, that the administrative connection of a place of detention to an authority which also has powers with regard to prison facilities is not sufficient to rule out the possibility that it is a 'specialised detention facility'. The same applies with regard to the mere fact that a separate part of a complex in which third-country nationals are detained for the purpose of removal hosts convicted persons, provided, in particular, that separation is effectively ensured. In addition, the referring court must pay particular

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

attention to the organisation of the premises specifically dedicated to the detention of third-country nationals, to the rules which lay down their detention conditions and to the particular classification and duties of the staff responsible for the supervision of the detention and the facility in which that detention takes place.

In the second place, the Court clarifies the circumstances in which a Member State may temporarily provide for the detention of third-country nationals, for the purpose of removal, in a prison facility, thus derogating from the principle of detention in a specialised facility.

First, such a derogation may be justified under Article 18(1) of Directive 2008/115, as long as the Member State concerned cannot reasonably be expected to put an end to the heavy and unexpected burden which continues to weigh on the capacities of its specialised detention facilities, because of the exceptionally large number of third-country nationals subject to a decision ordering their detention for the purpose of removal. A periodic review of the situation may be necessary in that regard. Furthermore, such detention in a prison facility is precluded if it proves to be incompatible with a potential vulnerable situation of the third-country national concerned. In any event, it is also excluded where a place is available in one of the specialised detention facilities of the Member State concerned or where a less coercive measure can be considered. Finally, detention conditions must be distinguished, so far as possible, from the conditions of detention applicable to persons convicted of criminal offences.

Second, under the second sentence of Article 16(1) of Directive 2008/115, detention in a prison facility may, exceptionally, be justified on account of the total, sudden and momentary saturation of all the specialised detention facilities of the Member State concerned, provided that the third-country national concerned is separated from ordinary prisoners and that it is clear that no less coercive measure is sufficient to ensure the effectiveness of his or her return procedure. Detention in a prison facility based on that provision may be ordered only for a short period and ceases to be justified when saturation of specialised detention facilities persists for more than a few days or is repeated systematically and at short intervals. Finally, the fundamental rights guaranteed by the Charter and the rights established in Article 16(2) to (5) and Article 17 of Directive 2008/115 must be respected throughout the entire period of detention.

If the conditions in the situations set out above are not met and the national legislation concerned cannot be interpreted in accordance with EU law, the principle of the primacy of EU law requires the national court to disapply that legislation.

Finally, in the third place, the Court examines the scope of the judicial review to be undertaken by a national court when hearing an application for the detention in a prison facility of a third-country national for the purpose of removal, or an application for the extension of such detention on the basis of Article 18 of Directive 2008/115. In the light of the right to effective judicial review, guaranteed by Article 47 of the Charter, that court must be able to confirm that the conditions laid down by Article 18 have been satisfied. To that end, it must, in particular, be able to rule on all relevant matters of fact and of law, that power not being restricted solely to the matters put forward by the administrative authority concerned.

5. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN ARREST WARRANT

Judgment of the Court (Second Chamber) of 28 April 2022, C and CD (Legal obstacles to the execution of a decision on surrender), C-804/21 PPU

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 23(3) – Requirement of intervention on the part of the executing judicial authority – Article 6(2) – Police services – Not included – Force majeure – Concept – Legal obstacles to surrender – Legal actions brought by the requested person – Application for international protection – Not included – Article 23(5) – Expiry of the time limits provided for surrender – Consequences – Release – Obligation to adopt any other measures necessary to prevent absconding

C and CD, who are Romanian nationals, were the subjects of European arrest warrants issued in 2015 by a Romanian judicial authority for the purpose of executing prison sentences of five years and additional sentences of three years. Those sentences were imposed for the trafficking of dangerous and very dangerous narcotics and for participation in a criminal organisation.

C and CD were the subjects of procedures for the execution of those European arrest warrants in Sweden. By decisions delivered in 2020, the Swedish authorities ordered that C and CD be surrendered to the Romanian authorities. However, C and CD left Sweden for Finland before those decisions on surrender were implemented. On 15 December 2020, C and CD were arrested and placed in detention in Finland on the basis of the European arrest warrants at issue.

By decisions of 16 April 2021, the Supreme Court of Finland ordered that they be surrendered to the Romanian authorities. The Finnish National Bureau of Investigation initially set a surrender date of 7 May 2021. C and CD's air transport to Romania could not be organised before that date on account of the COVID-19 pandemic. A second surrender date was set for 11 June 2021. However, the surrender was once again postponed, owing to air transport issues. A third surrender date was set for 17 June 2021 for CD and for 22 June 2021 for C. However, it was once again not possible to proceed with that surrender, this time because C and CD had lodged applications for international protection in Finland.

C and CD then brought an action seeking, first, their release on the ground that the time limit for surrender had expired and, second, the postponement of their surrender on account of their applications for international protection. Those actions were declared inadmissible. The main proceedings concern the appeals brought by C and CD against those decisions before the Supreme Court.

Article 23 of Framework Decision 2002/584 104 lays down the rules applicable to the surrender of persons requested under a European arrest warrant once the final decision to surrender those persons has been taken by the competent authorities of the executing Member State. If the requested person is not surrendered within a very short period, he or she must be released pursuant to Article 23(5). If the surrender is prevented because of a situation of force majeure, that period may be extended pursuant to Article 23(3), provided that the executing judicial authority and the issuing judicial authority immediately agree on a new surrender date.

104 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

The referring court asks, first of all, whether the concept of force majeure extends to legal obstacles to surrender which arise from legal actions brought by the person who is the subject of the European arrest warrant and are based on the law of the executing Member State, in cases where the final decision on surrender has been adopted by the executing judicial authority.

In its judgment delivered today, the Court confirms that the bringing of legal actions by the person who is the subject of the European arrest warrant, in the context of proceedings provided for by the national law of the executing Member State, with a view to challenging his or her surrender to the authorities of the issuing Member State or having the effect of delaying that surrender, cannot be regarded as an unforeseeable circumstance. Consequently, such legal obstacles to surrender, which arise from legal actions brought by that person, do not constitute a situation of force majeure.

Accordingly, the time limits for surrender laid down in Article 23 of the framework decision cannot be regarded as suspended on account of proceedings pending in the executing Member State, brought by the person who is the subject of the European arrest warrant, where the final decision on surrender has been adopted by the executing judicial authority. Accordingly, the authorities of the executing Member State are still, in principle, required to surrender that person to the authorities of the issuing Member State within the time limits set.

Next, the referring court asks, first, whether the requirement for intervention on the part of the executing judicial authority is satisfied where the executing Member State makes a police service responsible for ascertaining whether there is a situation of force majeure and whether the necessary conditions for the continued detention of the person concerned are satisfied, on the understanding that that person is entitled to apply to the executing judicial authority at any time for a decision on the abovementioned matters. Second, that court asks whether the time limits referred to in Article 23 must be regarded as having expired, with the result that that person must be released, in the event that it is necessary to regard the requirement for intervention by the executing judicial authority as not having been met.

The Court finds, in the first place, that the intervention on the part of the executing judicial authority required under Article 23 of the framework decision, for the purpose of assessing whether there is a situation of force majeure and, as the case may be, setting a new surrender date, cannot be made the responsibility of a police service of the executing Member State, such as the National Bureau of Investigation in the dispute in the main proceedings. The finding of a situation of force majeure by the police services of the executing Member State and the setting of a new surrender date, without intervention on the part of the executing judicial authority, does not meet the formal requirements laid down in Article 23 of the framework decision, irrespective of whether a situation of force majeure actually exists.

Consequently, where there is no intervention on the part of the executing judicial authority, the time limits laid down in Article 23 of the framework decision cannot be validly extended and, in a situation such as that at issue in the main proceedings, those time limits must be regarded as expired.

The Court recalls that it is clear from the wording of Article 23 of the framework decision that the person who is the subject of a European arrest warrant, if still in custody, must, if those time limits have expired, be released. No provision is made for an exception to that obligation on the part of the executing Member State in such a case. Having regard to the obligation of the executing Member State to carry on with the procedure for executing a European arrest warrant, the competent authority of that Member State is required, if the person who is the subject of that warrant is released, to take any measures it deems necessary to prevent that person from absconding, with the exception of measures involving deprivation of liberty.

6. POLICE COOPERATION

Judgment of the General Court (Eighth Chamber) of 27 April 2022, Veen v Europol, T-436/21

Non-contractual liability – Cooperation of the police authorities and other law enforcement agencies of the Member States – Fight against crime – Communication of information by Europol to a Member State – Alleged unauthorised data processing – Regulation (EU) 2016/794 – Article 50(1) – Non-material harm

As part of an investigation following the seizure of 1.5 tonnes of methamphetamine, the Slovak police sought the assistance of Europol, [105] stating that Mr Veen was suspected of involvement in trafficking of that substance.

On the basis of information supplied by the Member States, Europol drew up a report, which was communicated to only France, the Netherlands, Slovakia and the United States. The report states that Mr Veen had been involved in several investigations in the Netherlands and had also been reported in the context of investigations in Sweden and Poland.

Mr Veen considered that he had suffered harm as a result of the inaccurate statement that he had been the subject of investigations in Sweden and Poland. He therefore brought an action before the General Court on the basis of the Europol Regulation [106] seeking compensation for the non-material harm he claimed to have suffered as a result of the alleged unlawful processing of his personal data by Europol.

The Court dismisses the action and, for the first time, applies the specific and autonomous regime for the protection of personal data in the context of Europol's actions.

Findings of the Court

First of all, the Court points out that the inclusion of personal information about an individual in a Europol report does not in itself constitute an unlawful act such as to incur liability on Europol's part. Europol's task is, inter alia, to collect, store, process, assess and exchange information, including criminal intelligence, and to notify the Member States without delay of any information and connections between criminal offences concerning them.

To that end, the Europol Regulation authorises Europol to process information, including personal data, inter alia through cross-checking aimed at identifying connections between information related to different categories of data subjects. [107] Europol must, however, comply with the data protection safeguards provided for in that regulation. [108] That protection is therefore autonomous and adapted to the specificity of the processing of personal data in a law enforcement context.

Against that background, the Europol Regulation specifies how responsibility in personal data protection matters is to be attributed between, inter alia, Europol and the Member States. Accordingly, Europol assumes responsibility for compliance with the general principles of data protection, with the exception of the requirement for data to be accurate and up to date, and responsibility for all data processing operations that it carries out. Meanwhile, the Member States are

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105 European Union Agency for Law Enforcement Cooperation.

106 Article 50(1) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ 2016 L 135, p. 53; 'the Europol Regulation').

107 Article 18(1) and (2) of the Europol Regulation.

108 In accordance with Article 18(4) of the Europol Regulation.

responsible for the quality of the personal data that they provide to Europol and for the legality of such transfers.

Therefore, even if the information contained in the report is incorrect, Europol cannot be held liable for any inaccuracies in data supplied by a Member State.

Next, the Court notes that there is no obligation on Europol to obtain prior authorisation from any court or independent administrative authority before processing any personal data, nor any obligation to give an individual the opportunity to be heard before such data about him or her is included in a report. To impose the latter obligation on Europol could undermine the practical effect of the Europol Regulation and the actions of given police authorities and law enforcement agencies.

Lastly, in relation to the alleged infringement of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ('the Charter') concerning the respect for private and family life and the protection of personal data, the Court recalls that Article 52(1) of the Charter, concerning the scope of the guaranteed rights, means that legislation involving a measure which permits interference with those rights must lay down clear and precise rules governing the scope and application of the measure in question and impose minimum safeguards.

The Europol Regulation was drawn up with a view to guaranteeing respect for the right to the protection of personal data and the right to privacy, whilst also pursuing the objective of effectively combating forms of serious crime affecting several Member States. Within that context, the EU legislature laid down clear and precise rules on the scope of the powers devolved to Europol, made Europol's actions subject to minimum safeguards in relation to the protection of personal data and put in place independent, transparent and accountable structures for supervision.

Accordingly, as Mr Veen has not established that Europol had failed to fulfil the obligations imposed on it, there can be no finding of any infringement of Articles 7 and 8 of the Charter.

7. APPROXIMATION OF LAWS: COMMUNITY DESIGNS

Judgment of the General Court (Ninth Chamber) of 27 April 2022, Group Nivelles/EUIPO – Easy Sanitary Solutions (Shower drainage channel), T-327/20

Community design – Invalidity proceedings – Registered Community design representing a shower drainage channel – Earlier design produced after the filing of the application for a declaration of invalidity – Article 28(1)(b)(v) of Regulation (EC) No 2245/2002 – Discretion of the Board of Appeal – Scope – Article 63(2) of Regulation (EC) No 6/2002 – Oral proceedings and measures of inquiry – Articles 64 and 65 of Regulation (EC) No 6/2002 – Ground for invalidity – Individual character – Article 6 and Article 25(1)(b) of Regulation No 6/2002 – Identification of the earlier design – Earlier whole design – Determination of the features of the contested design – Global comparison

Easy Sanitary Solutions BV is the holder of a Community design representing a shower drainage channel. I-Drain BVBA, the legal predecessor of the applicant, Group Nivelles NV, lodged an application for a declaration of invalidity based on the lack of novelty and individual character of that design. That application for a declaration of invalidity referred only to an earlier international design. However, in its reply to Easy Sanitary Solutions' observations, I-Drain submitted extracts from the Blücher catalogues containing another design, namely a cover plate.

The Invalidity Division of the European Union Intellectual Property Office (EUIPO), the Board of Appeal, and then the General Court, examined the contested design by taking into account, as an earlier design, the cover plate from the Blücher catalogues. By judgment of 13 May 2015, [109] the General Court annulled the first decision of the Board of Appeal. The appeals against that judgment were dismissed by judgment of the Court of Justice of 21 September 2017. [110]

The case was remitted to the Board of Appeal of EUIPO. After observing that the application for a declaration of invalidity did not contain a representation of the earlier design examined by the adjudicating bodies which had made the previous decisions, the Board of Appeal took into account, as an earlier design, only the designs referred to in the application for a declaration of invalidity. It concluded that the contested design possessed individual character and therefore that it was, a fortiori, new. The application for a declaration of invalidity was rejected.

An action brought by Group Nivelles is dismissed by the Court, which holds that only the earlier designs identified in the application for a declaration of invalidity can be taken into account.

Findings of the Court

In the first place, the Court observes that the earlier design must be identified when the application for a declaration of invalidity is submitted, because the subject matter of the dispute is defined in the application. Accordingly, the discretion conferred on EUIPO to take into account facts or evidence which are not submitted in due time [111] is applicable only to facts and evidence, [112] and not to the indication and the reproduction of the earlier designs. [113] Although further evidence may be taken into account, in addition to the earlier designs already relied on, to expand the factual context of the application for a declaration of invalidity, it may not however be used to extend the legal context of that application, since the scope of that application was definitively determined when the application was submitted, by identifying the earlier design relied on. Consequently, only the earlier designs identified in the application for a declaration of invalidity must be examined.

In the second place, the Court rejects as ineffective the plea relating to the Board of Appeal's error in determining the features of the contested design, since the error relied on is not one of the grounds of the decision, but is mentioned in the summary of the facts. In addition, the contested design must be compared with the earlier designs as it was registered. Conclusions as to the subject matter and features of the contested design cannot be left to the discretion of the parties.

In the third place, the Court confirms that the contested design has individual character. First of all, it points out that an earlier design incorporated into a product other than the one to which the contested design relates is, in principle, an earlier design which is relevant for the purposes of assessing individual character. Next, it states that any errors made by the Board of Appeal concerning the features of the earlier designs representing only one element of a shower drainage channel have no bearing on the legality of the decision, since no errors were made in the comparison between the contested design and the whole designs. Since an earlier design must be an earlier whole design, only the designs representing complete shower drainage channels are relevant. Lastly, in view of the elegant and minimalist appearance of the contested design, the overall impression it produces differs from that of the earlier design, with features which are more functional and not decorative.

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109 Judgment of 13 May 2015, *Group Nivelles* v *EUIPO – Easy Sanitairy Solutions (Shower drainage channel)* (T-15/13, EU:T:2015:281).

110 Judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO* v *Group Nivelles* (C-361/15 P and C-405/15 P, EU:C:2017:720).

111 Article 63(2) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

112 For the purposes of Article 28(1)(b)(vi) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 (OJ 2002 L 341, p. 28).

113 Article 28(1)(b)(v) of Regulation No 2245/2002.

Furthermore, the Court states that, although EUIPO may hold oral proceedings, [114] a refusal is vitiated by manifest error only if it is shown that EUIPO did not have all the necessary information. As regards the refusal to hear witnesses, [115] there is no manifest error where the statements could be given in writing and, a fortiori, where, as in the present case, those statements have in fact been submitted.

In the last place, the Court notes that, for reasons of methodology and procedural economy, it is not necessary to examine the requirement of novelty because the novelty of a design may be inferred from the fact that it has individual character.

8. SOCIAL POLICY: ORGANISATION OF WORKING TIME

Judgment of the Court (Second Chamber) of 24 February 2022, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto', C-262/20

Reference for a preliminary ruling – Social policy – Organisation of working time – Directive 2003/88/EC – Article 8 – Article 12(a) – Articles 20 and 31 of the Charter of Fundamental Rights of the European Union – Reduction of the normal duration of night work in relation to day work – Public-sector workers and private-sector workers – Equal treatment

VB, an agent in the fire service of the Directorate-General for Fire Safety and Civil Protection, under the Bulgarian Ministry of the Interior, carried out night work for a number of years. Taking the view that he is entitled to seven hours of night work being treated as equivalent to eight hours of day work, VB applied to his employer for overtime pay.

His application was refused on the ground that no provision in force requires hours of night work to be converted into hours of day work for agents of the Ministry of the Interior. The normal duration of night work of seven hours for one week of five working days, provided for by the Bulgarian Labour Code for private-sector workers, does not apply to such agents. The Law on the Ministry of the Interior defines only the number of hours of night work and merely states that the working time of those agents must not exceed on average eight hours in any 24-hour period, without specifying the normal and maximum duration of night work. VB challenged that refusal before the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria).

Following a reference for a preliminary ruling from that court, which considers that the normal duration of night work for agents of the Ministry of the Interior should be seven hours so that they are no less favourably treated than other workers, the Court of Justice sets out the obligations of the Member States concerning measures for the protection of the safety and health of night workers to be taken pursuant to Directive 2003/88, [116] and rules on the compatibility of the Bulgarian legislation at issue with the principle of equal treatment, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter') and with the right of every worker to fair and just working conditions, enshrined in Article 31 of the Charter.

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114 Article 64(1) of Regulation No 6/2002.

115 Article 65(1) and (3) of Regulation No 6/2002.

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

Findings of the Court

As regards the relationship between the normal duration of night work and that of day work, the Court notes, first of all, that Directive 2003/88 contains no indication in that regard. That directive lays down only minimum requirements, including the maximum duration of night work being eight hours in a 24-hour period. [117] That directive also provides for the obligation to take the necessary measures to ensure that night workers enjoy a level of protection appropriate to the nature of their work, [118] leaving a certain margin of discretion to the Member States in that respect.

Accordingly, Article 8 and Article 12(a) of Directive 2003/88 do not impose an obligation to adopt national legislation which provides that the normal duration of night work for public-sector workers, such as police officers and fire fighters, is less than their normal duration of day work.

However, the Member States must ensure that such workers benefit from other protective measures relating to working hours, wages, allowances or similar benefits which make it possible to compensate for how strenuous the night work they perform is. Although reducing the normal duration of night work in comparison with that of day work may constitute an appropriate solution for ensuring protection of the health and safety of the workers concerned, that reduction is not the only possible solution.

Next, after finding that the provisions of the Bulgarian Labour Code and the Law on the Ministry of the Interior at issue constitute an implementation of Directive 2003/88 and, therefore, fall within the scope of EU law, the Court rules on the compatibility of that legislation with the Charter.

In that regard, the Court holds that Articles 20 and 31 of the Charter do not preclude the normal duration of night work, which is fixed at seven hours for workers in the private sector, from not applying to public-sector workers, in particular to police officers and fire fighters, if such a difference in treatment is based on an objective and reasonable criterion, that is to say, that it relates to a legally permitted objective pursued by that legislation and is proportionate to that objective.

The Court notes, first of all, that it is for the referring court to identify the categories of persons in comparable situations and to compare them in a specific and concrete manner, including with regard to conditions for night work. In the present case, the referring court has analysed abstract categories of workers, such as that of private-sector workers who benefit from the rules laid down by the Labour Code and that of public-sector workers, such as the agents of the Ministry of the Interior, who do not benefit from them.

As regards the justification for any difference in treatment, the Court observes that the absence of a mechanism for converting hours of night work into hours of day work for agents of the Ministry of the Interior cannot be justified on budgetary grounds alone, without other political, social or demographic considerations.

If it is not based on an objective and reasonable criterion, that is to say, that it relates to a legally permitted objective and is proportionate to that objective, a difference, established by provisions of national law as regards night work, between different categories of workers in comparable situations is incompatible with EU law and will, as the case may be, require the national court to interpret the national law, as far as possible, in the light of the wording and purpose of the provision of primary law concerned, taking into consideration the whole body of national law and applying the interpretative methods recognised by national law, with a view to ensuring that that provision is fully effective and to achieving an outcome consistent with the objective which it pursues.

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117 Article 8(b) of Directive 2003/88.

118 Article 12(a) of Directive 2003/88.

9. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Seventh Chamber) of 27 April 2022, Ilunga Luyoyo v Council, T-108/21

Common foreign and security policy – Restrictive measures adopted in view of the situation in the Democratic Republic of the Congo – Freezing of funds – Restriction on admission to the territory of the Member States – Retention of the applicant's name on the lists of persons covered – Proof that inclusion and retention on the lists is well founded – Continuation of the factual and legal circumstances which led to the adoption of the restrictive measures

In response to the deteriorating security situation in the Democratic Republic of the Congo (DRC) and the worsening of the political situation in that country at the end of 2016, the Council had adopted, on 12 December 2016, Decision 2016/2231 and Regulation 2016/2230, [119] which provide, inter alia, for the freezing of funds and economic resources belonging to persons involved in acts undermining the rule of law in the DRC or constituting serious human rights violations.

The applicant's name, Mr Ilunga Luyoyo, was initially included on the lists of persons covered by those restrictive measures in 2016. By Decision 2020/2033 and Regulation 2020/2021, [120] the Council maintained that listing, [121] on the grounds that, as the commander of an anti-riot unit (the LNI) until 2017 and the commander of a unit responsible for the protection of institutions and high-ranking officials (the UPIHP) until December 2019, the applicant bore responsibility for human rights violations committed by the Congolese National Police (PNC), which had made disproportionate use of force and violent repression in September 2016 in Kinshasa. The Council had added that Mr Ilunga Luyoyo had retained his rank of General and remained active on the public scene in the DRC.

Mr Ilunga Luyoyo claimed that the Council had committed a manifest error of assessment, given that he had not held a position within the PNC since 2019 and that he no longer carried out any specific public duties. He maintained, inter alia, that his former positions could not justify the decision to maintain his name on the lists in question.

The General Court upholds the action for annulment brought by Mr Ilunga Luyoyo, since the Council was unable to establish that the maintenance of the restrictive measures against him was justified, in particular in the light of changes in his personal situation since the initial inclusion of his name on the lists at issue.

Findings of the Court

The Court points out, first of all, that the EU judicature must ensure that a decision imposing restrictive measures is taken on a sufficiently solid factual basis. To that end, in so far as it is for the competent EU authority to establish, in the event of challenge, that the reasons relied on against the

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119 Council Decision (CFSP) 2016/2231 of 12 December 2016 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo (OJ 2016 L 336I, p. 7) and Council Regulation (EU) 2016/2230 of 12 December 2016 amending Council Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo (OJ 2016 L 336I, p. 1)

120 Council Decision (CFSP) 2020/2033 of 10 December 2020 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo (OJ 2020 L 419, p. 30) and Council Implementing Regulation (EU) 2020/2021 of 10 December 2020 implementing Article 9 of Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo (OJ 2020 L 419, p. 5); 'the contested acts'.

121 As had already been the case on three occasions. See, in that regard, judgment of 12 February 2020, *Ilunga Luyoyo* v *Council* (T-166/18, not published, EU:T:2020:50); judgment of 3 February 2021, *Ilunga Luyoyo* v *Council* (T-124/19, not published, EU:T:2021:63); and judgment of 15 September 2021, *Ilunga Luyoyo* v *Council* (T-101/20, not published, EU:T:2021:575).

person concerned are well founded, it is necessary that the information or evidence produced should support the reasons relied on. In that regard, the Court observes that it was common ground between the parties that Mr Ilunga Luyoyo had not held a position within the PNC since December 2019 and that the Council had that information when the time came to review the restrictive measures at issue.

The Court then points out that restrictive measures are of a precautionary and, by definition, provisional nature, and their validity always depends on whether the factual and legal circumstances which led to their adoption continue to apply and on the need to persist with them in order to achieve their objective. It is for the Council, in the course of its periodic review of those measures, to carry out an updated assessment of the situation and to appraise the impact of such measures.

The Court finds, in the present case, that the evidence relied on by the Council is not capable of establishing a link between human rights violations and Mr Ilunga Luyoyo since December 2019, which is almost one year before the adoption of the contested measures, or demonstrating that Mr Ilunga Luyoyo may have been reinstated to any position in connection with the security situation in the DRC. Moreover, the fact that Mr Ilunga Luyoyo retained his rank of General does not in itself permit the inference that he could have exercised any influence whatsoever on the security forces in the DRC. As regards Mr Ilunga Luyoyo's duties as President of the Congolese Boxing Federation, there is no concrete information in the articles produced by the Council to justify the view that the holder of that position may have an influence on security policy in the DRC, or to suggest that Mr Ilunga Luyoyo carried out highly politicised duties in that capacity.

Since the Council has failed to adduce sufficient evidence to support the view that there was still a sufficient link between Mr Ilunga Luyoyo and the security situation which gave rise to the human rights violations in the DRC, even though, for a considerable period of time before the adoption of the contested measures, he had not held the various positions which had justified the inclusion of his name on the lists in question, the Court also considers that the Council could not legitimately rely on the fact that Mr Ilunga Luyoyo had not dissociated himself from the regime formerly in power in the DRC to support its decision to maintain the restrictive measures against him.

10. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: GRANT AGREEMENT

Judgment of the General Court (First Chamber) of 27 April 2022, Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii v Commission, T-4/20

Link to the complete text of the judgment

Arbitration clause – Grant agreement concluded in the context of the Seventh Framework Programme for research, technological development and demonstration activities (2007-2013) – Eligible costs – Request for reimbursement – Financial audit – OLAF investigation – Conflict of interest on account of family or emotional ties – Principle of good faith – Principle of non-discrimination on grounds of marital status – Legitimate expectations – Action for annulment – Debit notes – Acts inseparable from the contract – Act not open to challenge – Right to effective judicial review – Inadmissibility

The applicant, Sieć Badawcza Łukasiewicz, is a research institute which acceded, as a beneficiary, to three grant agreements under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013).

In 2013, certain grant agreements concluded in that context were the subject of an audit carried out by an external auditing firm engaged by the Commission. Later on, in the context of an investigation, the European Anti-Fraud Office (OLAF) accused the applicant of complicity in the false declarations made on the timesheets of certain of its employees. On the basis of OLAF's conclusions, the Commission issued debit notes requiring the payment of certain amounts by way of damages. The

Commission did not accept the personnel costs of an employee ('the employee in question') whose timesheets had been signed, indicating approval, by his wife. The amounts claimed were paid in full by the applicant, which nevertheless brought an action before the General Court seeking, inter alia, a declaration that the Commission's contractual claim was non-existent and repayment of the amounts contained in the debit notes.

The General Court dismisses that action and examines, first, the legality of the recovery effected by the Commission and, secondly, the existence in the case at hand of a conflict of interest on account of family ties.

Findings of the Court

After rejecting the application for omission of certain information vis-à-vis the public submitted by the applicant, on the ground that that information is not contained in the judgment or is information the omission of which would be liable to have a detrimental effect on the public's access to and understanding of the judgment, the General Court examines the legality of the Commission's recovery orders.

In that regard, it notes, first of all, that the grant agreements provide for audit procedures, on the one hand, and control procedures, on the other. The control procedures, as provided for in the agreements at issue, are measures falling within the contractual framework linking the parties which are juxtaposed with the audit procedures as independent procedures. The procedure conducted by OLAF comes under those control procedures.

In that context, the General Court takes the view that, first, at the end of the control procedure, the Commission was entitled to demand recovery of the sums due, after having identified irregularities committed by the applicant, in accordance with the grant agreements at issue. [122] Secondly, no particular and specific procedural requirement is imposed as to how irregularities are to be identified in the context of control procedures initiated after the acceptance of the final reports and accounts. [123] Thus, contrary to the applicant's claim that there is no power for the Commission to ignore a final audit report under the grant agreements at issue, the procedure followed in the case at hand was independent of the audit procedure referred to by the applicant. In that context, the General Court states that it follows from the provisions of the grant agreements at issue and from the Financial Regulation that the audits are not binding. [124] Accordingly, the final audit report, even after validation by the Commission, cannot be regarded as being binding and immutable in relation to it, and the Commission is not bound by the findings of a financial audit where a subsequent check calls into question its results.

Next, regarding the risk of a conflict of interest on account of the existence of family ties, the General Court finds that the grant agreements at issue give rise to a rebuttable presumption as to the existence of a risk of a conflict of interest where, in particular, persons with family or emotional ties are involved in one way or another in the same project. [125] In the case at hand, the marital relationship between the employee in question and his wife leads to the application of that presumption.

The General Court takes the view that the fact that the wife of the employee in question was responsible for approving her husband's timesheets without being able to alter them, while appearing

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122 Article II.22(6) and the second subparagraph of Article II.21(1) of Annex II to the grant agreements at issue.

123 Article 119 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation').

124 In particular, Article II.22(1) of Annex II to the grant agreements at issue recognises the possibility of carrying out new audits during the five years after completion of the project concerned. Moreover, paragraph 1 of Article 119 of the Financial Regulation states that acceptance by the institution of final reports and accounts is 'without prejudice to subsequent checks by the institution'.

125 Article II.3(n) of Annex II to the grant agreements at issue.

as ‘supervisor’ on those records, is sufficient for the review system put in place by the applicant to be regarded as failing to satisfy the requirement that it take every necessary precaution to avoid any risk of a conflict of interest relating to family or emotional ties liable to influence the impartial and objective performance of the project concerned, in accordance with the grant agreements at issue. According to the General Court, the influence of the family situation cannot be ruled out merely because there was no relationship of administrative subordination in the work environment. Consequently, the proper performance of the project concerned may have been jeopardised.

Furthermore, as regards the applicant’s argument that the Commission’s position constitutes discrimination on grounds of marital status, contrary to Articles 7 and 9 of the Charter of Fundamental Rights of the European Union (‘the Charter’), [126] the General Court takes the view that the requirement to avoid any conflict of interest on account of family or emotional ties is intended to prevent a serious and manifest breach of the requirement of impartiality and objectivity, to which the person responsible for certifying the timesheets of researchers working on an EU-funded project is subject. Therefore, even if a rule intended to ensure that there is no conflict of interest might affect the rights protected by Articles 7 and 9 of the Charter, those rights would not be affected in terms of their content; rather, at most, they would be subject to a limitation on their exercise.

On that point, the General Court holds that, in the case at hand, such a limitation would seek to ensure observance of the principle of sound financial management [127] and would be necessary, since the Commission has no other means of checking the accuracy of the personnel costs declared by the grant beneficiary than those which should be engendered by, inter alia, the production of reliable timesheets. That limitation would not be disproportionate, since, first, the rights protected by Articles 7 and 9 of the Charter would not be affected in terms of their actual content and, secondly, the requirement to avoid any conflict of interest on account of family or emotional ties could be satisfied by means of minimal organisational adjustments.

Lastly, the General Court dismisses as inadmissible the action brought by the applicant on the basis of Article 263 TFEU seeking annulment of the Commission’s letter of 12 November 2019, by which the Commission had informed the applicant of the issue of debit notes. The General Court finds, in that context, that the applicant’s right to effective review has not been infringed since the applicant has brought an action on a contractual basis pursuant to Article 272 TFEU and the pleas raised in support of that action have been examined by the court with jurisdiction.

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126 Articles 7 and 9 of the Charter concern the right to respect for private and family life, the right to marry and the right to found a family.

127 That principle is enshrined in Article 317 TFEU.

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 4 May 2022, Larko v Commission, T-423/14 RENV, EU:T:2022:268
- Judgment of 18 May 2022, Uzina Metalurgica Moldoveneasca v Commission, T-245/19, EU:T:2022:295