COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. WITHDRAWAL OF A MEMBER STATE FROM THE EUROPEAN UNION

Judgment of the Court (Grand Chamber) of 9 June 2022, Préfet du Gers and Institut national de la statistique et des études économiques (INSEE), C-673/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – National of the United Kingdom of Great Britain and Northern Ireland residing in a Member State – Article 9 TEU – Articles 20 and 22 TFEU – Right to vote and to stand as a candidate in municipal elections in the Member State of residence – Article 50 TEU – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Consequences of the withdrawal of a Member State from the Union – Removal from the electoral roll in the Member State of residence – Articles 39 and 40 of the Charter of Fundamental Rights of the European Union – Validity of Decision (EU) 2020/135

EP, a United Kingdom national residing in France since 1984, was removed from the French electoral roll following the entry into force, on 1 February 2020, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement').[1]

EP challenged that removal before the tribunal judiciaire d'Auch (Court of Auch, France) on the ground that she was no longer entitled to vote either in France, on account of the loss of her status as a citizen of the Union following the withdrawal of the United Kingdom from the Union, or in the United Kingdom, on account of the fact that she no longer enjoyed the right to vote and to stand as a candidate in that State.[2] According to EP, that loss infringes the principles of legal certainty and proportionality and also constitutes discrimination between Union citizens and an infringement of her freedom of movement.

The referring court considers that the application of the provisions of the Withdrawal Agreement to EM constitutes a disproportionate breach of her fundamental right to vote. It asks in that regard whether Article 50 TEU[3] and the Withdrawal Agreement must be interpreted as repealing the EU citizenship of nationals of the United Kingdom, who, while remaining nationals of that State, have resided in the territory of another Member State for more than 15 years and are, accordingly, deprived entirely of the right to vote. If that question is answered in the affirmative, it asks to what extent the relevant provisions of the Withdrawal Agreement[4] and of the TFEU[5] must be regarded as allowing such nationals to retain the rights to EU citizenship that they enjoyed before the withdrawal of the United Kingdom from the Union. It also raises a question concerning the validity of the

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

2 By virtue of a legal rule of the United Kingdom, under which a national of that State who has resided abroad for more than 15 years is no longer entitled to take part in elections in the United Kingdom.

3 Article 50 TEU relates to the right of and arrangements for the withdrawal of a Member State from the European Union.

4 Articles 2, 3, 10, 12 and 127 of the Withdrawal Agreement.

5 Articles 18, 20 and 21 TFEU.

Withdrawal Agreement and, accordingly, the validity of Council Decision 2020/135 on the conclusion of that agreement.[6]

In its judgment, the Court holds, first, that the relevant provisions of the TEU[7] and of the TFEU,[8] read in conjunction with the Withdrawal Agreement, must be interpreted as meaning that, as from the withdrawal of the United Kingdom from the European Union, nationals of that State who exercised their right to reside in a Member State before the end of the transition period laid down in that agreement no longer enjoy the status of citizen of the Union. More particularly, they no longer enjoy the right to vote and to stand as a candidate in municipal elections in their Member State of residence, including where they are also deprived, by virtue of the law of the State of which they are nationals, of the right to vote in elections held by that State. Second, the Court has not identified any factor capable of affecting the validity of Decision 2020/135.

Findings of the Court

In the first place, the Court recalls that Union citizenship requires, in accordance with Article 9 TEU and Article 20(1) TFEU, possession of the nationality of a Member State and that there is an indissociable and exclusive link between the possession of the nationality of a Member State and the acquisition, and retention, of the status of citizen of the Union.

A series of rights attaches to Union citizenship,[9] including the fundamental and individual right to move and reside freely within the territory of the Member States. In particular, as regards Union citizens residing in a Member State of which they are not nationals, those rights include the right to vote and to stand as a candidate in municipal elections in the Member State where they reside, a right which is also recognised by the Charter of Fundamental Rights of the European Union.[10] By contrast, none of those provisions enshrines that right for nationals of third States. Consequently, the fact that an individual has, where the State of which he or she is a national used to be a Member State, exercised his or her right to move and reside freely in the territory of another Member State is not such as to enable him or her to retain the status of citizen of the Union and all the rights attached thereto by the TFEU, if, following the withdrawal of his or her State of origin from the European Union, he or she no longer holds the nationality of a Member State.

In the second place, the Court recalls that, by virtue of its sovereign decision, taken under Article 50(1) TEU, to leave the European Union, the United Kingdom has no longer been a member of the European Union since 1 February 2020, so that its nationals now have the nationality of a third State and no longer that of a Member State. The loss of the nationality of a Member State entails, for any person who does not also hold the nationality of another Member State, the automatic loss of his or her status as a citizen of the Union. Accordingly, that person no longer enjoys the right to vote and to stand as a candidate in municipal elections in his or her Member State of residence.

In that regard, the Court states that, since the loss of Union citizenship for a United Kingdom national is an automatic consequence of the United Kingdom's sovereign decision to withdraw from the European Union, neither the competent authorities of the Member States nor their courts may be required to carry out an individual examination of the consequences of the loss of the status of Union citizens for the persons concerned, in the light of the principle of proportionality.

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

7 Article 9 TEU on Union citizenship and Article 50 TEU on the right of and arrangements for the withdrawal of a Member State from the European Union.

8 Article 20 TFEU on Union citizenship, Article 21 TFEU on the freedom of movement and freedom to reside of Union citizens, and Article 22 TFEU on the rights to vote and to stand as a candidate of citizens of the Union.

9 By virtue of Article 20(2) and Articles 21 and 22 TFEU.

10 Article 40 of the Charter.

In the third place, the Court notes that the Withdrawal Agreement contains no provision which maintains, beyond the withdrawal of the United Kingdom from the European Union, in favour of United Kingdom nationals who have exercised their right to reside in a Member State before the end of the transition period, the right to vote and to stand as a candidate in municipal elections in their Member State of residence.

Although that agreement sets out the principle of maintaining the applicability of EU law in the United Kingdom during the transition period, Article 127(1)(b) of that agreement however expressly excludes, by way of derogation from that principle, the application in the United Kingdom and in its territory of the provisions of the TFEU and the Charter[11] relating to the right of citizens of the Union to vote and to stand as a candidate in the European Parliament and in municipal elections in their Member State of residence during that period. Admittedly, the wording of that exclusion refers to the United Kingdom and 'the territory of that State' without expressly referring to its nationals. However, having regard to Article 127(6) of the Withdrawal Agreement, that exclusion must be understood as also applying to United Kingdom nationals who exercised their right to reside in a Member State in accordance with EU law before the end of the transition period. The Member States were therefore no longer required, as from 1 February 2020, to treat United Kingdom nationals residing in their territory as nationals of a Member State as regards the grant of the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections.

An interpretation to the contrary of Article 127(1)(b) of the Withdrawal Agreement, consisting of limiting the application of that agreement solely to the territory of the United Kingdom and therefore solely to Union citizens who resided in that State during the transition period, would create an asymmetry between the rights conferred by that agreement on United Kingdom nationals and Union citizens. That asymmetry would be contrary to the purpose of that agreement, which is to ensure mutual protection for citizens of the Union and for United Kingdom nationals who exercised their respective rights of free movement before the end of the transition period.

As regards the period, which began at the end of the transition period, the Court notes that the right of United Kingdom nationals to vote and to stand as a candidate in municipal elections in the Member State of residence does not fall within the scope of Part Two of the Withdrawal Agreement, which lays down rules designed to protect, after 1 January 2021, on a reciprocal and equal basis, Union citizens and United Kingdom nationals[12] who exercised their rights to freedom of movement before the end of the transition period.

Finally, the first paragraph of Article 18 TFEU and the first paragraph of Article 21 TFEU,[13] which the Withdrawal Agreement renders applicable during the transition period and subsequently, cannot be interpreted as requiring Member States to continue to grant, after 1 February 2020, to United Kingdom nationals who reside in their territory the right to vote and to stand as a candidate in municipal elections held in that territory which they grant to Union citizens.

In the fourth and last place, as regards the validity of Decision 2020/135, the Court holds that that decision is not contrary to EU law.[14] In particular, there is no factor that permits the view that the European Union, as a contracting party to the Withdrawal Agreement, exceeded the limits of its discretion in the conduct of external relations, by not requiring that a right to vote and to stand as a candidate in municipal elections in the Member State of residence be provided for United Kingdom

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11 Articles 20(2)(b) and 22 TFEU and Articles 39 and 40 of the Charter.

12 Article 10(a) and (b) of the Withdrawal Agreement.

13 Article 18 TFEU concerns the prohibition of any discrimination on grounds of nationality and Article 21 TFEU concerns the freedom of movement and the freedom of establishment of citizens of the Union.

14 In the present case, Article 9 TEU, Articles 18, 20, 21 and 22 TFEU and Article 40 of the Charter.

nationals who exercised their right to reside in a Member State before the end of the transition period.

II. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 44/2001 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Judgment of the Court (Grand Chamber) of 20 June 2022, London Steam-Ship Owners' Mutual Insurance Association, C-700/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil and commercial matters – Regulation (EC) No 44/2001 – Recognition of a judgment given in another Member State – Grounds for non-recognition – Article 34(3) – Judgment irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought – Conditions – Whether the prior judgment entered in the terms of an arbitral award complies with the provisions and fundamental objectives of Regulation (EC) No 44/2001 – Article 34(1) – Recognition manifestly contrary to public policy in the Member State in which recognition is sought – Conditions

In November 2002, the M/T Prestige, an oil tanker flying the flag of the Bahamas, split in two following a violent storm and sank off the coast of Galicia (Spain). It was transporting 70 000 tons of fuel oil, which spilled, causing significant damage to beaches, towns and villages along the north coast of Spain and the west coast of France. Thus began a lengthy legal dispute between the insurer of the vessel (The London Steam-Ship Owners' Mutual Insurance Association Limited ('the London P&I Club')) and Spain in two different sets of proceedings initiated in two Member States.

First, the Spanish State, amongst other victims of the damage, brought a civil action before the Spanish courts. That action resulted in the London P&I Club being ordered to pay compensation for the damage caused, subject to the limit of 1 billion United States dollars (USD) (approximately EUR 900 000 000) stipulated in the insurance contract.

Secondly, after the introduction of that action, the *Prestige*'s insurer initiated arbitration proceedings in London on the basis of a clause in the insurance contract. Those proceedings resulted in an arbitral award according to which the claims for damages brought by Spain before the Spanish courts should have been made in those arbitration proceedings. In addition, the arbitral award concluded that, in accordance with another clause in the insurance contract – the 'pay to be paid' clause – the London P&I Club could not be liable to Spain in the absence of the prior payment of the damages, by the owners of the vessel, to Spain.

As provided for by the Arbitration Act 1996, the London P&I Club applied for and obtained a judgment of the High Court of Justice (England & Wales) in the terms of the arbitration award. That judgment was confirmed in appeal proceedings brought by Spain.

Spain, on the other hand, applied to the courts in the United Kingdom for the recognition of the Spanish order enforcing the judicial ruling finding the London P&I Club liable to pay compensation for the damage caused. The High Court granted that application in May 2019. The London P&I Club brought an appeal against that recognition, and the High Court decided to refer questions to the

Court of Justice concerning the interpretation of Regulation No 44/2001.[15] It asked the Court, in essence, whether that recognition could be refused on the basis of the existence, in the United Kingdom, of a judgment entered in the terms of an arbitral award and the effects of which are irreconcilable with those of the abovementioned judicial ruling.

By its judgment delivered today, the Court holds that Regulation No 44/2001 must be interpreted as meaning that a judgment entered by a court of a Member State in the terms of an arbitral award cannot prevent, in that Member State, the recognition of a judgment given in another Member State where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of the first Member State without infringing the provisions and the fundamental objectives of that regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules on lis pendens. In doing so, the Court ensures, in essence, that those provisions and fundamental objectives cannot be circumvented by means of arbitration proceedings followed by judicial proceedings seeking to have the terms of the arbitral award entered in a judicial decision.

As a preliminary point, the Court notes that the regulation excludes arbitration from its scope. A judgment entered in the terms of an arbitral award is therefore caught by that arbitration exclusion and cannot enjoy mutual recognition between the Member States.

That being said, such a judgment may be regarded as a judgment within the meaning of Article 34(3) of the regulation alone, capable of preventing the recognition of judgments from other Member States if those judgments are irreconcilable.

However, the position is different where the arbitral award in the terms of which that judgment was entered was, as in the present case, made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation.

As regards the relative effect of an arbitration clause included in an insurance contract, the Court notes that a jurisdiction clause agreed between an insurer and an insured party cannot be invoked against a victim of insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or before the courts for the place where the victim is domiciled.[16] To accept that a judgment entered in the terms of an arbitration award by which an arbitral tribunal declared itself to have jurisdiction on the basis of such an arbitration clause may prevent the recognition of a judgment given in another Member State following a direct action for damages brought by the injured party would be liable to deprive that party of effective compensation for the damage suffered.

As regards lis pendens, the Court notes that the two sets of proceedings in question, namely the civil action in Spain and the arbitration proceedings in London, were not only between the same parties but, moreover, had the same cause of action, namely the potential liability of the London P&I Club in respect of the Spanish State, under the insurance contract concluded between the London P&I Club and the owners of the Prestige, for the damage caused by the sinking of that vessel.

The Court emphasises that it is for the court seised with a view to entering a judgment in the terms of an arbitration award to verify that the provisions and fundamental objectives of Regulation No 44/2001 have been complied with, in order to prevent a circumvention of those provisions and objectives, such as a circumvention consisting in the completion of arbitration proceedings in

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15 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1). Regulation No 44/2001 is applicable to the dispute before the High Court. It has since been repealed and replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

16 Judgment of 13 July 2017, Assens Havn (C-386/16, EU:C:2017:599).

disregard of both the relative effect of an arbitration clause included in an insurance contract and the rules on lis pendens laid down in that regulation.

III. COMPETITION

1. AGREEMENTS, DECISIONS AND CONCERTED PRACTICES (ARTICLE 101 TFEU)

Judgment of the Court (First Chamber) of 22 June 2022, Volvo and DAF TRUCKS, C-267/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Agreements, decisions and concerted practices – Article 101 TFEU – Directive 2014/104/EU – Articles 10, 17 and 22 – Actions for damages for infringements of the provisions of EU competition law – Limitation period – Rebuttable presumption of harm – Quantification of harm suffered – Belated transposition of the directive – Temporal application – Substantive and procedural provisions

By decision of 19 July 2016,[17] the European Commission found that, by agreeing, first, on the prices of trucks in the European Economic Area (EEA) from 1997 to 2011 and, second, on the timing and passing on of costs for the introduction of emission technologies required by EURO 3 to EURO 6 standards, Volvo and DAF Trucks participated, with a number of other truck manufacturers, in a cartel contrary to the EU law rules prohibiting cartels.[18] A press release was issued on the same day as the adoption of that decision and a summary was published in the Official Journal of the European Union on 6 April 2017.[19]

Having purchased, during 2006 and 2007, three trucks manufactured by Volvo and DAF Trucks, RM brought before the Juzgado de lo Mercantil de León (Commercial Court, León, Spain) an action seeking compensation for the harm suffered as a result of the cartel found by the Commission. That action, brought on 1 April 2018, was declared admissible by the Commercial Court, inter alia having regard to the five-year limitation period provided for by the Spanish legislation transposing Directive 2014/104 on the compensation of victims of anti-competitive practices.[20] The Commercial Court also relied on the presumption established by that transposing legislation according to which it is presumed that all cartels cause harm and it exercised the discretion, provided for by that same legislation, to estimate the amount of the harm caused to RM. Volvo and DAF Trucks were thus ordered to pay RM compensation corresponding to 15% of the purchase price of the trucks in question.

Volvo and DAF Trucks brought an appeal against that judgment before the Audiencia Provincial de Léon (Provincial Court, Léon, Spain), disputing the applicability of Directive 2014/104 and of the Spanish transposing legislation, on the ground that the cartel had ceased before the entry into force of that directive.

17 Commission Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (AT.39824 – Trucks).

18 Article 101 TFEU and Article 53 of the EEA Agreement.

19 OJ 2017 C 108, p. 6.

20 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

In that context, the Provincial Court, Léon referred to the Court a number of questions for a preliminary ruling with a view to ascertaining whether Article 10 and Article 17(1) and (2) of Directive 2014/104, which establish, respectively, the rules:

– on the time-barring of actions for damages for infringements of competition law,

– on the quantification of harm resulting from such infringements and

– on the presumption of the existence of that harm,

are applicable to an action for damages which, although relating to a cartel which ceased before the entry into force of that directive, was brought after the entry into force of the provisions transposing it into national law.

Assessment of the Court

So far as concerns the temporal scope of Directive 2014/104, the Court recalls first of all that that directive prohibits, first, the retroactive application of any national legislation transposing the substantive provisions that it provides for and, second, the application of any national legislation transposing the non-substantive provisions of the directive to actions for damages brought before 26 December 2014.

Regarding the temporal applicability of Article 10 of Directive 2014/104, which establishes the rules relating to the time-barring of actions for damages for infringements of competition law, the Court notes, next, that such rules protect both the aggrieved person and the person responsible for the harm. It is apparent, additionally, from case-law of the Court that the limitation period, by resulting in the extinction of the legal action, is a matter of substantive law. Therefore, Article 10 of Directive 2014/104 is a substantive provision, for which the retroactive application of the transposing provisions is excluded under the directive.

Since Directive 2014/104 was transposed into Spanish law five months after the expiry of the time limit for transposition, fixed at 27 December 2016, the Court considers that, in order to determine the temporal applicability of Article 10 of that directive, it is necessary to ascertain whether the legal situation at issue in the main proceedings arose before the expiry of the period for transposition of the said directive or whether it continued to produce effects after the expiry of that time limit. In particular, the Court considers it necessary to ascertain whether, at the date of expiry of the time limit for transposition of Directive 2014/104, namely 27 December 2016, the limitation period applicable to the situation at issue in the main proceedings had elapsed, which means determining the time when that limitation period began to run. The Spanish legislation that was in force at the time provided that the one-year limitation period began to run from when the circumstances giving rise to liability had become known to the injured party.

While it is for the referring court to determine the date of the acquisition of that knowledge by RM in this case, it is obliged to interpret the applicable national provisions, so far as possible, in the light of EU law and, in particular, the wording and purpose of Article 101 TFEU.

In that context, the Court emphasises that it follows from the principle of effectiveness that national limitation periods applicable to actions for damages for infringements of competition law cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring his or her action, namely the existence of harm, the causal link between that harm and the infringement of competition law committed and the identity of the perpetrator of that infringement.

In that regard, the Court notes that the press release of the Commission decision finding the cartel, published on 19 July 2016, does not appear to identify with the precision of the summary, published on 6 April 2017, the identity of the perpetrators of the infringement, its exact duration and the products concerned. In those circumstances, the full effectiveness of Article 101 TFEU requires it to be considered that, in this case, the limitation period of the action for compensation brought by RM began to run on the day of the publication of the summary of the Commission decision.

In so far as that would be the case, it thus appears that that period had not elapsed before the expiry of the time limit for transposition of Directive 2014/104. It continued to run even after the date of entry into force of the Spanish transposing legislation. Thus, the Court considered that, in so far as the

limitation period applicable to RM's action for damages under the old rules did not elapse before the date of expiry of the time limit for transposing that directive, that action falls within the temporal scope of Article 10 of the said directive.

With regard to the temporal applicability of Article 17(1) of that same directive, the Court finds that, by aiming in particular to empower the national courts to estimate the amount of harm suffered where it is practically impossible or excessively difficult precisely to quantify it on the basis of the evidence available, the objective of that provision is to relax the standard of proof required for the purposes of determining the amount of the harm resulting from an infringement of the competition law rules.

In the light of its case-law, according to which the rules on the burden of proof and the standard of proof are, in principle, classified as procedural rules, the Court concludes that Article 17(1) of Directive 2014/104 constitutes a procedural provision, within the meaning of Article 22(2) of that directive, for which the application of the transposing provisions to actions brought before 26 December 2014 is excluded.

RM having brought its action on 1 April 2018, that action, although relating to an infringement which ceased before the entry into force of the said directive, falls, consequently, within the temporal scope of Article 17(1) of the said directive.

So far as concerns, last, the temporal applicability of Article 17(2) of Directive 2014/104, establishing a rebuttable presumption as to the existence of harm resulting from a cartel, the Court emphasises that that provision is directly linked to the incurrence of the non-contractual civil liability of the perpetrator of the infringement concerned and, consequently, directly affects his or her legal situation. As such a rule may be classified as a substantive rule, the Court considers that Article 17(2) of Directive 2014/104 is substantive in nature within the meaning of that directive, such that a retroactive application of the provisions transposing it into Spanish law is prohibited.

Since the fact identified by the EU legislature as giving rise to a presumption of the existence of harm under Article 17(2) of Directive 2014/104 is the existence of a cartel, the prohibition of retroactive application of that provision and of the transposing legislation means that they cannot be applicable to an action for damages which, although brought after the entry into force of the provisions transposing belatedly that directive into Spanish law, pertains to an infringement of competition law which ceased before the expiry of the time limit for transposing that directive.

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

Judgment of the General Court (Sixth Chamber, Extended Composition) of 15 June 2022, Qualcomm v Commission (Qualcomm – Exclusivity payments), T-235/18

Link to the complete text of the judgment

Competition – Abuse of a dominant position – LTE chipsets market – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Exclusivity payments – Rights of the defence – Article 19 and Article 27(1) of Regulation (EC) No 1/2003 – Foreclosure effects

The applicant, Qualcomm Inc., is a US company which develops and supplies baseband chipsets ('chipsets') intended for use in smartphones and tablets to enable them to connect to cellular

networks,[21] according to the respective standard. Chipsets are therefore sold to original equipment manufacturers, including Apple, who incorporate them into their devices.

By decision of 24 January 2018[22], the Commission imposed on the applicant a fine of close to EUR 1 billion for having abused its dominance on the worldwide market for chipsets compatible with the LTE standard, for a period lasting from February 2011 to September 2016.

According to the Commission, that abuse was characterised by incentive payments being made, under agreements concluded between the applicant and Apple. Those agreements provided for incentive payments to be made by the applicant to Apple on condition that Apple source all of its LTE chipsets from the applicant. In those circumstances, the Commission took the view that those payments, which it characterises as exclusivity payments, were capable of having anticompetitive effects, in that they had reduced Apple's incentives to switch to competing LTE chipset providers, which was confirmed by Apple's internal documents and explanations.

By its judgment, the General Court annuls in its entirety the contested decision, basing its conclusions on, first, the finding of a number of procedural irregularities which affected the applicant's rights of defence, and, second, an analysis of the anticompetitive effects of the incentive payments, which it found to be incomplete and unfit to bear out such payments as being capable of having anticompetitive effects. In so doing, it provides clarification of the scope of the obligations on the Commission concerning, first, the putting together of the administrative case file in order to enable any undertaking under investigation to assert its rights of defence properly and, second, its analysis of the foreclosure capability of at least as efficient competitors.

Findings of the Court

As a preliminary point, the Court gives its ruling on the admissibility of certain further evidence adduced by the applicant after closure of the written part of the judicial proceedings. That evidence consists, in essence, of two sets of documents stemming from two sets of legal proceedings in the United States. Pointing out that it is admissible to lodge evidence late only if justified by exceptional circumstances, such as it having been impossible to produce the documents concerned earlier, the Court finds that, in the present case, contrary to the Commission's arguments, taking account, in particular, of the circumstances in which the applicant obtained them, the applicant did not have those documents when it lodged its written submissions. Accordingly, the Court finds that the further evidence so produced is admissible.

As regards substance, the Court examines, first of all, the plea alleging manifest procedural errors, choosing to begin by examining the complaint regarding infringement of the rights of the defence concerning the putting together of the case file, then the differences between the statement of objections and the contested decision.

As regards, on the one hand, the putting together of the case file, the Court points out at the outset that it is for the Commission to record, in a form of its choosing, the precise content of all interviews conducted, under Article 19 of Regulation No 1/2003, for the purposes of collecting information relating to the subject matter of an investigation.

In the present case, the Court finds, first that the information provided to the applicant, on its request, by the Commission after receipt of the contested decision discloses that meetings and conference calls had been held with third parties, in their position as competitors or customers of the applicant. In that regard, the Court takes the view that the evidence concerning the purpose of those exchanges makes it possible to characterise them as interviews subject, as such, to the recording

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21 Chipsets are used both for voice services and data transmission. Chipsets are made up of a number of components. Their compatibility with one or more cellular communication standards, such as the GSM, UMTS or LTE standards, is one of their essential characteristics.

22 Commission Decision C(2018) 240 final of 24 January 2018 relating to proceedings under Article 102 [TFEU] and Article 54 of the [EEA Agreement] (Case AT.40220 – Qualcomm (Exclusivity payments)).

requirement referred to above. In the light of the evidence placed on the file, the Court observes that the notes sent by the Commission give no indication as to the content of the discussions which took place during those interviews, in particular regarding the nature of the information provided on the subjects addressed. Accordingly, the Court finds the first failure on the part of the Commission to fulfil its obligations to record the interviews concerned and to include those recordings in the case file.

Second, the same goes, according to the Court, for the exchanges with a third party, the existence of which was disclosed even later, during the judicial proceedings. Having observed that it was common ground that the Commission had not documented those exchanges, the Court bases its findings on the evidence placed on the file, and on a detailed analysis of their procedural context, to find that they had involved, at least in part, information concerning the purpose of the investigation at issue, and, consequently, that they are interviews which had to be recorded.

Third, the Court finds a further failure on the part of the Commission to fulfil its obligations in putting together the administrative case file. In that regard, it states that the evidence adduced by the Commission before the Court referred to a meeting with a third-party informant which took place before the Commission had commenced its investigation, and to allegations made by that third-party informant at that meeting. After having stated that the Commission had not documented that meeting in any way, the Court considers that such an omission is a procedural defect. Even though there is no requirement to make a record referred to above in relation to interviews before the first investigative act, as in the present case, the Commission nevertheless remains bound, more generally, to enable undertakings under investigation to gain proper access to inculpatory evidence contained in its case file. From that, it follows, in particular, that it is for the Commission to document, in a written document placed in the case file any meeting with a third-party informant which made it possible for it to gather, orally, inculpatory evidence which it intends to use, which, in the present case, it failed to do.

As regards the consequences to be drawn from the three sets of procedural errors thereby established, it is settled case-law that, where such errors exist, an infringement of the rights of the defence can be found only if the applicant undertaking demonstrates that it could have been better able to ensure its defence had those errors not occurred. In the present case, the Court observes that the evidence submitted by the applicant tends to demonstrate that those meetings and those conference calls could have provided information essential to the further course of the proceedings which might have been relevant to the applicant, by making it better able to ensure its defence, in the light, in particular, of the nature of the third parties in question.

As regards, on the other hand, the differences between the statement of objections and the contested decision, the Court observes, first of all, that the contested decision limits itself to finding abuse solely on the market for LTE chipsets, whereas the statement of objections contemplated abuse both on the LTE chipsets market and the UMTS chipsets market. In response to the statement of objections, the applicant sought to demonstrate, by means of an economic analysis known as 'critical margin analysis', [23] that the payments at issue were not capable of having foreclosure effects on those two markets. In the contested decision, the Commission rejected that analysis. However, the Court considers that, in so far as the alteration of the objections concerning the scope of the abuse had an effect on the relevance of the data which formed the basis of the applicant's analysis seeking to challenge the capability of its conduct to have foreclosure effects, the Commission ought to have given it the opportunity to be heard and, where necessary, to adapt its analysis in order to take into account the withdrawal of the objections relating to UMTS chipsets, the supply of which was no longer criticised by the Commission. Accordingly, having failed to hear the applicant on that point, the Court finds that the Commission infringed the rights of defence of the applicant.

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23 Such analysis sought to demonstrate that a hypothetical competitor as efficient as the applicant could have competed with the applicant to supply chipsets compatible with the two standards concerned to Apple, and would have been in a position to offer a price covering its costs while also compensating Apple for the loss of the incentive payments at issue.

Stating that the infringements of the rights of defence of the applicant which had been observed are sufficient to justify setting aside the contested decision, the Court finds it nevertheless useful to continue its examination even after having upheld the plea alleging infringement of the rights of defence.

Accordingly, second, the Court examines the plea alleging manifest errors of law and of assessment seeking to challenge the finding that the payments concerned were capable of having potential anticompetitive effects.

In that regard, the Court points out first of all that, according to established case-law, when an undertaking, relying on evidence, challenges the capability of the conduct alleged against it to restrict competition and, in particular, to have foreclosure effects, it is for the Commission to carry out an analysis of the foreclosure capacity of competitors that are at least as efficient, in order to establish that the conduct alleged is abusive.

As a preliminary point, the Court states that the conduct alleged against the applicant falls solely within the scope of its contractual relations with Apple during the period concerned. The Court, following a detailed analysis of the contested decision and of the information provided by the Commission, observes that, first, the Commission found that the payments concerned had reduced Apple's incentives to switch to the applicant's competitors to source LTE chipsets for all its devices, namely iPhones and iPads, basing its conclusions on an analysis of the capability of those payments to have anticompetitive effects. Second, the Commission took the view that those payments had actually reduced Apple's incentives to switch to the applicant's competitors to obtain supplies of LTE chipsets for certain of its devices, namely certain iPad models which Apple intended to launch in 2014 and 2015, based on an analysis of the actual effect of those payments.

In that context, the Court examines the applicant's complaints concerning those two aspects of the Commission's analysis.

In the first place, the Court finds that, in concluding that the payments at issue were capable of restricting competition for all of Apple's LTE chipset demand for both iPhones and iPads, the Commission failed to take account of all of the relevant factual circumstances. The Commission had taken the view, in that regard, that the payments at issue had reduced Apple's incentive to switch to the applicant's competitors to obtain supplies of LTE chipsets, whereas, as is apparent from the contested decision, Apple had no technical alternative to the applicant's LTE chipsets for the majority of its requirements during the period concerned, namely that part corresponding, in essence, to iPhones. The Court recalls that, since all the relevant circumstances surrounding the conduct complained of must be taken into account, the analysis of the anticompetitive capability of that conduct cannot be purely hypothetical.

In the second place, the Court observes that the conclusion that the payments at issue had actually reduced Apple's incentives to switch to the applicant's competitors to obtain supplies of LTE chipsets in respect of its requirements for certain iPad models to be launched in 2014 and 2015 is not sufficient to determine that they were anticompetitive. In that regard, the Court considers that an analysis of that nature cannot remedy the failure to take account of all the relevant factual circumstances in the Commission's general demonstration of the capability of the payments at issue to have anticompetitive effects during the period concerned in relation to all of Apple's LTE chipset requirements. In any event, the Court finds that the analysis of those actual effects in relation to certain iPad models to be launched in 2014 and 2015, first of all, is vitiated by a lack of consistency in the evidence relied on in support of its findings, next, was carried out without taking account of all the relevant factors for that purpose and, finally, was carried out relying on evidence which did not make it possible to support its findings.

Observing, accordingly, that the Commission failed to characterise to the requisite legal standard the payments at issue as constituting an abuse of dominant position, the Court upholds the plea and sets aside, also on that basis, the contested decision.

3. STATE AID

Judgment of the General Court (Second Chamber, Extended Composition) of 8 June 2022, United Kingdom and ITV v Commission, T-363/19 et T-456/19

Link to the complete text of the judgment

State aid – Aid scheme implemented by the United Kingdom in favour of certain multinational groups – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering the recovery of the aid paid – Advance tax rulings – Tax regime relating to the financing of groups and concerning in particular controlled foreign companies – Selective tax advantages

Under the corporation tax rules in the United Kingdom, only profits generated by activities and assets in the United Kingdom are taxed. However, the rules applicable to controlled foreign companies (CFCs) provide that the profits of those CFCs are taxed in the United Kingdom by means of a charge ('the CFC charge') when they are considered to have been artificially diverted from the United Kingdom.

Such a CFC charge was provided for, inter alia, in respect of the non-trading profits of CFCs, when they arose from activities the significant human functions of which were carried out in the United Kingdom or had been generated from United Kingdom funds or assets.

The rules applicable to CFCs, as applicable between 1 January 2013 and 31 December 2018, provided for the exemption from the CFC charge of non-trading finance profits arising from intra-group loans granted by a CFC to other members of the group which are not resident in the United Kingdom ('qualifying loans') and for which those groups could submit an application for partial or full exemption from the CFC charge ('the exemption scheme').

By decision of 2 April 2019,[24] the European Commission classified that exemption scheme as an unlawful State aid scheme incompatible with the internal market, in so far as it applied to profits arising from activities the significant human functions of which were carried out in the United Kingdom, since it was not justified either by the need to have administrable anti-avoidance rules or by the need to comply with the freedoms enshrined in the Treaties.

By contrast, in so far as the exemption scheme applied to profits arising from United Kingdom funds or assets, the Commission considered that, despite the a priori selective nature of those exemptions, they were justified in that they aimed to apply, in an administrable way, the rules applicable to CFCs.

The United Kingdom Government and ITV plc,[25] which had benefited from the exemption scheme ('the applicants'), brought actions for annulment of the contested decision.

Those actions are dismissed by the Second Chamber (Extended Composition) of the General Court. In its judgment, the General Court confirms, inter alia, that the United Kingdom tax rules applicable to CFCs constitute an appropriate reference framework for assessing the selectivity of the exemption scheme since they form a body of tax rules, distinct from the general United Kingdom corporation tax system.

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24 Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p. 1; 'the contested decision').

25 ITV plc, a tax resident in the United Kingdom, is the holding company at the head of the ITV Group, which is active in the creation, production and distribution of audiovisual content over various platforms throughout the world. That group includes inter alia CFCs, such as ITV Entreprises BV and ITV (Finance) Europe BV, two companies formed under Netherlands law which had granted several loans to other companies in the ITV Group.

Findings of the Court

As regards the analysis of tax measures from the point of view of Article 107(1) TFEU, the Court notes, as a preliminary point, that the examination of both the criterion of advantage and that of selectivity requires that the normal tax rules forming the relevant reference framework for that examination be determined.

The Court rejects, first of all, the applicants' pleas alleging errors of assessment on the part of the Commission, in that it had identified the tax rules applicable to CFCs as the reference framework.

In that regard, the Court points out that the reference framework cannot consist of some provisions of the domestic law of the Member State concerned that have been artificially taken from a broader legislative framework. On the other hand, where it appears that the measure is clearly severable from that general scheme, it cannot be ruled out that the reference framework to be taken into account may be more limited than the general scheme.

Thus, in so far as they seek to tax profits which have been artificially diverted from the United Kingdom by CFCs, the tax rules applicable to CFCs are based on a logic distinct from that underlying the general system of taxation in the United Kingdom, which covers profits made in the United Kingdom. Furthermore, in so far as they define specifically for the purpose of taxation of CFCs profits, inter alia, the tax base, the taxable person, the taxable event and the tax rates, those rules constitute a complete body of rules, distinct from the general corporation tax system in the United Kingdom.

Next, the Court rejects the applicants' pleas alleging an error of assessment vitiating the finding as to the existence of an advantage. In so far as the exemption scheme made it possible to exempt from taxation certain profits which should have been subject to a CFC charge in that they had been artificially diverted from the United Kingdom, that system thus conferred an advantage on the companies benefiting from the exemptions.

As regards, finally, the applicants' arguments alleging errors of assessment in the analysis of the selectivity of the exemption scheme, the Court states, first of all, that the Commission had correctly considered that the objective of the tax rules applicable to CFCs was limited to the taxation of CFCs profits artificially diverted from the United Kingdom, in order to protect the United Kingdom corporation tax base. The Court considers, moreover, that the Commission was correct in finding that the exemptions at issue, in that they exempt only CFCs non-trading finance profits arising from qualifying loans, to the exclusion of those arising from non-qualifying loans, lead to a difference in treatment of the two situations even though they are comparable, in the light of the objective pursued by those rules. Since both the profits arising from qualifying loans and those arising from non-qualifying loans were capable of being generated as a result of significant human functions carried out in the United Kingdom, the exclusion of non-qualifying loans from the exemptions at issue cannot be regarded as relating to specific situations of artificial diversion of profits.

In the light of those observations, the Court finds that, in view of the fact that the exemption scheme derogated from the tax rules applicable to CFCs and exempted only the non-trading finance profits of CFCs arising from qualifying loans, that system led to a difference in treatment of two comparable situations in the light of the objective of those rules and was, therefore, a priori selective.

The Court notes, moreover, that none of the circumstances put forward by the United Kingdom can justify that difference in treatment. Since it has not been established that the identification and location of the significant human functions carried out in the context of intra-group loans was part of a particularly costly exercise, the exemptions at issue could not be justified on grounds of administrative practicability. Furthermore, in so far as the taxation of a CFC charge applied only to profits regarded as having been artificially diverted, the imposition of such a charge cannot be regarded as constituting an obstacle to freedom of establishment. Accordingly, the exemptions at issue could not be justified by the need to comply with freedom of establishment.

Finally, the Court upholds the recovery of the aid ordered by the Commission from the beneficiaries of the exemptions at issue without providing for any derogation for cases in which no advantage has been obtained, observing that, in the case of an aid scheme, the Commission is not required to carry out an analysis of the aid granted in each individual case.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 22 June 2022, Ryanair v Commission (Finnair II; Covid-19), T-657/20

Link to the complete text of the judgment

State aid – Finnish air-transport market – Aid granted by Finland to Finnair in the context of the COVID-19 pandemic – Recapitalisation of an airline by its public and private shareholders on a pro rata basis in proportion to the previously existing ownership structure – Decision not to raise any objections – Temporary Framework for State aid measures – Measure intended to remedy a serious disturbance in the economy of a Member State – Derogation from certain requirements of the temporary framework – No weighing of the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition – Equal treatment – Freedom of establishment – Freedom to provide services – Obligation to state reasons

On 3 June 2020, Finland notified the Commission of an aid measure in favour of the airline Finnair, Plc, of which it is the majority shareholder. Under the notified measure, Finland planned to subscribe, on a pro rata basis in proportion to its existing shareholding, to the new shares that were being offered to all of Finnair's shareholders in order to carry out a recapitalisation of the airline ('the measure at issue').[26]

Without initiating the formal investigation procedure laid down by Article 108(2) TFEU, the Commission, by a decision of 9 June 2020,[27] accepted the measure at issue pursuant to Article 107(3)(b) TFEU, which provides that aid to remedy a serious disturbance in the economy of a Member State may be declared compatible with the internal market.

The action for annulment brought against that decision by the airline Ryanair DAC ('the applicant') has been dismissed by the Tenth Chamber (Extended Composition) of the General Court. In this instance, the General Court upholds the choice made by the Commission to depart, for the purpose of its examination of the compatibility of the measure at issue with the internal market, from certain requirements set out in its communication entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'.[28]

Findings of the General Court

In support of its action for annulment, the applicant, in essence, criticises the Commission on the ground that it did not initiate the formal investigation procedure despite the doubts that it should have had during the preliminary examination of the compatibility of the aid with the internal market.

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26 That measure follows the grant of a State guarantee to Finnair covering 90% of a loan of €600 million obtained by it from a pension fund, which the Commission classified as State aid that was compatible with the internal market by Decision C(2020) 3387 final of 18 May 2020 on State aid SA.56809 (2020/N) – Finland COVID-19: State guarantee for Finnair. By judgment of 14 April 2021, Ryanair v Commission (Finnair I; Covid-19), T388/20 (under appeal) (see also PR 53/21), the General Court dismissed the action brought by Ryanair DAC against that decision.

27 Decision C(2020) 3970 final of 9 June 2020 on State aid SA.57410 (2020/N) – Finland COVID-19: Recapitalisation of Finnair ('the contested decision').

28 Commission Communication on the temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1), as amended on 3 April and 8 May 2020 ('the temporary framework').

According to the applicant, the Commission, inter alia, infringed the principles of equal treatment, legal certainty and the protection of legitimate expectations by waiving, for the purpose of examining the measure at issue, the application of a number of requirements laid down in section 3.11 of the temporary framework in relation to aid measures in the form of recapitalisation, namely:

– the requirement that individual recapitalisation measures must include a step-up mechanism increasing the remuneration of the State,

– a prohibition on beneficiaries from acquiring a stake of more than 10% in competing undertakings as long as at least 75% of those measures have not been redeemed, and

– a ban on beneficiaries from making dividend payments as long as those measures have not been fully redeemed.

In the opinion of the applicant, the non-compliance with the requirements laid down by the temporary framework is indicative of the doubts which ought to have led the Commission to initiate the formal investigation procedure.

While confirming that the Commission is under an obligation to initiate a formal investigation procedure in cases where there are doubts as to the compatibility of notified aid with the internal market, the General Court rejects the various arguments put forward by the applicant in that regard.

As far as the legal status of the temporary framework is concerned, the General Court observes first of all that, while the adoption of that framework results in a self-imposed limitation on the discretionary power enjoyed by the Commission when examining whether aid measures are compatible with the internal market, the adoption of such a framework does not, however, relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU.

In addition, the General Court points out that the temporary framework was adopted a few days after the introduction of the first lockdown measures by the Member States, in order to allow those States to act with the urgency that the situation demanded. Since that framework could not foresee all the measures that the Member States might adopt, it has been amended several times. Accordingly, in line with the announcement made to that effect in the contested decision, the temporary framework was amended once again, approximately 20 days after the adoption of that decision, in order to take account of the type of temporary aid measures such as that at issue in the present case.

Next, the General Court notes that the measure at issue has several very particular characteristics which the Commission had not envisaged at the time when the requirements set out in section 3.11 of the temporary framework were adopted and from which it departed in the contested decision.

As regards, in the first place, the requirement to provide for a step-up mechanism in respect of the shares acquired by the State, the General Court notes that the objective of that mechanism is to incentivise the beneficiary of the aid to buy back the State capital injections and, as a consequence, to ensure that the status quo ante is restored. However, since Finland planned to acquire new shares on a pro rata basis in proportion to its previous shareholding in the capital of Finnair, the application of the step-up mechanism for its remuneration would lead in the present case to a change in the capital structure of Finnair, which would go beyond the objective of that requirement.

The General Court points out, in addition, that the new shares were offered at a sufficiently large price discount for the view to be taken that Finland has received sufficient remuneration.

In the second place, as for the prohibition on acquisitions laid down by the temporary framework, the applicant contested the decision of the Commission not to prohibit Finnair from acquiring a stake of more than 10% in competing undertakings as long as at least 75% of the aid had not been redeemed and to accept, by contrast, the ban imposed by Finland on Finnair from making acquisitions for a period of three years from the date of the capital increase.

However, since the application of the acquisition ban in the manner laid down by the temporary framework would again have had the objective of forcing Finland to reduce its stake in the capital of

Finnair to a level below that which it held before the COVID-19 pandemic, the General Court finds that the Commission was entitled to waive it.

In the third place, as regards the lack of a prohibition on Finnair from paying dividends as long as the measure at issue has not been fully redeemed, the General Court observes that the absence of such a prohibition is justified by the fact that Finland does not increase its shareholding in Finnair on account of the simultaneous participation by private shareholders and investors in the airline's recapitalisation, which decreases the amount of the aid. Accordingly, the dividends paid to the private shareholders and investors are merely the remuneration for their significant investment in Finnair in crisis circumstances and amid a downbeat investment climate.

Since the measure at issue thus differs from the situations covered by section 3.11 of the temporary framework, the General Court finds that, contrary to what was argued by the applicant, the Commission did not infringe the principles of equal treatment, legal certainty and the protection of legitimate expectations. The mere fact that the Commission derogated from the application of certain requirements of section 3.11 in order to take account of the specific circumstances of the measure at issue is thus not sufficient to demonstrate that the Commission ought to have had doubts as to the compatibility of that measure with the internal market.

The General Court, in addition, rejects the applicant's line of argument that the Commission infringed the rule laid down by the temporary framework stating that, where the beneficiary of a recapitalisation measure above €250 million is an undertaking with significant market power on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In that context, the applicant, more specifically, criticised the Commission for having erred in its assessment in finding that Finnair did not have significant market power.

In that respect, the General Court states that, since the measure at issue seeks as far as possible to maintain the entirety of Finnair's operations and does not target particular routes, the Commission could examine the presence of a competitive constraint on that airline at the airports where it held slots. In the present case, the Commission carried out that assessment, inter alia, on the basis of the level of congestion at Helsinki Airport, Finnair's main base and hub, and on the share of slots held by Finnair at that airport. That share was less than 25% of the total number of slots at the airport in 2019. Furthermore, slots are available at any time of the day for new entrants, including those wishing to compete with Finnair on one route or another. It follows that the share of slots held by Finnair does not enable it to disturb the various markets for passenger air transport services departing from or arriving at Helsinki Airport.

Having regard to those considerations, the General Court finds that the applicant has likewise not adduced any conclusive evidence of the existence of doubts as to the compatibility of the measure at issue with the internal market with respect to the Commission's assessment of Finnair's market power on the markets in question.

After also rejecting all the other complaints intended to establish the existence of doubts that should have led the Commission to initiate the formal investigation procedure, the General Court rejects the plea in law alleging failure to state reasons and, consequently, dismisses the action in its entirety.

IV. APPROXIMATION OF LAWS: INTELLECTUAL PROPERTY

Judgment of the General Court (Sixth Chamber) of 8 June 2022, Muschaweck v EUIPO – Conze (UM), T-293/21

Link to the judgment as published in extract form

EU trade mark – Revocation proceedings – EU word mark UM – Genuine use of the mark – Use with the consent of the proprietor – Use in the form in which the mark was registered – Article 51(1)(a) of Regulation (EC) No 207/2009 (now Article 58(1)(a) of Regulation (EU) 2017/1001) – Representation by the proprietor of the trade mark – Evidence of use submitted within the time limit set

In 2010, MSM medical company[29] filed an application for registration of the word sign UM as an EU trade mark for medical services. In 2015, that company became subject to insolvency proceedings and an insolvency administrator was appointed.

The applicant, Ms Ulrike Muschaweck, then filed, in 2017, an application for revocation of the contested mark on the ground of lack of genuine use of that mark.[30] After the declaration of bankruptcy of MSM medical company, the same year, that mark was transferred to HUMJC medical practice,[31] and, one year later, relisted in the name of Mr Joachim Conze, legal successor of that medical practice.

The Cancellation Division of the European Union Intellectual Property Office (EUIPO) upheld the applicant's application in part, revoking the contested mark in respect of all the goods and services registered, with the exception of medical services in the field of hernia surgery. That decision was the subject of an appeal which was dismissed by the Second Board of Appeal of EUIPO.

Hearing an action for annulment of those two decisions, the General Court interprets for the first time the EUIPO Guidelines for Examination of European Union trade marks[32] and, in so doing, provides clarification on the extension of a time limit in the event of a second request for an extension of an extendable time limit. Accordingly, the Court dismisses the action and holds that the contested mark has in fact been put to genuine use in connection with medical services in the field of hernia surgery.

Findings of the Court

In the first place, the General Court considers that Mr Conze was entitled to authorise, of his own volition and without the applicant's agreement, in his capacity as partner of HUMJC medical practice, the law firm which represented the latter before the Cancellation Division. If the applicant had had to approve the decision relating to that representation, there would have been a high risk that she would not approve it, given her status as cancellation applicant in respect of the contested mark. Such a situation would undermine HUMJC medical practice's right to effective judicial protection.[33]

In the second place, the Court rejects the plea relating to the late submission, before the Cancellation Division, of the evidence of use of the contested mark by HUMJC medical practice.

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29 Medizinische Systeme Dr Muschaweck GmbH ('MSM medical company').

30 Under Article 51(1)(a) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

31 Hernienzentrum medical practice Dr Ulrike Muschaweck und PD Dr Joachim Conze PartG.

32 Hereinafter 'the EUIPO examination guidelines'. They may be consulted on EUIPO's website.

33 In accordance with Article 47 of the Charter of Fundamental Rights of the European Union.

The Court recalls that the EUIPO examination guidelines are a consolidated set of rules setting out the line of conduct which EUIPO itself proposes to adopt and that, provided that those rules are consistent with provisions of a superior rule of law, EUIPO must comply with those rules. Although those guidelines lack binding force, they are nevertheless a source of reference on EUIPO's practice in relation to trade marks. According to the EUIPO examination guidelines, where a request is filed for an extension to an extendable time limit before this time limit expires and is not accepted, the party concerned will be granted at least one day to meet the deadline, even if the request for an extension arrives on the last day before the expiry of the time limit.[34] In order to preserve the practical effect of those guidelines, the Court holds that that new time limit will be granted from the date on which the adjudicating body of EUIPO before which the request for an extension of a time limit is brought provides its response. In addition, a second request for an extension of the same time period must be refused unless the party requesting it can explain and properly justify the 'exceptional circumstances' which prevented it from carrying out the required action during the previous two time periods.[35]

In the present case, the Court finds, first, that the time limit for submitting evidence of use of the contested mark, the extension of which was requested for a second time by HUMJC medical practice, is an extendable time limit and that that medical practice submitted that request on the last day before the expiry of that time limit. Second, it observes that the fact of granting, essentially on the grounds of fairness, at least one additional day of extension following a request for an extension of a time limit filed on the last day of that period does not infringe a provision of a superior rule of law. Consequently, the Cancellation Division could not have merely dismissed the second request for an extension of the time limit of HUMJC medical practice, without granting further time running from the date of the communication of its response. Therefore, the evidence produced between the submission of that second request for an extension of the time limit and the Cancellation Division's response cannot be regarded as having been submitted out of time and must be taken into account for the purposes of examining the use of the contested mark.

In the third and last place, the Court confirms the existence of genuine use of the contested mark for medical services in the field of hernia surgery. First of all, the Court states that the period to be taken into consideration for the evidence of genuine use of the contested mark is comprised of the five years preceding the date of introduction of the application for revocation, even if that period coincides in part with the grace period.[36] Next, the Court holds that the contested mark had been used by HUMJC medical practice with the consent of MSM medical company, proprietor of that mark during the period at issue. More specifically, implicit consent of use of the contested mark had been given, for a number of years, by the insolvency administrator of that company. Finally, ruling on the territorial use of the contested mark, the Court finds that the evidence shows that HUMJC medical practice was active not only in Munich, but also throughout Germany and in London.

Judgment of the General Court (Sixth Chamber, Extended Composition) of 29 June 2022, Hijos de Moisés Rodríguez González v EUIPO – Irland and Ornua (La Irlandesa 1943), T-306/20

Link to the complete text of the judgment

EU trade mark – Invalidity proceedings – EU figurative mark La Irlandesa 1943 – Absolute grounds for invalidity – Declaration of invalidity by the Grand Board of Appeal of EUIPO – Evidence submitted for the

34 Paragraph 4.3 of the EUIPO examination guidelines, relating to the extension of time limits set by EUIPO.

35 Idem.

36 Under the first subparagraph of Article 15(1) and Article 51(1)(a) of Regulation No 207/2009, that grace period covers the period of five years following the date of registration of the EU trade mark. During that period, the rights of the proprietor cannot be declared to be revoked.

first time before the Court – Relevant date for the examination of an absolute ground for invalidity – Mark of such a nature as to deceive the public – Article 7(1)(g) of Regulation (EC) No 207/2009 (now Article 7(1)(g) of Regulation (EU) 2017/1001) – Bad faith – Article 52(1)(b) of Regulation No 207/2009 (now Article 59(1)(b) of Regulation 2017/1001)

For decades, the applicant, Hijos de Moisés Rodríguez González, SA, purchased Irish butter from Ornua Co-operative Ltd and sold it in the Canary Islands (Spain) under trade marks containing the element 'la irlandesa'. After that business relationship came to an end in 2011, the applicant continued to sell goods under those trade marks.

In 2014, it obtained, from the European Union Intellectual Property Office (EUIPO), registration of the EU figurative mark La Irlandesa 1943 for various foodstuffs.[37]

Ireland and Ornua Co-operative applied to EUIPO for a declaration that that mark was invalid on the ground that it was deceptive and that its registration had been applied for in bad faith.[38]

The Cancellation Division of EUIPO rejected the application for a declaration of invalidity.

However, the Grand Board of Appeal of EUIPO annulled the Cancellation Division's decision and declared the contested mark invalid. It found that, at the time when the application for registration was filed, that mark was of such a nature as to deceive the public as to the geographical origin of the goods at issue and that the registration of that mark had been applied for in bad faith.

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

The Court dismisses that action, finding that the contested mark was not misleading at the time of the application for registration, but that the applicant acted in bad faith at the time of that application. On this occasion, it clarifies the conditions for applying the concepts of 'deceptive mark' and 'bad faith on the part of the applicant' in the context of trade marks indicating a geographical origin of goods.

Findings of the Court

First of all, the Court notes that, when seeing the contested mark affixed to the goods at issue, Spanish-speaking consumers, who constitute the relevant public, will believe that those goods originate in Ireland.

Next, as regards the deceptive nature of the contested mark, the Court points out that, unlike the examination of an application for revocation,[39] which requires that account be taken of evidence subsequent to the filing of the mark, such as the use made of that mark, the examination of an application for a declaration of invalidity based on the deceptive nature of the mark[40] requires that it be established that the sign filed for the purposes of registration as a mark was per se of such a nature as to deceive the consumer at the time of filing of the application for registration, since the subsequent management of that sign is irrelevant. In the case of invalidity, it is necessary to assess whether the mark should not have been registered *ab initio* for reasons already existing on the date of that application, since the consideration of subsequent evidence can serve only to clarify the circumstances as they were on that date.

In the present case, the Grand Board of Appeal should have ascertained whether, on the date of the application for registration, there was any inconsistency between the information which the contested

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37 Those foodstuffs were goods such as meat or dairy products in Class 29 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

38 For the purposes of Article 7(1)(g) and Article 52(1)(a) and (b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

39 Within the meaning of Article 51(1)(c) of Regulation No 207/2009.

40 Brought under the provisions of Article 52(1)(a) of Regulation No 207/2009, in conjunction with Article 7(1)(g) of that regulation.

mark conveyed and the characteristics of the goods designated in that application. Since the list of goods did not contain any indication of their geographical origin and could therefore cover goods originating from Ireland, there was no such inconsistency at the time of the application, with the result that it was not possible to find that the contested mark was deceptive on that date. Thus, the Grand Board of Appeal erred in criticising the applicant for not having limited that list to goods originating from Ireland. Furthermore, since the contested mark could not be regarded as misleading on the date of the application for registration, the subsequent evidence, which did not concern the situation on that date, could not confirm such a misleading nature. Consequently, the Grand Board of Appeal erred in that regard.

Lastly, as regards bad faith on part of the applicant when filing the contested mark,[41] the Court states that, in order to decide that question, the Grand Board of Appeal could legitimately rely on evidence – and even on the use of that mark – subsequent to the date of that filing, since that evidence constituted evidence relating to the situation on the relevant date.

In the present case, first, a not insignificant part of the goods sold by the applicant under the contested mark was not of Irish origin and therefore did not correspond to the relevant public's perception of those goods. Although that fact is irrelevant for the purpose of examining whether the trade mark is misleading, it is not irrelevant for the purpose of examining bad faith on the part of the applicant. Since Spanish-speaking consumers had become accustomed over the course of several decades to the contested mark being affixed to butter originating from Ireland, they could be misled as to the geographical origin of those goods once the applicant had extended the use of the mark to goods other than butter of Irish origin.

Secondly, cases in which marks which were similar to the mark at issue in the present case were declared to be invalid or refused by EUIPO and the Spanish authorities confirm that the contested mark could be perceived as indicating the Irish origin of goods. They also indicate that the use of the mark for goods not of Irish origin was controversial as regards its potential deceptive nature; a fact of which the applicant was necessarily aware on the date of the application for registration and which is therefore capable of supporting the existence of bad faith on the part of the applicant on that date.

Thirdly, the applicant had adopted a commercial strategy of association with the marks containing the element 'la irlandesa' which were linked to the applicant's former business relationship with Ornua Co-operative, in order to continue to take advantage of that relationship, which has been terminated, and the marks which were linked to it.

Accordingly, the Court finds that registration of the contested mark was contrary to honest commercial and business practices and that the Grand Board of Appeal was correct in finding that the applicant acted in bad faith. Since that finding is such as to justify, by itself, the operative part of the decision of the Grand Board of Appeal, the Court dismisses the action.

41 For the purposes of Article 52(1)(b) of Regulation No 207/2009.

V. ECONOMIC AND MONETARY POLICY

1. PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the General Court (Ninth Chamber, Extended Composition) of 22 June 2022, Anglo Austrian AAB and Belegging-Maatschappij "Far-East" v ECB, T-797/19

Economic and monetary policy – Prudential supervision of credit institutions – Specific supervisory tasks assigned to the ECB – Decision to withdraw a credit institution's authorization – Serious breach of the national provisions transposing Directive 2005/60/EC – Proportionality – Infringement of the national legislation on the governance of credit institutions – Rights of the defence – Manifest error of assessment – Right to effective judicial protection

Since 2010, the Österreichische Finanzmarktbehörde (Austrian financial markets supervisory authority; 'the FMA') has adopted a large number of injunctions and sanctions against AAB Bank, a credit institution established in Austria. On that basis, in 2019, the FMA submitted to the European Central Bank (ECB) a draft decision to withdraw AAB Bank's authorisation to access the activities of a credit institution. By its decision,[42] the ECB withdrew that authorisation. In essence, it considered that, based on the FMA's findings, made in the context of carrying out its task of prudential supervision and in relation to AAB Bank's continued and repeated non-compliance with the requirements on anti-money laundering and countering the financing of terrorism and internal governance, AAB Bank was not able to ensure a sound management of its risks.

The action seeking annulment of that decision of the ECB is dismissed by the Ninth Chamber (Extended Composition) of the General Court. In its judgment, the Court rules, for the first time, on a withdrawal of authorisation of a banking institution on account of serious breaches of the legislation on anti-money laundering and countering the financing of terrorism and infringements of the rules on the governance of credit institutions.

Assessment of the General Court

First of all, the Court finds that, in the present case, the criteria justifying the withdrawal of authorisation provided for in Directive 2013/36[43] and transposed into national law were fulfilled.

First, on the ECB's finding that AAB Bank was found liable for serious breaches of the national provisions on anti-money laundering and countering the financing of terrorism adopted pursuant to Directive 2005/60,[44] [45] the Court holds that the ECB committed no manifest error of assessment.

As a preliminary point, the Court observes that, in exercising its competence relating to the withdrawal of authorisations of credit institutions, the ECB is obliged to apply, inter alia, the national law provisions transposing Directive 2013/36.

In the present case, it notes that, in taking into account inter alia the decisions of the FMA and the judgments of the Austrian courts, the ECB considered that AAB Bank had infringed, for several years, the national provisions transposing Directive 2013/36. It did not have an appropriate procedure for managing risks for the purposes of preventing money laundering and had been found liable for

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42 Decision ECB-SSM-2019-AT 8 WHD-2019 0009 of 14 November 2019.

43 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (OJ 2013 L 176, p. 338).

44 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15).

45 Criterion resulting in the revocation of authorisation, referred to in Article 67(1)(o) of Directive 2013/36.

serious, repeated or systematic breaches of the national legislation on anti-money laundering and countering the financing of terrorism.

The Court considers that, in view of the importance of combating money laundering and terrorist financing, a credit institution may be found liable for serious breaches on the basis of administrative decisions adopted by a competent national authority, sufficient, in themselves, to justify a withdrawal of its authorisation. The fact that the breaches are old or have been corrected has no bearing on the incurrence of such liability. The relevant national law does not impose a time limit to be observed for taking into account earlier decisions establishing liability. Nor does it require that serious breaches be interrupted or still exist when the decision to withdraw authorisation is adopted, especially since, in this case, the breaches were found only a few years before the adoption of the contested decision. Regarding AAB Bank's position that the breaches had been corrected and, consequently, could no longer justify such a withdrawal of authorisation, the Court states that such an approach would call into question the objective of safeguarding the European banking system since it would permit credit institutions that have committed serious breaches to continue their activities as long as the competent authorities do not demonstrate again that they have committed new breaches. In addition, a credit institution found liable for serious breaches by a decision which has become final cannot invoke any time-barring of such breaches.

The Court also rejects the arguments of AAB Bank aimed at disputing the seriousness of the breaches found.

In that regard, it emphasises, in particular, that the seriousness of the breaches cannot be challenged at the stage of the administrative procedure before the ECB given that, in the decisions preceding the FMA's proposal of withdrawal, which became final on the date of the contested decision, the competent authorities deemed AAB Bank liable for the said breaches. Moreover, in the light of the objective of safeguarding the European banking market, the ECB cannot be criticised for having found that systematic, serious and continuous breaches of the national legislation on anti-money laundering and countering the financing of terrorism had to be classified as serious breaches justifying a withdrawal of authorisation.

Second, the Court endorses the position of the ECB according to which AAB Bank failed to implement the governance arrangements required by the competent authorities in accordance with the national provisions transposing Directive 2013/36.[46] In that context, it rejects the arguments of AAB Bank according to which, at the date of the contested decision, it was not in breach of the legislation on governance arrangements. It notes that the interpretation according to which past breaches or breaches which have been mitigated cannot justify a withdrawal of authorisation is apparent neither from Directive 2013/36 nor from the relevant national law.

Next, the Court concludes that, in refusing to suspend the application of the contested decision, the ECB committed no error. It observes inter alia that the latter's refusal to suspend the immediate application of that decision did not prevent AAB Bank from bringing an action for annulment and making an application for interim measures. In addition, the President of the General Court ordered the suspension of operation of the contested decision six days after its adoption, the time for a decision on the application for interim measures to be taken. Thus, no infringement of the right to effective legal protection could be found.

Subsequently, the Court rules that the contested decision was adopted in due observance of the rights of defence of AAB Bank. In that context, it states that AAB Bank was properly heard during the adoption of the contested decision. The latter was given the opportunity to submit its observations on the draft of that decision. By contrast, the ECB was not obliged to send AAB Bank the FMA's draft decision and thus allow it to respond to it.

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46 Criterion resulting in the revocation of authorisation, referred to in Article 67(1)(d) of Directive 2013/36.

Furthermore, the Court finds that, in the present case, the ECB did not fail to determine, examine and assess carefully and impartially all the material elements relevant for the withdrawal of the authorisation. Specifically, the ECB validly declared, following its own assessment, that it agreed with the FMA's determinations on the commission of breaches by AAB Bank, confirmed both by the FMA's administrative decisions and by the decisions of the national courts. At the end of its own assessment, the ECB classified the facts at issue as establishing that AAB Bank had been found liable for a serious breach of the national legislation on anti-money laundering and countering the financing of terrorism. Likewise, it did not merely reproduce the findings made by the FMA regarding AAB Bank's failure to implement the necessary governance arrangements. On the contrary, the ECB relied on its own assessment of compliance with the national provisions relevant in that regard.

Last, the Court rejects AAB Bank's plea according to which the contested decision destroyed the economic value of the shares that its shareholder held in its capital and undermined the essence of that shareholder's right to property. As AAB Bank is not the holder of that property right, it cannot rely on it in support of its action for annulment.

2. SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Third Chamber, Extended Composition) of 1 June 2022, Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB, T-481/17

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Action for annulment – Actionable measure – Admissibility – Right to be heard – Right to property – Obligation to state reasons – Articles 18, 20 and 24 of Regulation (EU) No 806/2014

Judgment of the General Court (Third Chamber, Extended Composition) of 1 June 2022, Del Valle Ruíz and Others v Commission and SRB, T-510/17

Link to the complete text of the judgment

Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Right to be heard – Delegation of power – Right to property – Obligation to state reasons – Articles 18 and 20 and Article 21(1) of Regulation (EU) No 806/2014

Judgment of the General Court (Third Chamber, Extended Composition) of 1 June 2022, Eleveté Invest Group and Others v Commission and SRB, T-523/17

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Right to be heard – Obligation to state reasons – Articles 18 and 20 of Regulation (EU) No 806/2014 – Non-contractual liability

Judgment of the General Court (Third Chamber, Extended Composition) of 1 June 2022, Algebris (UK) and Anchorage Capital Group v Commission, T-570/17

Link to the complete text of the judgment

Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Delegation of power – Obligation to state reasons – Principle of good administration – Article 20 of Regulation (EU) No 806/2014 – Right to be heard – Right to property

Judgment of the General Court (Third Chamber, Extended Composition) of 1 June 2022, Aeris Invest v Commission and SRB, T-628/17

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Delegation of power – Right to be heard – Right to property – Obligation to state reasons – Articles 14, 18 and 20 of Regulation (EU) No 806/2014

Banco Popular Español, SA ('Banco Popular') was a Spanish credit institution under direct prudential supervision by the European Central Bank (ECB). On 7 June 2017, the Single Resolution Board (SRB) adopted a decision concerning a resolution scheme in respect of Banco Popular[47] ('the resolution scheme'). On the same day, the European Commission adopted Decision 2017/124[48] endorsing that scheme.

Prior to the adoption of the resolution scheme, a valuation of Banco Popular was carried out, comprising two reports which are annexed to the resolution scheme, namely a first valuation ('valuation 1'), dated 5 June 2017 and drafted by the SRB, and a second valuation ('valuation 2'), dated 6 June 2017, drafted by an independent expert. The purpose of valuation 2 was, inter alia, to estimate the value of Banco Popular's assets and liabilities, to inform the decision to be taken on the shares and instruments of ownership to be transferred and to enable the SRB to determine what constituted commercial terms for the purposes of the sale of business tool. Also on 6 June 2017, the ECB, after consulting the SRB, carried out an assessment as to whether Banco Popular was failing or was likely to fail,[49] in which it took the view that, given the liquidity problems which Banco Popular was facing, the latter would probably not be in a position, in the near future, to pay its debts or other liabilities as they fell due.[50] On the same day, Banco Popular's Board of Directors informed the ECB that it had reached the conclusion that the institution was likely to fail.

In the resolution scheme, the SRB considered that Banco Popular fulfilled the conditions for the adoption of a resolution scheme,[51] that is to say that it was failing or was likely to fail, that there were no other measures that could have prevented its failure within a reasonable time frame and that resolution action in the form of a sale of business tool[52] was necessary in the public interest. The SRB exercised its power to write down and convert Banco Popular's capital instruments[53] and ordered that the resulting new shares were to be transferred to Banco Santander for the price of €1.00.

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47 Decision SRB/EES/2017/08 of the Executive Session of the SRB of 7 June 2017, concerning the adoption of a resolution scheme in respect of Banco Popular Español SA.

48 Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p.15).

49 In accordance with the second subparagraph of Article 18(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1) ('the SRM Regulation'). Article 18 of that regulation concerns the resolution procedure.

50 In accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

51 In accordance with Article 18(1) of Regulation No 806/2014.

52 In accordance with Article 24(1)(a) of Regulation No 806/2014.

53 In accordance with Article 21 of Regulation No 806/2014.

The actions were designated as 'test cases' representing approximately 100 actions brought by natural and legal persons who owned capital instruments in Banco Popular before the resolution. The actions sought the annulment of the resolution scheme and/or Decision 2017/1246, together with compensation.

By its five judgments delivered by the Third Chamber, Extended Composition, the General Court dismisses the applicants' actions in their entirety. The present cases provide the Court, for the first time, with the opportunity to rule on the lawfulness of a decision concerning a resolution scheme adopted by the SRB.

Findings of the Court

In the first place, the Court states that an action may be brought against a resolution scheme adopted by the SRB, without there being any requirement that an action must also be brought against the Commission decision endorsing that scheme, with the result that, once it is endorsed by the Commission, such a scheme produces legal effects and constitutes an act against which an independent action for annulment may be brought.

In the second place, as regards the scope of its review, the Court considers that, since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, the Court must carry out a limited review. However, the Court considers that, even in the case of complex assessments such as those made by the SRB in the present case, the EU Courts must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also review whether that evidence constitutes all the relevant information which must be taken into account in order to assess a complex situation and whether that information is capable of supporting the conclusions drawn from it.

In the third place, the Court examines the applicants' arguments in the light of the Charter of Fundamental Rights of the European Union.

First, the Court holds that, although the shareholders and creditors of an institution which is the subject of a resolution action may rely on the right to be heard in a resolution procedure, the exercise of that right may be subject to limitations. In that regard, the Court states that the procedure for the resolution of Banco Popular pursued an objective of general interest, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard. Thus, in the context of the procedure for the resolution of Banco Popular, the absence of a provision requiring the shareholders and creditors of the entity concerned to be heard, and the failure to hear the applicants, constitute a limitation on the right to be heard which is justified and necessary in order to meet an objective of general interest and respects the principle of proportionality. Such hearings would have undermined the objectives of the protection of the stability of financial markets and the continuity of the entity's critical functions, as well as the requirements of speed and effectiveness of the resolution procedure.

Second, the Court states, as regards the right to property, inter alia, that Banco Popular was failing or was likely to fail and that there were no alternative measures capable of preventing that situation. Accordingly, the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute an excessive and intolerable interference impairing the very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction of their right to property.

Third, in respect of the right of access to the file, the Court finds that, during the administrative procedure which led to the adoption of the resolution scheme, the fact that (i) valuation 2 was not communicated by the SRB and (ii) the SRB and the Commission did not disclose the documents on which they relied does not constitute an infringement of that right. Certain information held by the SRB, contained in the resolution scheme, in valuation 2 and in the documents on which the SRB relied,

is covered by professional secrecy and is confidential. The Court therefore finds that, after the adoption of the resolution scheme, the applicants do not have a right to receive communication of all of the file on which the SRB relied.

In the fourth place, the Court rejects the plea of illegality alleging that the relevant provisions of the SRM Regulation[54] infringe the principles relating to the delegation of powers, stating that it is necessary for an EU institution, namely the Commission or the Council, to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects. The EU legislature thus conferred on an institution the legal and political responsibility for determining the European Union's resolution policy, thereby avoiding an 'actual transfer of responsibility',[55] without having delegated autonomous power to the SRB.

In the fifth place, as regards valuations 1 and 2, the Court indicates that, in view of the urgency of the situation, the SRB could rely on valuation 2 in order to adopt the resolution scheme. Given the time constraints and available information, some uncertainties and estimates are inherent in any provisional valuation, and the reservations expressed by an expert who carried out that valuation cannot mean that it was not 'fair, prudent and realistic'.[56] Furthermore, the Court observes that valuation 1, which was aimed at determining whether Banco Popular was failing or was likely to fail, in order to establish whether the conditions for initiating a resolution procedure or for the write-down or conversion of capital instruments had been met, became obsolete following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or was likely to fail.

In the sixth place, the Court finds that the SRB and the Commission did not make a manifest error of assessment in finding that the conditions laid down in Article 18(1) of Regulation No 806/2014 for the adoption of a resolution scheme had been satisfied.

First, the Court states that the insolvency of an entity is not a condition for a finding that it is failing or is likely to fail and, therefore, is not a condition for the adoption of a resolution scheme. The fact that an entity is balance sheet solvent does not mean that it has sufficient liquidity, that is to say that it has funds available to settle its debts or other liabilities as they fall due. The Court therefore holds that the SRB and the Commission did not make a manifest error of assessment in finding that Banco Popular was failing or was likely to fail. It also notes that the resolution scheme was validly adopted irrespective of the reasons which led Banco Popular to be failing or to be likely to fail.

Second, the Court finds that the applicants have not established that there were alternative measures to resolution and that the SRB and the Commission did not make a manifest error of assessment in finding that there was no other reasonable prospect that alternative private sector measures or supervisory action would prevent the failure of Banco Popular within a reasonable time frame.

Third, the Court states that the SRB and the Commission did not make a manifest error of assessment in finding that the resolution action was necessary and proportionate in light of the public interest objectives pursued.

In the seventh place, the Court rejects the plea alleging that the Commission did not examine the resolution scheme before endorsing it, stating that the Commission designates a representative entitled to participate in meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that its representative is entitled to participate in the debates and have access to all documents. Thus, the Commission, having participated in several meetings with the SRB, had been associated with the various phases leading to the adoption of the resolution scheme, had access to the preliminary drafts of that scheme and had participated in the preparation of those drafts.

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54 Articles 18, 21, 22 and 24 of the SRM Regulation.

55 Within the meaning of the judgment of 13 June 1958, Meroni v Haute Autorité, (9/56).

56 Under Article 20(1) of the SRM Regulation.

In the eighth place, the Court rejects the plea regarding the infringement of the Commission's obligation to state reasons. The Court states that, when the Commission endorsed the resolution scheme in Decision 2017/1246, it was entitled, in order to justify the adoption of that scheme, to limit itself to providing a statement of reasons indicating that it agreed with the content of that resolution scheme and the reasons put forward by the SRB.

In the ninth place, the Court rejects the arguments regarding the irregularity of the sale procedure. It confirms, inter alia, the lawfulness of the SRB's decision to request the national resolution authority to contact only the institutions which had participated in the procedure for the private sale of Banco Popular. That authority is entitled to solicit particular potential purchasers.[57]

In the tenth and last place, the Court, in the present case, rules out non-contractual liability on the part of the SRB and the Commission. In that regard, the Court notes that the applicants have not demonstrated that the SRB or the Commission acted unlawfully. It has not been demonstrated that the SRB or the Commission disclosed confidential information on the implementation of a resolution procedure in respect of Banco Popular and, consequently, there can be no finding that they infringed the principle of confidentiality or the obligation of professional secrecy.

Furthermore, the applicants have not demonstrated a causal link between the unlawful conduct of the SRB and the Commission, even if that conduct had been established, and Banco Popular's liquidity crisis, and therefore between that unlawful conduct and the alleged damage.

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

Judgment of the Court (Second Chamber) of 2 June 2022, HK/Danmark and HK/Privat, C-587/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Prohibition of discrimination on grounds of age – Directive 2000/78/EC – Article 3(1)(a) and (d) – Scope – Post of elected sector convenor of an organisation of workers – Statutes of that organisation under which only members under the age of 60 or 61 on the date of the election are eligible to stand as sector convenor

A, who was born in 1948, was recruited in 1978 as a union representative in a local branch of HK, a Danish organisation of workers including HK/Danmark and HK/Privat. In 1993, she was elected sector convenor of HK/Privat. That political office, which was based on trust, nevertheless included certain elements characteristic of ordinary workers. A was employed full-time, received a monthly salary and the Law on holidays applied to her.

A was re-elected every four years and held the post of sector convenor until 8 November 2011, when she reached the age of 63 and had exceeded the age limit laid down in the statutes of HK/Privat[58] for standing for the election planned for that year.

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57 According to the second subparagraph of Article 39(2) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

58 According to its statutes, only members who are under the age of 60 on the date of the election may be elected as sector convenor, with that age limit being deferred to 61 for members re-elected after the 2005 congress.

Following the complaint lodged by A with the Ligebehandlingsnævnet (Equal Treatment Board, Denmark), that Board held that it was contrary to the Danish Anti-Discrimination Law[59] for A to be prohibited, by reason of her age, to stand for election as sector convenor of HK/Privat and ordered HK to pay compensation to A for the harm suffered.

As that decision was not complied with, the Equal Treatment Board, acting on behalf of A, brought an action against HK. The Østre Landsret (High Court of Eastern Denmark) considers that the outcome of the dispute depends on whether, as a politically elected sector convenor of HK/Privat, A falls within the scope of the 'Anti-Discrimination' directive. If that is the case, it is not disputed that she would be the victim of direct discrimination on grounds of age contrary to that directive, under the statutes of HK/Privat.

The Court of Justice, from which the High Court of Eastern Denmark requested a preliminary ruling, holds that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of the 'Anti-Discrimination' directive.[60]

Findings of the Court

First, the Court concludes that the 'conditions for access' within the meaning of Article 3(1)(a) of Directive 2000/78,[61] to the post of sector convenor of an organisation of workers fall within the scope of that directive.

In that respect, as regards the concept of 'conditions for access to employment, to self-employment or to occupation', within the meaning of that provision, it follows from the use, together, of the terms 'employment', 'self-employment' and 'occupation' that Article 3(1)(a) covers conditions for access to any occupational activity, whatever the nature and characteristics of such activity. Those terms must be construed broadly, as is apparent from a comparison of the different language versions of that provision.

Accordingly, it follows from the wording of Article 3(1)(a) of the 'Anti-Discrimination' directive that the scope of that directive is not limited solely to the conditions for accessing posts occupied by 'workers' within the meaning of Article 45 TFEU.

In addition, the objectives of that directive bear out a textual interpretation thereof. The 'Anti-Discrimination' directive, the legal basis of which is the current Article 19(1) TFEU, does not seek to protect only workers as the weaker party in an employment relationship. The directive seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided. Accordingly, the question of whether the conditions for access to the post of sector convenor of HK/Privat fall within the scope of Directive 2000/78 does not depend on whether or not the sector convenor is characterised as a worker within the meaning of Article 45 TFEU and the case law interpreting it.[62]

The political nature of such a post has no bearing on the inclusion of those conditions in the scope of the 'Anti-Discrimination' directive, since that directive applies to both the private and the public sectors

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59 The lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. (forskelsbehandlingsloven) [Law on the prohibition of discrimination on the labour market – (Anti-Discrimination Law)], as amended by lov nr. 253 (Law No 253) of 7 April 2004, and lov nr. 1417 (Law No 1417) of 22 December 2004, concerning the transposition of Council Directive 2000/78/EC of November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p.16)('Anti-Discrimination' directive).

60 Article 3(1)(a) and (d), of the 'Anti-Discrimination' directive, entitled 'Scope'.

61 Article 3(1)(a) of that directive applies, within the limits of the areas of competence conferred on the European Union, to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

62 According to settled case-law of the Court, a 'worker' , within the meaning of Article 45 TFEU, is a person who, for a certain period of time, performs services for and under the direction of another person in return for which he or she receives remuneration.

and whatever the branch of activity, any exceptions being expressly specified.63 In addition, the method of recruitment to a post, such as being elected, has no bearing on the application of that directive.

The foregoing findings are not called into question by the argument relating to the right of organisations of workers to elect freely their representatives, which forms part of the freedom of association enshrined in Article 12 of the Charter of Fundamental Rights of the European Union ('the Charter').

That right must be reconciled with the prohibition of discrimination in employment and occupation which is the purpose of the 'Anti-Discrimination' directive, as a specific expression of the general principle of non-discrimination enshrined in Article 21 of the Charter. Freedom of association is not absolute, according to Article 52(1) of the Charter, its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that freedom and the principle of proportionality.

Second, as regards the interpretation of Article 3(1)(d) of the 'Anti-Discrimination' directive, according to which that directive applies to, inter alia, involvement in an organisation of workers, the Court considers that the pursuit of the activity of sector convenor of such an organisation falls within the scope of that provision. To stand for election as sector convenor of an organisation of workers, just as is the case in respect of holding the role of sector convenor once elected, constitutes a means of 'involvement', in the usual sense of that term, in such an organisation.

Such an interpretation reflects the objective of that directive, which is to lay down a general framework to combat discrimination on the grounds, inter alia, of age in employment and occupation, so that concepts which, in Article 3 of that directive, define the scope of that directive cannot be interpreted restrictively.

VII. PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 21 June 2022, Ligue des droits humains, C-817/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Processing of personal data – Passenger Name Records (PNR) – Regulation (EU) 2016/679 – Article 2(2)(d) – Scope – Directive (EU) 2016/681 – Use of PNR data of air passengers of flights operated between the European Union and third countries – Power to include data of air passengers of flights operated within the European Union – Automated processing of that data – Retention period – Fight against terrorist offences and serious crime – Validity – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 21 as well as Article 52(1) – National legislation extending the application of the PNR system to other transport operations within the European Union – Freedom of movement within the European Union – Charter of Fundamental Rights – Article 45

The PNR Directive [64]requires the systematic processing of a significant amount of PNR (Passenger Name Record) data relating to air passengers on extra-EU flights entering and leaving the European Union, for the purposes of combating terrorist offences and serious crime. In addition, Article 2 of

63 Under Article 3(4) of the 'Anti-Discrimination' directive, Member States may provide that that directive, in so far as it relates specifically to discrimination on the grounds of age, does not apply to the armed forces.

64 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ 2016 L 119, p. 132).

that directive provides Member States with the possibility to apply the directive to intra-EU flights also.

The Ligue des droits humains (LDH) is a not-for-profit association which filed an action for annulment with the Cour constitutionnelle (Constitutional Court, Belgium) in July 2017 against the Law of 25 December 2016 which transposed into domestic law the PNR Directive, the API Directive[65] and also Directive 2010/65.[66] According to LDH, that law infringes the right to respect for private life and the right to the protection of personal data guaranteed under Belgian and EU law. It criticises, first, the very broad nature of the PNR data and, secondly, the general nature of the collection, transfer and processing of those data. In its view, the law also infringes the free movement of persons in that it indirectly re-establishes border controls by extending the PNR system to intra-EU flights, as well as to transport by other means within the European Union.

In October 2019, the Belgian Constitutional Court referred ten questions to the Court of Justice for a preliminary ruling on, among other things, the validity of the PNR Directive and the compatibility of the Law of 25 December 2016 with EU law.

In its judgment delivered today, the Court held, first, that since the interpretation given by the Court to the provisions of the PNR Directive in the light of the fundamental rights guaranteed by Articles 7, 8 and 21 and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter') ensures that that directive is consistent with those articles, the examination of the questions referred has revealed nothing capable of affecting the validity of the said directive.

It should be noted as a preliminary point that an EU act must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Member States must therefore ensure that they do not rely on an interpretation of that act that would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles recognised by EU law. The Court states that many of the recitals and provisions of the PNR Directive require such an interpretation, stressing the importance that the EU legislature, by referring to the high level of data protection, gives to the full respect for fundamental rights enshrined in the Charter.

The Court states that the PNR Directive entails undeniably serious interferences with the rights guaranteed in Articles 7 and 8 of the Charter, in so far, inter alia, as it seeks to introduce a surveillance regime that is continuous, untargeted and systematic, including the automated assessment of the personal data of everyone using air transport services. It notes that the question whether the Member States may justify that interference must be assessed by measuring its seriousness and by verifying that the importance of the objective of general interest pursued is proportionate to that seriousness.

The Court concludes that the transfer, processing and retention of PNR data provided for by that directive may be regarded as being limited to what is strictly necessary for the purposes of combating terrorist offences and serious crime, provided that the powers provided for by that directive are interpreted restrictively. In that regard, today's judgment states, inter alia, that:

– The system established by the PNR Directive must cover only clearly identifiable and circumscribed information contained in the headings of Annex I thereto, relating to the flight operated and to the passenger concerned, which implies that, for certain headings of that annex, only the information specifically referred to is covered.

– The application of the system established by the PNR Directive must be limited to terrorist offences and serious crime having an objective link, even if only an indirect one, with the carriage

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65 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ 2004 L 261, p. 24).

66 Directive 2010/65/EU of the European Parliament and of the Council of 20 October 2010 on reporting formalities for ships arriving in and/or departing from ports of the Member States and repealing Directive 2002/6/EC (OJ 2010 L 283, p. 1).

of passengers by air. As regards those crimes, the application of that system cannot be extended to offences which, although meeting the criterion laid down in that directive relating to the threshold of severity and being referred to in Annex II thereto, amount to ordinary crime in view of the particular features of the domestic criminal justice system.

– The possible extension of the application of the PNR Directive to selected or all intra-EU flights, which a Member State may decide by exercising the power provided for in that directive, should be limited to what is strictly necessary. To that end, it must be open to effective review, either by a court or by an independent administrative body whose decision is binding. In that regard, the Court states that:

  • in the sole situation where the Member State establishes that there are sufficiently solid grounds for considering that it is confronted with a terrorist threat which is shown to be genuine and present or foreseeable, the application of that directive to all intra-EU flights from or to the said Member State, for a period which is limited to what is strictly necessary but may be extended, does not go beyond what is strictly necessary;

  • in the absence of such a terrorist threat, the application of the directive cannot be extended to all intra-EU flights, but must be limited to intra-EU flights relating, inter alia, to certain routes or travel patterns or to certain airports for which there are, at the discretion of the Member State concerned, indications that would justify that application. The strictly necessary nature of that application to the selected intra-EU flights must be regularly reviewed in accordance with changes in the circumstances that justified their selection.

– For the purposes of the advance assessment of PNR data, the objective of which is to identify persons who require further examination before their arrival or departure and which is initially carried out by means of automated processing, the passenger information unit (PIU) may compare those data only against the databases on persons or objects sought or under alert. Those databases must be non-discriminatory and must be used by the competent authorities in the context of their mission to combat terrorist offences and serious crime having an objective link, even if only an indirect one, with the carriage of passengers by air. As regards, moreover, the advance assessment in the light of the pre-determined criteria, the PIU may not use artificial intelligence technology in self-learning systems ('machine learning'), capable of modifying without human intervention or review the assessment process and, in particular, the assessment criteria on which the result of the application of that process is based as well as the weighting of those criteria. Those criteria must be defined in such a way that their application targets, specifically, individuals who might be reasonably suspected of involvement in terrorist offences or serious crime and to take into consideration both 'incriminating' as well as 'exonerating' evidence, and, in so doing, must not give rise to direct or indirect discrimination.

– Given the margin of error inherent in such automated processing of PNR data and the fairly substantial number of 'false positives' obtained as a result of their application in 2018 and 2019, the appropriateness of the system established by the PNR Directive to achieve the objectives pursued depends essentially on the proper functioning of the verification of the positive results obtained under those processing operations carried out by the PIU, as a second step, by non-automated means. In that regard, Member States must lay down clear and precise rules capable of providing guidance and support for the analysis carried out by the PIU agents in charge of that individual review for the purposes of ensuring full respect for the fundamental rights enshrined in Articles 7, 8 and 21 of the Charter and, in particular, guarantee a uniform administrative practice within the PIU that observes the principle of non-discrimination. In particular, they must ensure that the PIU establishes objective review criteria enabling its agents to verify, on the one hand, whether and to what extent a positive match ('hit') concerns effectively an individual who may be involved in the terrorist offences or serious crime, as well as, on the other hand, the non-discriminatory nature of the automated processing operations. In that context, the Court also stresses that the competent authorities must ensure that the person concerned can understand the operation of the pre-determined assessment criteria and programs applying those criteria, so that it is possible for that person to decide with full knowledge of the relevant facts whether or not to exercise his or her right to judicial redress. Similarly, in the context of such an action, the court responsible for reviewing the legality of the decision adopted by the competent authorities as well as, except in the case of threats to State security, the persons concerned themselves must

have had an opportunity to examine both all the grounds and the evidence on the basis of which the decision was taken, including the pre-determined assessment criteria and the operation of the programs applying those criteria.

– The subsequent disclosure and assessment of PNR data after the arrival or departure of the person concerned may be carried out only on the basis of new circumstances and objective evidence capable of giving rise to a reasonable suspicion of that person's involvement in serious crime having an objective link, even if only an indirect one, with the carriage of passengers by air, or from which it can be inferred that those data could, in a given case, contribute effectively to combating terrorist offences with such a link. Disclosure of PNR data for the purposes of such subsequent assessment must, as a general rule, except in the event of duly justified urgency, be subject to a prior review carried out either by a court or by an independent administrative authority, upon a reasoned request from the competent authorities, regardless of whether that request was introduced before or after the expiry of a period of six months following the transfer of those data to the PIU.

Secondly, the Court considers that the PNR Directive, read in the light of the Charter, precludes national legislation which authorises the processing of PNR data collected in accordance with that directive to be processed for purposes other than those expressly referred to in Article 1(2) of the said directive.

Thirdly, as regards the retention period for PNR data, the Court held that Article 12 of the PNR Directive, read in the light of Articles 7 and 8 as well as Article 52(1) of the Charter, precludes national legislation which provides for a general retention period of five years for such data, applicable indiscriminately to all air passengers.

According to the Court, after expiry of the initial retention period of six months, the retention of PNR data does not appear to be limited to what is strictly necessary in respect of those air passengers for whom neither the advance assessment nor any verification carried out during the initial six-month retention period nor any other circumstance have revealed the existence of objective evidence – such as the fact that the PNR data of the passengers concerned gave rise to a verified positive match during the advance assessment – that would be capable of establishing a risk that relates to terrorist offences or serious crime having an objective link, even if only an indirect one, with those passengers' air travel. On the other hand, it considers that, during the initial six-month period, the retention of the PNR data of all air passengers subject to the system established by that directive does not appear, as a matter of principle, to go beyond what is strictly necessary.

Fourthly, the Court holds that EU law precludes national legislation which, in the absence of a genuine and present or foreseeable terrorist threat to which the Member State concerned is confronted, provides for a system for the transfer, by air carriers and tour operators, as well as for the processing, by the competent authorities, of the PNR data of all intra-EU flights and transport operations carried out by other means within the European Union and departing from, going to or transiting through that Member State, for the purposes of combating terrorist offences and serious crime. In such a situation, the application of the system established by the PNR Directive must be limited to the transfer and processing of the PNR data of flights and/or transport operations relating, inter alia, to certain routes or travel patterns or to certain airports, stations or seaports for which there are indications that would justify that application. Furthermore, the Court states that EU law precludes national legislation providing for such a system for the transfer and processing of those data for the purposes of improving border controls and combating illegal immigration.

VIII. INTERNATIONAL AGREEMENTS: OPINION PROCEEDINGS PURSUANT TO ARTICLE 218(11) TFEU

Opinion of the Court (Fourth Chamber) of 16 June 2022, Opinion 1/20 pursuant to Article 218(11) TFEU (modernised Energy Charter Treaty)

Link to the complete text of the opinion

Opinion pursuant to Article 218(11) TFEU – Request for an Opinion – Draft modernised Energy Charter Treaty – Article 26 – Dispute settlement mechanism – Admissibility

The Energy Charter Treaty (ECT), approved on behalf of the European Communities in 1997,[67] has not been the subject of major revision since its entry into force in 1998. In 2020 negotiations on its modernisation were started. Those negotiations were to be based inter alia on a list of areas open to negotiation adopted in 2018 by the Charter Conference.[68]

During the negotiations, the European Union proposed amending the mechanism for the settlement of disputes between investors and Contracting States.[69] Since the field to which that mechanism belongs was not included in that list, the opening of negotiations on this area had to be the subject of consensus between the contracting parties. In the present case, that consensus was not reached.

On 2 December 2020, the Kingdom of Belgium submitted to the Court of Justice a request for an Opinion[70] on the compatibility with the Treaties of the dispute settlement mechanism provided for in the draft modernised ECT, and of the concepts of 'investment' and 'investor'.[71] In essence, that Member State harbours doubts as to the applicability of that mechanism to disputes between an investor from one Member State, and another Member State.

In its Opinion, the Court takes the view that it does not have sufficient information on the actual content of the draft modernised ECT and that, therefore, the present request for an Opinion, on account of its premature nature, must be regarded as inadmissible.

Findings of the Court

The Court, after finding that at the date on which the request for an Opinion was made, there was no document containing the text of the ECT, in its updated version, or that of Article 26 thereof, observes, first of all, that on that date negotiations were at a very early stage. Even if a list of areas open to negotiation had been identified and did not include the dispute settlement mechanism, a consensus could have, and might still, emerge, among the contracting parties, in favour of the inclusion in that list of the area covering the dispute settlement mechanism. Consequently, the outcome of any negotiations concerning that area is not sufficiently foreseeable and it cannot be ruled out that the provision relating to that provision may be amended.

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67 The ECT was approved by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p. 1).

68 Article 34 of the ECT provides that the Contracting Parties are to meet periodically in the Energy Charter Conference ('the Charter Conference').

69 The mechanism for the settlement of disputes between an investor and a Contracting Party is provided for in Article 26 of the ECT.

70 Under Article 218(11) TFEU.

71 Set out in the proposal for amendment of Article 1 of the ECT.

Next, the Court considers that the scope of the dispute settlement mechanism is dependent on the definition of the concepts of 'investment' and 'investor', which are the subject of negotiations. However, no amendment of the provision laying down those concepts was adopted at that stage. In addition, the impact that any amendments to those concepts might have on that dispute settlement mechanism cannot be assessed in the absence of any element making it possible to ascertain, with some accuracy, the rules governing that mechanism.

In the light of those uncertainties, the Court considers that it does not have sufficient information on the content and, more particularly, the scope of the provision relating to the dispute settlement mechanism, as it will appear in the modernised ECT. Therefore, the request for an Opinion appears premature.

Finally, the Court examines the considerations of expediency, expressed by certain Member States that intervened in the proceedings, which justify its taking a position on the question of the compatibility of the dispute settlement mechanism with the Treaties. Those considerations concern, inter alia, the absence of unanimous interpretation by the Member States as to the application of the dispute settlement mechanism at issue to disputes between an investor from one Member State and another Member State and arbitrators' refusal to find that they have no jurisdiction in such disputes, in arbitration proceedings based on that mechanism. In that regard, first, the Court finds that such considerations are unrelated to the purpose of the opinion procedure, since the dispute settlement mechanism[72] is already in force. Secondly, the Court notes that it has already held[73] that, in accordance with the principle of the autonomy of EU law,[74] the dispute settlement mechanism provided for in the ECT is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.

IX. JUDGMENT PREVIOUSLY DELIVERED

COMMON COMMERCIAL POLICY: SAFEGUARD MEASURES

Judgment of the General Court (First Chamber) of 18 May 2022, Uzina Metalurgica Moldoveneasca v Commission, T-245/19

Link to the complete text of the judgment

Safeguard measures – Market for steel products – Implementing Regulation (EU) 2019/159 – Action for annulment – Interest in bringing proceedings – Standing to bring proceedings – Admissibility – Equal treatment – Legitimate expectations – Principle of sound administration – Duty of care – Threat of serious injury – Manifest error of assessment – Initiation of a safeguard investigation – Competence of the Commission – Rights of the defence

In the context of the European Union's commercial defence policy, the European Commission made imports of certain steel products originating in certain third countries[75] ('the product concerned')

72 As provided for in Article 26 of the ECT.

73 Judgment of 2 September 2021, Republic of Moldova (C-741/19, EU:C:2021:655, paragraphs 40 to 66).

74 Article 344 TFEU.

75 Commission Implementing Regulation (EU) 2016/670 of 28 April 2016 introducing prior Union surveillance of imports of certain iron and steel products originating in certain third countries (OJ 2016 L 115, p. 37).

subject to prior monitoring. In the light of the statistical data collected for that purpose, the Commission initiated a safeguard investigation, further to which it adopted Implementing Regulation (EU) 2019/159,[76] which introduced definitive safeguard measures, in the form of tariff-rate quotas, against those imports.[77]

Uzina Metalurgica Moldoveneasca OAO ('the applicant'), established in Moldova, is an exporting producer of certain categories of the product concerned, and brought an action seeking annulment of the contested regulation in so far as it applies to the applicant.

The General Court, while declaring that action admissible in respect of the safeguard measures, dismisses it by examining whether, by treating Moldova differently from that applied to the Member States of the European Economic Area (EEA), the Commission infringed the principle of non-discrimination as a fundamental principle of EU law. It also interprets Article 5(1) of Regulation (EU) 2015/478[78] in the light of the Commission's power to initiate a safeguard investigation on its own initiative.

Findings of the Court

As regards the admissibility of the action, the Court rejects the plea of inadmissibility raised by the Commission alleging that the applicant has no legal interest in bringing proceedings and has no standing to do so.

As regards the applicant's interest in bringing proceedings, the Court considers that a partial annulment of the contested regulation would in itself be capable of having legal consequences and would be capable of procuring an advantage for the applicant. It is apparent from the mechanism put in place by the contested regulation, namely the imposition of an above-quota duty of 25% in the event that the tariff-rate quotas are exhausted, that the legal rules applicable to the export of the applicant's products to the European Union is less favourable than that which applied to it prior to the adoption of that regulation.

As to the applicant's standing to bring proceedings, the Court notes that the applicant is directly and individually concerned by the contested regulation. As regards direct concern, the Court finds, in the first place, that the contested regulation produces direct effects on the applicant's legal situation: it determines the legal framework and the conditions under which the applicant may export to the European Union, in terms both of volume and pricing, since its products are now subject to a quota system and no longer subject to free movement within the European Union, which requires neither the allocation of quantities nor authorisation from the Commission. In the second place, the contested regulation leaves no discretion to the competent authorities of the Member State in the implementation of safeguard measures, since those authorities are required to apply the above-quota duty once the tariff-rate quotas have been exhausted. As regards individual concern, the Court holds that there is a set of factual and legal elements constituting a particular situation which distinguishes the applicant from all other economic operators and which shows that the applicant is individually concerned by the contested regulation. The applicant may be regarded as (i) being part of a closed group, (ii) identifiable in the contested regulation, (iii) having participated in the investigation in preparation for the introduction of safeguard measures, and (iv) the only operator whose commercial data were used to set the tariff-rate quotas in respect of Moldova.

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76 Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (OJ 2019 L 31, p. 27; 'the contested regulation').

77 In the present case, the contested regulation established a country-specific tariff-rate quota for countries having a significant interest as suppliers and a 'residual' tariff-rate quota for other exporting countries to the European Union. Countries having a significant interest as suppliers, such as Moldova, could operate under those two separate systems, since the competent authorities were required to apply an additional duty at the rate of 25% on imports from those countries once the two tariff quotas had been exhausted ('the above-quota tariff').

78 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (OJ 2015 L 83, p. 16; 'the Basic Safeguards Regulation').

As to the substance, the Court rejects, first of all, the applicant's complaint alleging infringement of the principle of non-discrimination in that the Commission did not exclude the Republic of Moldova from the application of the contested regulation, like the Member States of the EEA, when it is in a comparable situation in so far as concerns close integration with the EU market, overall import figures and the low risk of diversion of trade flows. In that connection, the Court explains that the comparability of the situations should be assessed in the light of the context of the relations between the European Union and the third State concerned. The Agreement on the European Economic Area and the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, in terms of their respective scope, objectives and institutional mechanisms. Thus, the Commission cannot be criticised for taking the view that Moldova's situation was not comparable to that of the relevant EEA Member States.

Second, the Court rejects the applicant's complaint alleging infringement of Article 5(1) of the Basic Safeguards Regulation,[79] in that the Commission initiated a safeguard investigation on its own initiative, whereas only the Member States may initiate such an investigation. In that regard, the Court rules that the interpretation advocated by the applicant, which is tantamount to making the initiation of an investigation dependent on a Member State referring the matter to the Commission, aside from the fact that it appears inconsistent with the other provisions of the contested regulation, is incompatible with the general scheme of the system laid down by that regulation. Since no safeguard measures may be imposed without the initiation of a prior investigation, the power granted to the Commission to impose, on its own initiative, safeguard measures where the substantive conditions are met would be limited in its effects.[80] Furthermore, the very purpose of the monitoring mechanism would be affected by depriving the study of the data collected under that mechanism of most of its interest, since that data has allowed the Commission to consider that trends in imports of the product concerned might make it necessary to resort to safeguard measures. Accordingly, the Court concludes that the Commission has the opportunity to act on its own initiative where it has sufficient evidence to justify its action, and that such a possibility is recognised in the context of the initiation of investigations referred to in Article 5(1) of the Basic Safeguards Regulation.

79 Article 5(1) of the Basic Safeguards Regulation reads as follows: 'Where it is apparent to the Commission that there is sufficient evidence to justify the initiation of an investigation, the Commission shall initiate an investigation within 1 month of the date of receipt of information from a Member State and publish a notice in the Official Journal of the European Union …'

80 Pursuant to Article 15(1) of the Basic Safeguards Regulation, the Commission, in order to safeguard the interests of the European Union, may, inter alia on its own initiative, impose such measures where substantive conditions are satisfied.

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 16 June 2022, Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychothérapeutes), C-577/20, EU: C:2022:467
- Judgment of 22 June 2022, Leistritz, C-534/20, EU:C:2022:495
- Judgment of 28 June 2022, Commission v Spain, C-278/20, EU:C:2022:503
- Judgment of 30 June 2022, Valstybės sienos apsaugos tarnyba, C-72/22 PPU, EU:C:2022:505
- Judgment of 4 May 2022, Larko v Commission, T-423/14 RENV, EU:T:2022:268
- Order of 13 June 2022, Mendes de Almeida v Conseil, T-334/21, EU:T:2022:375
- Order of 20 June 2022, Natixis v Commission, T-449/21, EU:T:2022:394
- Judgment of 22 June 2022, Italy v Commission, T-357/19, EU:T:2022:385
- Judgment of 29 June 2022, LA International Cooperation v Commission, T-609/20, EU:T:2022:407