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I. CITIZENSHIP OF THE UNION: EXTRADITION OF A UNION CITIZEN TO A THIRD STATE

Judgment of the Court of Justice (Grand Chamber), 22 December 2022, Generalstaatsanwaltschaft München (Request for extradition to Bosnia and Herzegovina), C-237/21

Link to the full text of the judgment

Reference for a preliminary ruling – Citizenship of the European Union – Articles 18 and 21 TFEU – Request sent to a Member State by a third State for the extradition of a Union citizen who is a national of another Member State and who has exercised his right to free movement in the first of those Member States – Request made for the purpose of enforcing a custodial sentence – Prohibition on extradition applied solely to own nationals – Restriction of freedom of movement – Justification based on the prevention of impunity – Proportionality

S.M., who has Croatian, Bosnian and Serbian nationality, has lived in Germany since 2017 and has been working there since 2020. In November 2020, the authorities of Bosnia and Herzegovina requested that the Federal Republic of Germany extradite S.M. for the purpose of enforcing a custodial sentence that was imposed on him by a Bosnian court.

The Generalstaatsanwaltschaft München (Munich Public Prosecutor's Office, Germany) applied, referring to the judgment in Raugevicius,[1] for the extradition of S.M. to be declared inadmissible.

According to the Oberlandesgericht München (Higher Regional Court, Munich, Germany), which is the referring court, the validity of that application depends on whether Articles 18 and 21 TFEU are to be interpreted as providing for the non-extradition of a Union citizen even if, under the international treaties, the requested Member State[2] is required to extradite that Union citizen.

That question was not answered in the judgment in Raugevicius, since, in the case which gave rise to that judgment, the requested Member State was authorised, under the international treaties applicable, not to extradite the Lithuanian national in question out of the European Union. In the present case, however, Germany is under an obligation to Bosnia and Herzegovina to extradite S.M. pursuant to the European Convention on Extradition, signed in Paris on 13 December 1957. In accordance with Article 1 of that convention, Germany and Bosnia and Herzegovina are required to surrender to each other persons who are wanted by the judicial authorities of the requesting State for the carrying out of a sentence. In that regard, the declaration made by Germany under Article 6 of that convention, concerning the protection of its 'nationals' against extradition, restricts that term solely to persons possessing German citizenship.

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1 In the judgment of 13 November 2018, Raugevicius (C-247/17, EU:C:2018:898; 'the judgment in Raugevicius'), the Court interpreted Article 18 TFEU (which sets out the principle of non-discrimination on grounds of nationality) and Article 21 TFEU (which guarantees, in paragraph 1, the right to move and reside freely within the territory of the Member States) as meaning that, where an extradition request has been made by a third State for a Union citizen who has exercised his or her right to free movement, for the purpose of enforcing a custodial sentence, the requested Member State, whose national law prohibits the extradition of its own nationals out of the European Union for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served in its territory, is required to ensure that that Union citizen, provided that he or she resides permanently in the territory of the Member State in question, receives the same treatment as that accorded to its own nationals in relation to extradition (paragraph 50 and the operative part).

2 The Member State to which an extradition request was submitted.

Thus, the Court of Justice did not address in the judgment in Raugevicius the question whether the need to contemplate measures that are less restrictive than extradition may mean that the requested Member State infringes its obligations under international law.

The referring court therefore asks the Court about the interpretation of Articles 18 and 21 TFEU. It asks, in essence, whether, where a request for extradition has been made to a Member State by a third State for the purpose of enforcing a custodial sentence imposed on a national of another Member State residing permanently in the first Member State, the national law of which prohibits only the extradition of its own nationals out of the European Union and makes provision for the possibility that that sentence may be enforced in its territory provided that the third State consents to it, Articles 18 and 21 TFEU preclude that first Member State from extraditing that Union citizen, in accordance with its obligations under an international convention, if it cannot actually assume responsibility for enforcing that sentence in the absence of such consent.

In its judgment, the Court replies that Articles 18 and 21 TFEU must be interpreted as meaning that:

– the requested Member State is, in such circumstances, required by those provisions actively to seek consent from the third State, which made the extradition request, for the sentence imposed on the national of another Member State, residing permanently in the requested Member State, to be enforced in the latter's territory, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State;

– in the absence of such consent, the requested Member State is not precluded by those provisions, in such circumstances, from extraditing that Union citizen, in accordance with its obligations under an international convention, in so far as that extradition does not infringe the rights guaranteed by the Charter of Fundamental Rights of the European Union.[3]

Findings of the Court

In the first place, the Court recalls that, in the judgment in Raugevicius, which, like the case in the main proceedings, concerned an extradition request from a third State which had not concluded an extradition agreement with the European Union, it held that although, in the absence of EU legal provisions on the extradition of nationals of Member States to third States, Member States have the power to adopt such provisions, that power must be exercised in accordance with EU law and, in particular, with Article 18 and Article 21(1) TFEU.

As a Croatian national who is lawfully resident in Germany, S.M. is entitled, as a Union citizen, to rely on Article 21(1) TFEU and falls within the scope of the Treaties, within the meaning of Article 18 TFEU. Holding also the nationality of the third country which made the extradition request cannot prevent him from asserting the rights and freedoms conferred by Union citizenship, in particular those guaranteed by Articles 18 and 21 TFEU.

In the second place, the Court notes that a Member State's rules on extradition which give rise, as in the main proceedings, to different treatment, depending on whether the requested person is a national of that Member State or of another Member State, are liable to affect the freedom of movement and residence of nationals of other Member States who are lawfully resident in the territory of the requested State, in so far as they have the consequence that such nationals are not afforded the protection against extradition reserved for nationals of the latter Member State.

Consequently, in a situation such as that in the main proceedings, the unequal treatment involved in permitting the extradition of a national of a Member State other than the requested Member State constitutes a restriction on that freedom, which can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of national law.

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3 'The Charter'.

The legitimate objective of averting the risk that persons who have committed an offence should go unpunished may justify a measure that restricts the freedom laid down in Article 21 TFEU, provided that that measure is necessary for the protection of the interests which it is intended to secure and those objectives cannot be attained by less restrictive measures.

In the case of an extradition request for the purpose of enforcing a custodial sentence, the possibility, where available under the law of the requested Member State, of the sentence to which the extradition request relates being enforced in the territory of the requested Member State constitutes an alternative to extradition which is less prejudicial to the exercise of the right to free movement and residence of a Union citizen who is permanently resident in that Member State. Therefore, under Articles 18 and 21 TFEU, such a national of another Member State, residing permanently in the requested Member State, should be able to serve a sentence in the territory of that Member State under the same conditions as nationals of that Member State.

In the third place, the Court points out, however, that the case-law arising from the judgment in Raugevicius did not establish an automatic and absolute right for Union citizens not to be extradited out of the European Union. The Court also states that, where a national rule introduces, as in the case in the main proceedings, a difference in treatment between nationals of the requested Member State and Union citizens who reside there permanently, by prohibiting only the extradition of the former, that Member State is obliged actively to seek to ascertain whether there is an alternative to extradition that is less prejudicial to the exercise of the rights and freedoms which such Union citizens derive from Articles 18 and 21 TFEU, when they are the subject of an extradition request that has been issued by a third State.

Thus, where the application of such an alternative to extradition consists in Union citizens who reside permanently in the requested Member State being able to serve their sentence in that Member State under the same conditions as nationals of that Member State, but such application is subject to the consent of the third State which made the extradition request, Articles 18 and 21 TFEU require the requested Member State actively to seek the consent of that third State, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State.

If that third State consents to the sentence being enforced in the territory of the requested Member State, that Member State will be in a position to allow the Union citizen whose extradition has been requested and who resides permanently in its territory to serve in that Member State the sentence that was imposed on that Union citizen in the third State which made the extradition request, and to ensure that that Union citizen is treated in the same way as that Member State's own nationals.

In such a case, that alternative to extradition could also allow the requested Member State to exercise its powers in accordance with its contractual obligations to that third State. The consent of that third State to the full sentence referred to in the extradition request being enforced in the requested Member State could render the execution of that request superfluous.

If, on the other hand, the consent of that third State is not obtained, the alternative to extradition required by Articles 18 and 21 TFEU could not be applied. In that situation, that Member State can extradite the person concerned in accordance with its obligations under the European Convention on Extradition, since a refusal to extradite would not enable the risk of that person going unpunished to be averted.

In that case, since the extradition of the person concerned constitutes, in the light of that objective, a necessary and proportionate measure, the restriction of the right to movement and residence stemming from extradition for the purpose of enforcing a sentence is justified. Nevertheless, the requested Member State must check that that extradition will not undermine the protection afforded by Article 19(2) of the Charter against any serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment in the third State which made the extradition request.

II. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Grand Chamber), 8 December 2022, Google (De-referencing of allegedly inaccurate content), C- 460/20

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Directive 95/46/EC – Article 12(b) – Point (a) of the first paragraph of Article 14 – Regulation (EU) 2016/679 – Article 17(3)(a) – Operator of an internet search engine – Research carried out on the basis of a person's name – Displaying a link to articles containing allegedly inaccurate information in the list of search results – Displaying, in the form of thumbnails, photographs illustrating those articles in the list of results of an image search – Request for de-referencing made to the operator of the search engine – Weighing-up of fundamental rights – Articles 7, 8, 11 and 16 of the Charter of Fundamental Rights of the European Union – Obligations and responsibilities of the operator of the search engine in respect of processing a request for de-referencing – Burden of proof on the person requesting de-referencing

The applicants in the main proceedings, TU, who occupies leadership positions and holds shares in various companies, and RE, who was his cohabiting partner and, until May 2015, held general commercial power of representation in one of those companies, were the subject of three articles published on a website in 2015 by G-LLC, the operator of that website. Those articles, one of which was illustrated by four photographs of the applicants and suggested that they led a life of luxury, criticised the investment model of a number of their companies. It was possible to access those articles by entering into the search engine operated by Google LLC ('Google') the surnames and forenames of the applicants, both on their own and in conjunction with certain company names. The list of results provided a link to those articles and to photographs in the form of thumbnails.

The applicants in the main proceedings requested Google, as the controller of personal data processed by its search engine, first, to de-reference the links to the articles at issue from the list of search results, on the ground that they contained inaccurate claims and defamatory opinions, and, second, to remove the thumbnails from the list of search results. Google refused to accede to that request.

Since they were unsuccessful at first instance and on appeal, the applicants in the main proceedings brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany), in the context of which the Bundesgerichtshof (Federal Court of Justice) made a request to the Court of Justice for a preliminary ruling on the interpretation of the GDPR [4] and Directive 95/46 [5].

By its judgment, delivered by the Grand Chamber, the Court develops its case-law on the conditions which apply to requests for de-referencing addressed to the operator of a search engine based on rules regarding the protection of personal data. [6] It examines, in particular, first, the extent of the

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4 Article 17(3)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ('the GDPR') (OJ 2016 L 119, p. 1).

5 Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

6 Judgments of 13 May 2014, Google Spain and Google (C-131/12, EU:C:2014:317) and of 24 September 2019, GC and Others (De-referencing of sensitive data) (C-136/17, EU:C:2019:773) and Google (Territorial scope of de-referencing) (C-507/17, EU:C:2019:772).

obligations and responsibilities incumbent on the operator of a search engine in processing a request for de-referencing based on the alleged inaccuracy of the information in the referenced content and, second, the burden of proof imposed on the data subject as regards that inaccuracy. The Court also gives a ruling on the need, for the purposes of examining a request to remove photographs displayed in the form of thumbnails in the list of results of an image search, to take account of the original context of the publication of those photographs on the internet.

Findings of the Court

In the first place, the Court rules that, in the context of striking a balance between, on the one hand, the right to respect for private life and the protection of personal data, and on the other hand, the right to freedom of expression and information, [7] for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal from the list of search results of a link to content containing allegedly inaccurate information, such de-referencing is not subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally, in an action brought by the person making that request against the content provider.

As a preliminary point, in order to examine the conditions in which the operator of a search engine is required to accede to a request for de-referencing and thus to remove from the list of results displayed following a search on the basis of the data subject's name, the link to an internet page on which allegations appear which that person regards as inaccurate, the Court stated, in particular, as follows:

– inasmuch as the activity of a search engine is liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of that search engine, as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the guarantees laid down by Directive 95/46 and the GDPR may have full effect and that effective and complete protection of data subjects may actually be achieved;

– where the operator of a search engine receives a request for de-referencing, it must ascertain whether the inclusion of the link to the internet page in question in the list of results is necessary for exercising the right to freedom of information of internet users potentially interested in accessing that internet page by means of such a search, a right protected by the right to freedom of expression and of information;

– the GDPR expressly lays down the requirement to strike a balance between the fundamental rights to privacy and protection of personal data, on the one hand, and the fundamental right of freedom of information on the other.

First of all, the Court finds that while the data subject's rights to respect for private life and the protection of personal data override, as a general rule, the legitimate interest of internet users who may be interested in accessing the information in question, that balance may, however, depend on the relevant circumstances of each case, in particular on the nature of that information and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

The question of whether or not the referenced content is accurate also constitutes a relevant factor when making that assessment. Accordingly, in certain circumstances, the right of internet users to information and the content provider's freedom of expression may override the rights to private life and to protection of personal data, in particular where the data subject plays a role in public life. However, that relationship is reversed where, at the very least, a part – which is not minor in relation

7 Fundamental rights guaranteed by Articles 7, 8 and 11, respectively, of the Charter of Fundamental Rights of the European Union.

to the content as a whole – of the information referred to in the request for de-referencing proves to be inaccurate. In such a situation, the right to inform and the right to be informed cannot be taken into account, since they cannot include the right to disseminate and have access to such information.

Next, as regards, first, the obligations relating to establishing whether or not the information found in the referenced content is accurate, the Court clarifies that the person requesting the de-referencing on account of the inaccuracy of such information is required to establish the manifest inaccuracy of such information or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information. However, in order to avoid imposing on that person an excessive burden which is liable to undermine the practical effect of the right to de-referencing, that person has to provide only evidence that, in the light of the circumstances of the particular case, can reasonably be required of him or her to try to find. In principle, that person cannot be required to produce, as from the pre-litigation stage, in support of his or her request for de-referencing, a judicial decision made against the publisher of the website, even in the form of a decision given in interim proceedings.

Second, as regards the obligations and responsibilities imposed on the operator of the search engine, the Court points out that the operator of a search engine must, in order to determine whether content may continue to be included in the list of search results carried out using its search engine following a request for de-referencing, take into account all the rights and interests involved and all the circumstances of the case. However, that operator cannot be obliged to investigate the facts and, to that end, to organise an adversarial debate with the content provider seeking to obtain missing information concerning the accuracy of the referenced content. An obligation to contribute to establishing whether or not the referenced content is accurate would impose on that operator a burden in excess of what can reasonably be expected of it in the light of its responsibilities, powers and capabilities. That solution would entail a serious risk that content meeting the public's legitimate and compelling need for information would be de-referenced and would thereby become difficult to find on the internet. There would, accordingly, be a real risk of a deterrent effect on the exercise of freedom of expression and of information if such an operator undertook such de-referencing quasi-systematically, in order to avoid having to bear the burden of investigating the relevant facts for the purpose of establishing whether or not the referenced content was accurate.

Therefore, where the person who has made a request for de-referencing submits evidence establishing the manifest inaccuracy of the information found in the referenced content or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information, the operator of the search engine is required to accede to that request. The same applies where the person making that request submits a judicial decision made against the publisher of the website, which is based on the finding that information found in the referenced content – which is not minor in relation to that content as a whole – is, at least prima facie, inaccurate. By contrast, where the inaccuracy of such information is not obvious, in the light of the evidence provided by the person making the request, the operator of the search engine is not required, where there is no such judicial decision, to accede to such a request for de-referencing. Where the information in question is likely to contribute to a debate of public interest, it is appropriate, in the light of all the circumstances of the case, to place particular importance on the right to freedom of expression and of information.

Lastly, the Court adds that, where the operator of a search engine does not grant a request for de-referencing, the data subject must be able to bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders that controller to adopt the necessary measures. In that regard, the judicial authorities must ensure a balance is struck between competing interests, since they are best placed to carry out a complex and detailed balancing exercise, which takes account of all the criteria and all the factors established by the relevant case-law.

In the second place, the Court rules that, within the context of weighing up fundamental rights mentioned above, for the purposes of examining a request for de-referencing seeking the removal from the results of an image search carried out on the basis of the name of a natural person of photographs displayed in the form of thumbnails representing that person, account must be taken of the informative value of those photographs regardless of the original context of their publication on the internet page from which they are taken. However, it is necessary to take into consideration any text element which accompanies directly the display of those photographs in the search results and which is capable of casting light on the informative value of those photographs.

In reaching that conclusion, the Court notes that image searches carried out by means of an internet search engine on the basis of a person's name are subject to the same principles as those which apply to internet page searches and the information contained in them. It states that displaying, following a search by name, photographs of the data subject in the form of thumbnails, is such as to constitute a particularly significant interference with the data subject's rights to private life and that person's personal data.

Consequently, when the operator of a search engine receives a request for de-referencing which seeks the removal, from the results of an image search carried out on the basis of the name of a person, of photographs displayed in the form of thumbnails representing that person, it must ascertain whether displaying the photographs in question is necessary for exercising the right to freedom of information of internet users who are potentially interested in accessing those photographs by means of such a search.

In so far as the search engine displays photographs of the data subject outside the context in which they are published on the referenced internet page, most often in order to illustrate the text elements contained in that page, it is necessary to establish whether that context must nevertheless be taken into consideration when striking a balance between the competing rights and interests. In that context, the question whether that assessment must also include the content of the internet page containing the photograph displayed in the form of a thumbnail, the removal of which is sought, depends on the purpose and nature of the processing at issue.

As regards, first, the purpose of the processing at issue, the Court notes that the publication of photographs as a non-verbal means of communication is likely to have a stronger impact on internet users than text publications. Photographs are, as such, an important means of attracting internet users' attention and may encourage an interest in accessing the articles they illustrate. Since, in particular, photographs are often open to a number of interpretations, displaying them in the list of search results as thumbnails may result in a particularly serious interference with the data subject's right to protection of his or her image, which must be taken into account when weighing-up competing rights and interests. A separate weighing-up exercise is required depending on whether the case concerns, on the one hand, articles containing photographs which are published on an internet page and which, when placed into their original context, illustrate the information provided in those articles and the opinions expressed in them, or, on the other hand, photographs displayed in the list of results in the form of thumbnails by the operator of a search engine outside the context in which they were published on the original internet page.

In that regard, the Court recalls that not only does the ground justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing-up of the rights and interests at issue may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of that internet page is at issue. The legitimate interests justifying such processing may be different and, also, the consequences of the processing for the data subject, and in particular for his or her private life, are not necessarily the same. [8]

As regards second, the nature of the processing carried out by the operator of the search engine, the Court observes that, by retrieving the photographs of natural persons published on the internet and displaying them separately, in the results of an image search, in the form of thumbnails, the operator of a search engine offers a service in which it carries out autonomous processing of personal data which is distinct both from that of the publisher of the internet page from which the photographs are taken and from that, for which the operator is also responsible, of referencing that page.

Therefore, an autonomous assessment of the activity of the operator of the search engine, which consists of displaying results of an image search, in the form of thumbnails, is necessary, as the

8 See judgment Google Spain and Google, paragraph 86.

additional interference with fundamental rights resulting from such activity may be particularly intense owing to the aggregation, in a search by name, of all information concerning the data subject which is found on the internet. In the context of that autonomous assessment, account must be taken of the fact that that display constitutes, in itself, the result sought by the internet user, regardless of his or her subsequent decision to access the original internet page or not.

The Court observes, however, that such a specific weighing-up exercise, which takes account of the autonomous nature of the data processing performed by the operator of the search engine, is without prejudice to the possible relevance of text elements which may directly accompany the display of a photograph in the list of search results, since such elements are capable of casting light on the informative value of that photograph for the public and, consequently, of influencing the weighing-up of the rights and interests involved.

Order of the General Court (Fourth Chamber, Extended Composition), 7 December 2022, WhatsApp Ireland Ltd v European Data Protection Board, T-709/21

Link to the full text of the order

Action for annulment – Protection of personal data – Draft decision of the lead supervisory authority – Resolution of disputes between supervisory authorities by the European Data Protection Board – Binding decision – Article 60(4) and Article 65(1)(a) of Regulation (EU) 2016/679 – Act not open to challenge – Preparatory act – Lack of individual concern

Following the entry into force of the GDPR, [9] the Data Protection Commission (Ireland) received complaints from users and non-users of the 'WhatsApp' messaging service concerning the processing of personal data by WhatsApp Ireland Ltd ('WhatsApp'). Against that background, that Irish supervisory authority, in its capacity as lead supervisory authority, [10] initiated of its own volition a general investigation into WhatsApp's compliance with the obligation of transparency and the obligation to provide information with regard to individuals.

Following that investigation, under the cooperation mechanism established by the GDPR, the Irish supervisory authority submitted a draft decision to all the other supervisory authorities of the Member States concerned by the processing of personal data at issue for their opinion. Since no consensus was reached on that draft, the Irish supervisory authority referred the matter to the European Data Protection Board (EDPB) [11] as provided for by the GDPR. On 28 July 2021, the EDPB adopted a decision that was binding on all the supervisory authorities concerned, in which it ruled on the matters which, in its view, had been the subject of relevant and reasoned objections by some of those authorities ('the contested decision'). [12] After receiving that decision, the Irish supervisory authority adopted a final decision on 20 August 2021, in which it found, inter alia, that WhatsApp had infringed certain provisions of the GDPR, and imposed corrective measures on it, in particular administrative fines for a cumulative amount of EUR 225 million.

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

10 Under Article 56(1) of the GDPR, which grants, inter alia, competence to act on the supervisory authority of the main establishment of the controller for the cross-border processing carried out by that controller.

11 Under Article 68(3) of the GDPR, the EDPB is composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor, or their respective representatives.

12 Binding Decision 1/2021 of the EDPB.

WhatsApp, in parallel, challenged the final decision before an Irish court and requested that the General Court annul the contested decision.

In this case, the Court rules, for the first time, on an application for annulment of a binding decision of the EDPB, adopted on the basis of the GDPR. The Court, ruling in extended composition, dismisses the action brought by WhatsApp as inadmissible on the ground that it is not directed against an act that is open to challenge under Article 263 TFEU and that WhatsApp is not directly concerned by the contested decision, within the meaning of the criteria for locus standi laid down in that article. It states that the validity of the contested decision may be examined by a national court hearing an action against the subsequent final decision that closes the procedure and is adopted at national level.

Findings of the Court

As a preliminary point, the Court notes that, in order for an act to be open to challenge by an applicant other than the 'privileged' applicants, [13] that act must have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position, cet acte doit produire des effets juridiques obligatoires de nature à affecter les intérêts de la partie requérante, en modifiant de façon caractérisée la situation juridique de celle-ci. That condition overlaps, where an applicant is not the addressee of an individual act which he is challenging, as in the present case, with the need for the applicant to be directly and individually concerned by that act in order to have standing to bring proceedings.

In that regard, the Court considers, first, that the contested decision does not in itself change WhatsApp's legal position, since, unlike the final decision of the Irish supervisory authority, the contested decision is not directly enforceable against WhatsApp and constitutes a preparatory act in a procedure which must be closed by the adoption of a final decision of a national supervisory authority addressed to that undertaking.

Moreover, the contested decision has no legal effect vis-à-vis WhatsApp that is independent of the final decision of the Irish supervisory authority. All the assessments made in the former decision are repeated in the latter and the former has no effect that is independent of the content of the latter. Thus, the fact that an intermediate act expresses the definitive position of an authority that will have to be taken up in the final decision closing the procedure at issue – as in the present case, since the contested decision contains a definitive analysis of certain aspects of the final decision – does not necessarily mean that that intermediate act itself brings about a distinct change in the applicant's legal position.

Next, the Court observes that WhatsApp is not directly concerned by the contested decision. In order to be of direct concern to an applicant who is not an addressee of a measure, that measure must, first, directly affect that applicant's legal situation and, second, leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being automatic and resulting from EU rules without the application of other intermediate rules.

As regards the first of those conditions, the Court recalls that the contested decision is not enforceable against WhatsApp in a way that would allow it, without further procedural steps, to be a source of obligations for WhatsApp or, as the case may be, rights for other individuals. In the present case, the contested decision is not the final step of the full procedure provided for by the GDPR.

With regard to the second of those conditions, the Court finds that, even though the contested decision was binding on the Irish supervisory authority as regards the aspects to which it related, it left a measure of discretion to that authority as to the content of the final decision, which also covers other aspects, in particular as regards the amount of the administrative fines.

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13 Under the second paragraph of Article 263 TFEU, the 'privileged' applicants are the Member States, the European Parliament, the Council and the European Commission.

Lastly, the Court notes that the inadmissibility of WhatsApp's action before it against the contested decision is consistent with the logic of the system of judicial remedies established by the TEU and the TFEU. More specifically, the TFEU, in particular by providing for the possibility of bringing a direct action for annulment before the Court of Justice of the European Union or of making a request to the latter for a preliminary ruling, has established a complete system of legal remedies designed to ensure judicial review of the legality of acts of the European Union, in which the national courts also participate. Under that system, where persons cannot, by reason of the conditions for admissibility, directly challenge EU acts before the Courts of the European Union, they are able to plead, by way of a plea of illegality, the invalidity of such an act before the national court, which, in turn, is able to make a request to the Court of Justice for a preliminary ruling.

The Court states that the logic of that system, which explains in particular the interpretation of the conditions for the admissibility of direct actions, [14] is that the judicial action of the Court of Justice of the European Union and that of the national courts complement each other effectively and that the Courts of the European Union and the national courts are not required to rule concurrently, in parallel proceedings, on the validity of the same EU act, either directly or, in the case of the national court if it has doubts as to the validity of the act in question, following a question referred for a preliminary ruling.

III. FREEDOM OF MOVEMENT: FREE MOVEMENT OF WORKERS

Judgment of the Court of Justice (Eighth Chamber), 8 December 2022, Caisse nationale d'assurance pension, C-731/21

Link to the full text of the judgment

Reference for a preliminary ruling – Free movement of persons – Article 45 TFEU – Workers – Regulation (EU) No 492/2011 – Article 7(1) and (2) – Equal treatment – Social advantages – Survivor's pension – Members of a civil partnership – National legislation making the grant of a survivor's pension conditional upon the entry in the national register of a partnership that was validly concluded and registered in another Member State

In December 2015, the applicant in the main proceedings and her partner, French nationals residing in France and employees in Luxembourg, registered, in due and proper form, a joint declaration of a civil solidarity pact ('PACS') with the tribunal d'instance de Metz (District Court, Metz, France). After the partner of the applicant in the main proceedings died in 2016 following an accident at work, the applicant applied to the caisse nationale d'assurance pension (National Pension Insurance Fund, Luxembourg) for a survivor's pension. That application was refused on the ground that the PACS registered in France had not been recorded in the Luxembourg Civil Records Registry during the lifetime of the two contracting parties and that, consequently, it could not be relied on against third parties. The refusal of that application was upheld in the action brought by the applicant before the competent social courts.

14 Set out in Article 263 TFEU.

An appeal was brought before the Cour de cassation (Court of Cassation, Luxembourg) and the latter asks the Court of Justice whether there is any indirect discrimination, [15] in so far as the obligation imposed by Luxembourg law [16] on partners who have already registered their partnership in another Member State also to have it registered in the Luxembourg Civil Records Registry in order to receive a survivor's pension affects cross-border workers in particular.

The Court rules that Article 45 TFEU and Article 7 of Regulation No 492/2011, which are aimed at ensuring equal treatment for workers, preclude legislation of a host Member State which provides that the grant, to the surviving partner of a partnership that was validly entered into and registered in another Member State, of a survivor's pension due on account of the exercise, in the first Member State, of a professional activity by the deceased partner, is subject to the condition that the partnership was first recorded in the register kept by that State.

Findings of the Court

The Court notes, in the first place, that the Luxembourg legislation lays down, with regard to a partnership entered into and registered in another Member State in accordance with the relevant rules of that State, a condition to which a partnership entered into in Luxembourg is not subject.

Whereas a partnership entered into and declared in Luxembourg is automatically entered into the Luxembourg Civil Records Registry by the Registrar before whom the partnership was declared, in the case of a partnership already registered in another Member State, registration in Luxembourg requires the partners to submit a request to that effect to the Luxembourg Public Prosecutor's Office. Consequently, the Luxembourg legislation establishes unequal treatment indirectly based on nationality.

In the second place, the Court verifies whether that unequal treatment is objectively justified and proportionate, and finds that it is not. In that regard, registration in the Luxembourg Civil Records Registry of partnerships entered into in other Member States is not an obligation but merely an option. If such a registration is not mandatory, it cannot be regarded consistently as constituting an essential formality for verifying that a partnership registered in another Member State fulfils the substantive conditions required by the Law of 9 July 2004 and for ensuring that such a partnership can be relied on against third parties.

In any event, a refusal to grant a survivor's pension on the ground that the partnership on which the application for a pension is based was not registered in Luxembourg goes beyond what is necessary to attain the objective pursued and thus infringes the principle of proportionality.

First, the production of an official document issued by the competent authority of the Member State in which the partnership was entered into appears sufficient to ensure that that partnership can be relied on against the authorities of another Member State which are responsible for payment of survivors' benefits, unless certain evidence may raise doubts as to the accuracy of that document. In such a case, any doubt on the part of the authorities of the latter Member State could be removed by means of a request for information addressed to the authorities which registered that partnership in order to satisfy themselves as to the authenticity of the partnership.

Secondly, in the absence, in the applicable national legislation, of any condition regarding the deadline for registering the partnership in question, there is nothing to prevent that registration from being carried out on the date on which the survivor's pension is applied for, which would also make it

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15 The referring court relies on Articles 18, 45 and 48 TFEU, and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1), as amended by Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 (OJ 2016 L 107, p. 1) ('Regulation No 492/2011').

16 Article 4-1 of the loi du 9 juillet 2004, relative aux effets légaux de certains partenariats (Law of 9 July 2004 on the legal effects of certain partnerships) (Mémorial A 2004, p. 2020), as amended by the loi du 3 août 2010 (Law of 3 August 2010) (Mémorial A 2010, p. 2190) ('the Law of 9 July 2004').

possible to attain the objective pursued by that legislation. It is not apparent from the order for reference that that possibility was exercised in the case in the main proceedings.

IV. APPROXIMATION OF LAWS

1. EUROPEAN UNION TRADEMARK

Judgment of the General Court (Tenth Chamber, Extended Composition), 7 December 2022, Neoperl v EUIPO (Representation of a cylindrical sanitary insert), T-487/21

EU trade mark – Application for an EU trade mark representing a cylindrical sanitary insert part – Tactile position mark – Absolute grounds for refusal – Scope of the law – Court acting of its own motion – Examination of distinctive character by the Board of Appeal – Article 7(1)(b) of Regulation (EC) No 207/2009 (now Article 7(1)(b) of Regulation (EU) 2017/1001) – Sign not capable of constituting an EU trade mark – Absence of a precise and self-contained graphic representation of the tactile impression produced by the sign – Article 4 and Article 7(1)(a) of Regulation No 207/2009 (now Article 4 and Article 7(1)(a) of Regulation 2017/1001)

On 1 September 2016, Neoperl AG filed an application with the European Union Intellectual Property Office (EUIPO) for registration of a trade mark representing a cylindrical sanitary insert part as an EU trade mark for goods in Class 11. [17]

The protection claimed relates both to the structure of the flow regulators and to the tactile aspect of the sign. That application was refused by the examiner on the ground that, in essence, it was not sufficiently precise.

By decision of 3 June 2021, the Board of Appeal of EUIPO found that the sign in respect of which registration was sought as a trade mark was devoid of distinctive character [18] and dismissed the appeal.

The General Court, hearing the appeal brought against that decision, annuls the decision of the Board of Appeal and rules, for the first time, on the application in the field of trade mark law of a plea, raised of the Court's own motion, alleging breach of the scope of the law, applied in respect of the examination of the application for registration of a tactile position mark.

Findings of the Court

In the first place, the Court raises of its own motion the plea alleging breach of the scope of the law.

In that regard, the Court recalls that it follows from a combined reading of the provisions of Article 4 of Regulation No 207/2009, in the version applicable ratione temporis, and Article 7(1)(a) and (b) of that regulation that the distinctive character of a sign can be assessed, for the purposes of its registration, only once it has been found that it constitutes a trade mark within the meaning of Article

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17 Within the meaning 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.

18 The distinctive character of a trade mark within the meaning of Article 7(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

4 of that regulation, that is to say, from the time when it has been found that it is capable of being represented graphically.

However, contrary to what follows from those considerations, the Board of Appeal proceeded to examine the distinctive character of a trade mark without first examining whether the sign in respect of which registration was sought was capable of constituting a trade mark.

It follows that the interpretation of the relevant rules of law, and in particular the question as to whether the sign in respect of which registration as an EU trade mark is sought fulfils the conditions laid down in Article 4 of Regulation No 207/2009, including that of being capable of being represented graphically, and thus of being capable of constituting a trade mark, is, in the present case, a preliminary question which must be resolved in order to proceed to the examination of the pleas alleging infringement of Article 7(1)(b) and Article 95(1) of Regulation No 207/2009.

Consequently, the Court would be neglecting its function as the arbiter of legality if it (i) failed to find, even in the absence of a challenge by the parties in that regard, that the contested decision had been adopted on the basis of a rule – namely a provision concerning refusal to register trade marks which are devoid of distinctive character – which could prove to be inapplicable in the present case in the event that the sign in respect of which registration is sought were not a trade mark within the meaning of Article 4 of Regulation No 207/2009, an aspect which was not examined by the Board of Appeal, and (ii) were led to adjudicate on the dispute before it by applying such a rule itself.

After having raised of its own motion the plea alleging infringement of the scope of the law, the Court considers, in the second place, the merits of that plea. In that regard, it examines whether the sign in respect of which registration is sought is capable of being represented graphically and whether, consequently, the provision concerning refusal to register trade marks which are devoid of distinctive character was applicable in the present case.

The Court finds that the structure of the sign at issue is capable of being represented graphically. By contrast, that is not the case for the tactile impression produced by that structure. This is because the tactile impression produced by the sign in respect of which registration is sought does not emerge in a precise and self-contained manner from the graphic representation of the sign itself but, at most, from the accompanying description. Therefore, that description does not clarify the graphic representation of the sign within the meaning of the case-law, [19] but rather may give rise to doubts as to the subject matter and scope of that graphic representation in that it attempts to broaden the subject matter of the protection applied for.

The sign at issue therefore does not fulfil the conditions laid down in Article 4 of Regulation No 207/2009 and is caught by the absolute ground for refusal laid down in Article 7(1)(a) of that regulation, under which signs which do not conform to the abovementioned Article 4 are not to be registered. Consequently, Article 7(1)(b) of Regulation No 207/2009 was not applicable to the assessment of the application for registration of the sign at issue, which was not capable of constituting a trade mark, with the result that the Board of Appeal adopted the contested decision, thereby refusing registration of the sign in application of that provision, in breach of the scope of the law.

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[19] Judgment of 29 July 2019, Red Bull v EUIPO C-124/18 P, EU:C:2019:641, paragraph 37 and the case-law cited).

2. ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION

Judgment of the Court of Justice (Grand Chamber), 8 December 2022, Orde van Vlaamse Balies and Others, C-694/20

Link to the full text of the judgment

Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Mandatory automatic exchange of information in relation to reportable cross-border arrangements – Directive 2011/16/EU, as amended by Directive (EU) 2018/822 – Article 8ab(5) – Validity – Lawyer's legal professional privilege – Exemption from the reporting obligation for lawyer-intermediaries subject to legal professional privilege – Obligation on that lawyer-intermediary to notify any other intermediary who is not his or her client of that intermediary's reporting obligations – Articles 7 and 47 of the Charter of Fundamental Rights of the European Union

As regards the administrative cooperation of Member States' national tax authorities, an amendment to Directive 2011/16 [20] by Directive 2018/822 introduced a reporting obligation to the competent authorities on intermediaries participating in potentially aggressive tax-planning cross-border tax arrangements. [21] Thus, all those who are involved in designing, marketing, organising or managing the implementation of such arrangements, and all those who provide assistance or advice in relation thereto and, if there are no such persons, the taxpayer him- or herself, are subject to that reporting obligation.

According to another provision of amended Directive 2011/16, [22] each Member State may take the necessary measures to give intermediaries bound by legal professional privilege who participate in those arrangements the right to a waiver from the reporting obligation where that obligation would breach that legal professional privilege under national law. In such circumstances, the Member State concerned is to ensure that those intermediaries are required to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations. However, intermediaries bound by legal professional privilege may be entitled to a waiver from the reporting obligation only to the extent that they operate within the limits of the relevant national laws that define their profession.

In order to satisfy the requirements introduced by Directive 2018/822 and to ensure that legal professional privilege does not prevent the necessary reporting, the provisions of the Flemish legislation on administrative cooperation in the field of taxation transposing that directive provide, inter alia, that where an intermediary is bound by legal professional privilege, he or she must notify the other intermediary or other intermediaries in writing, giving reasons, that he or she cannot comply with the reporting obligation, transferring that obligation automatically to the other intermediary or other intermediaries.

The Orde van Vlaamse Balies (Flemish Bar Association), the Belgian Association of Tax Lawyers [23] and three lawyers dispute that notification obligation on lawyers acting as intermediaries. In their

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20 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ 2018 L 139, p. 1) ('amended Directive 2011/16').

21 Article 8ab(1) of amended Directive 2011/16, as inserted by Directive 2018/822.

22 Article 8ab(5) of amended Directive 2011/16, as inserted by Directive 2018/822.

23 A professional association of lawyers.

submission, it is impossible to comply with that obligation to notify without infringing the legal professional privilege by which lawyers are bound. Moreover, that obligation to notify is not necessary, since the client, whether or not assisted by the lawyer, can him- or herself inform the other intermediaries and ask them to comply with their reporting obligation. The applicants thus brought an action before the Grondwettelijk Hof (Constitutional Court, Belgium) seeking suspension of the provisions of national law concerned and their annulment in whole or in part.

The referring court asks the Court about the validity of the provision of amended Directive 2011/16 [24] which imposes an obligation to notify.

By its judgment, the Court, sitting as the Grand Chamber, holds that that provision is invalid in the light of Article 7 of the Charter of Fundamental Rights of the European Union, [25] in so far as the Member States' application of that provision has the effect of requiring a lawyer acting as an intermediary, where he or she is exempt from the reporting obligation on account of the legal professional privilege by which he or she is bound, to notify without delay any other intermediary who is not his or her client of that intermediary's reporting obligations.

Findings of the Court

The Court specifies, as a preliminary point, that the question concerns the validity, in the light of Articles 7 and 47 of the Charter, of the obligation to notify laid down in amended Directive 2011/16 only in so far as the notification must be made, by a lawyer acting as an intermediary, to another intermediary who is not his or her client. Where the notification is made by the lawyer-intermediary to his or her client, whether that client is another intermediary or the relevant taxpayer, that notification is not capable of calling into question respect for the rights and freedoms concerned, which are guaranteed by the Charter.

In order to determine whether the obligation to notify is valid, the Court interprets Article 7 of the Charter in the light of the case-law of the European Court of Human Rights on the corresponding provision, namely Article 8 of the European Convention on Human Rights. [26] According to that case-law, that Article 8 protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. The Court concludes from this that Article 7 of the Charter guarantees not only the activity of defence but also the secrecy of legal advice, as regards both its content and its existence. Therefore, other than in exceptional situations, persons who consult a lawyer must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

That protection afforded to lawyers' legal professional privilege is justified by lawyers' fundamental role in a democratic society, that of defending litigants. That role entails the requirement that any person must be able, without constraint, to consult a lawyer in order to obtain independent legal advice whilst relying on his or her good faith.

The obligation expressly laid down by amended Directive 2011/16 for a lawyer-intermediary exempt from the reporting obligation to notify without delay other intermediaries who are not his or her clients of their reporting obligations necessarily means that those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement. The Court finds that this entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. Furthermore, that obligation to notify leads, indirectly, to another interference with that right, resulting from the disclosure, by the third-

24 Article 8ab(5) of amended Directive 2011/16.

25 'The Charter'.

26 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

party intermediaries thus notified, to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted.

As regards a possible justification for those interferences, the Court recalls that the right to respect for communications between lawyers and their clients may be limited provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the present case, the Court finds that both the principle of legality and the essence of the right to respect for communications between lawyers and their clients have been satisfied.

As regards the proportionality of the interference, the Court recalls that the amendment made in 2018 to Directive 2011/16 forms part of international tax cooperation, the objective of which is to contribute to the prevention of the risk of tax avoidance and evasion, which constitute objectives of general interest recognised by the European Union.

However, even if the obligation to notify on the lawyer subject to legal professional privilege is indeed capable of contributing to the combating of aggressive tax planning and the prevention of the risk of tax avoidance and evasion, it is not necessary in order to attain those objectives and, in particular, to ensure that the information concerning the cross-border arrangements is filed with the competent authorities. All intermediaries are, in principle, required to file that information with those authorities. No intermediary can therefore usefully argue that he or she was unaware of the reporting obligations, which are clearly set out in the Directive, to which he or she is directly and individually subject.

Furthermore, since each intermediary is exempt from the reporting obligation only if he or she has proof that it has already been discharged by another intermediary, there is no reason to fear that the intermediaries would rely, without verification, on the lawyer-intermediary making the required report. Furthermore, by expressly providing that legal professional privilege may lead to a waiver from the reporting obligation, the Directive makes a lawyer-intermediary a person from whom other intermediaries cannot, a priori, expect any initiative capable of relieving them of their own reporting obligations.

As regards the disclosure, by notified third-party intermediaries, of the identity of the lawyer-intermediary and of his or her having been consulted to the tax authorities, that disclosure also does not appear to be necessary for the pursuit of the objectives of the Directive. The reporting obligation on other intermediaries not subject to legal professional privilege and, if there are no such intermediaries, that obligation on the relevant taxpayer ensure, in principle, that the tax authorities are informed. In addition, the tax authorities may, after receiving such information, request additional information directly from the relevant taxpayer, who will then be able to consult his or her lawyer for assistance, or they may conduct an audit of that taxpayer's tax situation.

The Court therefore holds that the obligation to notify laid down in the EU Directive infringes the right to respect for communications between a lawyer and his or her client, guaranteed in Article 7 of the Charter, in so far as it provides that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary who is not his or her client of that other intermediary's reporting obligations.

Moreover, the Court finds in the present case that Article 47 of the Charter is not applicable given that that article presupposes a link with judicial proceedings. However, there is no such link in the present case, given that the obligation to notify arises at an early stage, at the latest when the reportable cross-border arrangement has just been finalised and is ready to be implemented, and thus outside the framework of legal proceedings or their preparation. Accordingly, the obligation to notify replacing, for the lawyer-intermediary bound by legal professional privilege, the reporting obligation laid down in Article 8ab(1) of amended Directive 2011/16 does not entail any interference with the right to a fair trial, guaranteed in Article 47 of the Charter.

3. MEDICINAL PRODUCTS FOR HUMAN USE

Judgment of the Court of Justice (Grand Chamber), 22 December 2022, EUROAPTIEKA, C-530/20

Link to the full text of the judgment

Reference for a preliminary ruling – Medicinal products for human use – Directive 2001/83/EC – Article 86(1) – Concept of 'advertising of medicinal products' – Article 87(3) – Rational use of medicinal products – Article 90 – Prohibited advertising methods – Advertising of medicinal products neither subject to medical prescription nor reimbursed – Advertising on the basis of price – Advertising of special sales – Advertising of bundled sales – Prohibition

'EUROAPTIEKA' SIA is a company operating a pharmaceutical business in Latvia. It is part of a group that owns a network of pharmacies and companies distributing medicinal products for retail in that country. In 2016, the Veselības inspekcijas Zāļu kontroles nodaļa (Medicinal Product Control Section of the Health Inspectorate, Latvia) banned EUROAPTIEKA from the dissemination of advertising relating to a promotional sale offering a reduction of 15% off the purchase price of any medicinal product when at least three articles were purchased. That decision was taken on the basis of a national provision that prohibited the inclusion in advertising to the general public of a medicinal product, which is neither subject to medical prescription nor reimbursed, of any information which encourages the purchase of the medicinal product by justifying the need to purchase that medicinal product on the basis of its price, by announcing a special sale, or by indicating that the medicinal product is sold as a bundle together with other medicinal products (including at a reduced price) or other types of product. [27]

In 2020, hearing an appeal brought by EUROAPTIEKA against that provision, the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) made a request to the Court of Justice for a preliminary ruling on the interpretation of Directive 2001/83. [28]

By its judgment, the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the concept of 'advertising of medicinal products', within the meaning of that directive, in particular as regards content that refers not to a specific medicinal product but to unspecified medicinal products. Furthermore, it rules on the compatibility with that directive of a national provision providing for prohibitions such as those at issue in the main proceedings, including as to whether those prohibitions seek to promote the rational use of medicinal products, within the meaning of that same directive.

Findings of the Court

In the first place, the Court rules that the dissemination of information that encourages the purchase of medicinal products by justifying the need for that purchase on the basis of price, by announcing a special sale, or by indicating that the medicinal products are sold together with other medicinal products, including at a reduced price, or with other products, falls within the concept of 'advertising

27 Subparagraph 18.12 of the Ministru kabineta noteikumi Nr. 378 « Zāļu reklamēšanas kārtība un kārtība, kādā zāļu ražotājs ir tiesīgs nodot ārstiem bezmaksas zāļu paraugus » (Decree No 378 of the Council of Ministers on 'the detailed rules for the advertising of medicinal products and detailed rules pursuant to which a medicinal product manufacturer may give free samples of medicinal products to medical practitioners'), of 17 May 2011 (Latvijas Vēstnesis, 2011, No 78).

28 More specifically, the provisions referred to are Articles 86(1), 87(3) and 90 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34).

of medicinal products', within the meaning of Directive 2001/83, even where that information does not refer to a specific medicinal product, but to unspecified medicinal products.

First of all, from a textual perspective, the Court recalls that Article 86(1) of that directive, which contains the concept of 'advertising of medicinal products' systematically refers to 'medicinal products' in the plural. In addition, that provision defines that concept broadly, as covering 'any form' of door-to-door information, canvassing activity or inducement, including, inter alia 'advertising of medicinal products to the general public'.

Next, from a contextual perspective, the Court finds that the provisions of Title VIII of Directive 2001/83, of which Article 86 is part, set out the general and fundamental rules relating to advertising of medicinal products and that, therefore, they apply to any activity seeking to promote the prescription, supply, sale or consumption of medicinal products.

Finally, as regards the objectives pursued by Directive 2001/83, the Court considers that the essential aim of safeguarding public health pursued by that directive would be greatly compromised if an activity of door-to-door information, canvassing or inducement seeking to promote the prescription, supply, sale or consumption of medicinal products without making reference to a specific medicinal product did not fall within the concept of 'advertising of medicinal products' and therefore escaped the prohibitions, conditions and restrictions laid down by that directive as regards advertising.

To the extent that advertising for non-specified medicinal products, such as the advertising of an entire class of medicinal products intended to treat the same pathology, may relate equally to medicinal products subject to medical prescription and to medicinal products the cost of which may be reimbursed, to exclude that advertising from the scope of the provisions of Directive 2001/83 on the subject of advertising would result in the prohibitions laid down by that directive [29] being deprived of their effectiveness to a large extent, by allowing any advertising that does not refer to a specific medicinal product within that class to escape those prohibitions.

In addition, the Court considers that advertising made with regard to a set of unspecified medicinal products that are neither subject to medical prescription nor reimbursed may, in the same way as advertising in respect of a single specific medicinal product, be excessive and ill-considered and, therefore, harmful to public health, by inducing the irrational use or overconsumption by consumers of the medicinal products concerned.

The Court concludes that, notwithstanding the decision in the judgment A (Advertising and sale of medicinal products online) [30] and the judgment in DocMorris, [31] the concept of 'advertising of medicinal products', for the purposes of Directive 2001/83, covers any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of specified or unspecified medicinal products.

The Court adds that, since the purpose of the message constitutes the fundamental defining characteristic of that concept and the decisive factor for distinguishing advertising from mere information and that the activities of disseminating information covered by the national provision, such as that at issue in the main proceedings, appear to have such a promotional purpose, those activities fall within that concept.

In the second place, the Court holds that the provisions of Directive 2001/83 [32] do not preclude a national provision that imposes restrictions not laid down by that directive but which meet the essential aim of safeguarding public health pursued by that directive, by prohibiting the inclusion, in

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29 Article 88(1)(a) and (3) of Directive 2001/83.

30 Judgment of 1 October 2020, C-649/18, EU:C:2020:764, paragraph 50.

31 Judgment of 15 July 2021, C-190/20, EU:C:2021:609, paragraph 20.

32 More specifically, Articles 87 (3) and 90 of Directive 2001/83.

advertising to the general public of medicinal products not subject to medical prescription and not reimbursed, of information that encourages the purchase of medicinal products by justifying the need for such a purchase on the basis of the price of those medicinal products, by announcing a special sale or by indicating that those medicinal products are sold together with other medicinal products, including at a reduced price, or with other products.

In support of that interpretation, the Court recalls, first, that, as regards the relationship between the requirement that that advertising promotes the rational use of medicinal products [33] and the restrictions referred to in Directive 2001/83 in the form of a list of banned advertising methods, [34] the fact that that directive does not contain any specific rules concerning certain advertising material does not preclude that, with the aim of preventing any excessive and ill-considered advertising of medicinal products which could affect public health, Member States may prohibit [35] that material to the extent that it encourages the irrational use of medicinal products.

Consequently, and notwithstanding the fact that Directive 2001/83 permits advertising of medicinal products not subject to medical prescription, in order to prevent risks to public health in accordance with the essential aim of safeguarding public health, Member States must prohibit the inclusion, in advertising to the public of medicinal products which are neither subject to medical prescription nor reimbursed, of material which is of such a nature as to promote the irrational use of such medicinal products.

Secondly, as regards whether that is the case for the material covered by prohibitions such as those at issue in the main proceedings, the Court observes that, as regards medicinal products that are not subject to medical prescription and not reimbursed, it is frequently the case that the end consumer himself or herself evaluates, without the assistance of a doctor, the usefulness or need to purchase such medicinal products. That consumer does not necessarily have the specific and objective knowledge enabling him or her to evaluate their therapeutic value. Advertising may therefore exercise a particularly strong influence on the evaluation and choice made by that consumer, both as regards the quality of the medicinal product and the amount to purchase.

In that context, advertising methods such as those referred to in the national provision at issue in the main proceedings are of such a nature as to encourage consumers to purchase medicinal products which are neither subject to medical prescription nor reimbursed according to an economic criterion connected with the price of those medicinal products and, therefore, are likely to lead consumers to purchase and consume those medicinal products without carrying out an objective evaluation based on the therapeutic properties of those products and on specific medical needs.

According to the Court, advertising that distracts the consumer from an objective evaluation of the need to take such medicine encourages the irrational and excessive use of that medicinal product. Such irrational and excessive use of medicinal products may also arise as a result of advertising material that, like that referring to promotional offers or bundled sales of medicinal products and other products, treats medicinal products in the same way as other consumer goods, which are in general the subject of discounts and price reductions where a certain level of expenditure is exceeded.

The Court concludes that, by prohibiting the dissemination of advertising material that encourages the irrational and excessive use of medicinal products that are neither subject to medical prescription nor reimbursed – without prejudice to the possibility for pharmacies to grant discounts and price reductions when selling medicinal products and other health products – a national provision such as

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33 Requirement laid down by Article 87(3) of Directive 2001/83.

34 Restrictions set out in Article 90 of Directive 2001/83.

35 On the basis of Article 87(3) of Directive 2001/83.

that at issue in the main proceedings meets the essential aim of safeguarding public health and is therefore compatible with Directive 2001/83.

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

Judgment of the General Court (Fourth Chamber, Extended Composition), 7 December 2022, PNB Banka v ECB, T-275/19

Link to the full text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Powers of the ECB – Investigatory powers – On-site inspections – Article 12 of Regulation (EU) No 1024/2013 – Decision of the ECB to conduct an inspection at the premises of a less significant credit institution – Action for annulment – Challengeable act – Admissibility – Competence of the ECB – Obligation to state reasons – Elements capable of justifying an inspection – Article 106 of the Rules of Procedure – Request for a hearing without a statement of reasons

The applicant, PNB Banka AS, is a credit institution incorporated under Latvian law which, before 1 March 2019, was considered to be a 'less significant' [36] credit institution and was therefore subject to direct prudential supervision by the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission, Latvia; 'the FCMC'). In 2017, it was classified as a 'less significant institution in crisis', which entailed it being subject to specific supervision by a crisis management group composed of the FCMC and the European Central Bank (ECB). On 21 December 2018, the FCMC requested the ECB to take over the direct prudential supervision of the applicant. On the basis of a draft decision approved by the ECB's Supervisory Board, in the absence of any objection by the ECB's Governing Council, the decision to carry out an on-site inspection at the applicant's premises was deemed adopted by the Governing Council on 21 January 2019 ('the contested decision').

Hearing an action for annulment of that decision, the General Court rules on a number of issues which have not previously been addressed. It confirms, first of all, its power to rule on an action without an oral part of the procedure where a request for a hearing lacks a statement of reasons. It then examines whether a decision by the ECB to conduct an on-site inspection is challengeable. It also analyses pleas relating to the formal legality of the contested decision (competence of the ECB and the applicant's right to be heard). Lastly, it considers substantive issues relating to, first, the relationship between off-site and on-site checks and, second, the ECB's competence itself to conduct an investigation into acts of corruption. The Court dismisses the action in its entirety.

Findings of the Court

First, the Court holds that it follows from the applicable procedural rules that, if no request for a hearing is made, or if a request for a hearing is made without a statement of reasons, the Court may decide to rule on the action without an oral part of the procedure if it considers that it has sufficient information available to it from the material in the case file. Thus, in the present case, the Court,

36 Under Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation').

finding that the applicant's request for a hearing does not state any reason why it wishes to be heard, and after considering that it has sufficient information, decides to rule on the action without an oral part of the procedure.

Secondly, the Court rules that an on-site inspection decision adopted by the Governing Council of the ECB, such as the contested decision, is an act open to challenge before the EU judicature. The Court finds that that decision is capable of affecting the interests of the legal person notified of it, by bringing about a distinct change in the latter's legal position. The Court states, inter alia, that, by providing that inspections of legal persons and, in particular, credit institutions, must be carried out by the ECB on the basis of a decision which defines the subject matter and purpose of the inspection and must be notified to the person concerned, the legislative and regulatory framework confers, on the act that decides on that inspection, binding legal effects on the latter.

Thirdly, as regards the pleas relating to the formal legality of the contested decision, the Court rules that the ECB has the power to exercise, with regard to a 'less significant' credit institution, the investigatory powers available to it, [37] in particular the power to carry out an on-site inspection. It points out that the ECB has exclusive competence to carry out the prudential supervision tasks entrusted [38] to it in respect of all credit institutions, without distinction between those which are 'significant' and those which are 'less significant', and considers that, although the national authorities assist the ECB in carrying out those tasks, in a decentralised manner and under the supervision of the ECB, that assistance has no bearing on the ECB's competence to exercise, at any time, its investigatory powers.

The Court also considers that it is apparent from the relevant legislation, [39] consistent with the nature of an investigatory measure, the sole purpose of which is to gather information, that a decision by the ECB, in the exercise of its investigatory powers, to carry out an on-site inspection in a credit institution is not subject to the right of the entity concerned to be heard before that decision is adopted. It is after that decision and before any adoption of a decision, under, inter alia, its specific supervisory powers, [40] that the ECB is required to give the persons concerned the opportunity to be heard.

Fourthly, as regards the pleas relating to the validity of the contested decision, the Court finds that credit institutions are subject to 'ongoing' prudential supervision, which is based on a combination of off-site checks, carried out on the basis of information regularly communicated to the competent authorities, and on the basis of on-site checks, which enable the information provided to be verified. Off-site checks cannot, in principle, replace on-site inspections, which, inter alia, enable the competent authority to verify independently the information declared by those institutions. The Court states that, unlike certain inspections carried out by the European Commission under the implementation of competition rules, the purpose of which is to detect infringements, the purpose of the on-site inspections carried out by the ECB is to verify, in the context of ongoing supervision combining off-site and on-site checks, that credit institutions ensure sound management and coverage of their risks and that the information communicated is reliable, so that the implementation of those inspections is not subject to the existence of suspicion of an infringement.

Furthermore, the Court rules that the ECB itself is not competent to conduct an investigation into acts of corruption that have been reported and that the ECB cooperates in that regard with the national competent authorities.

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37 Under Articles 10 to 13 of the SSM Regulation.

38 Under Article 4(1) of the SSM Regulation.

39 In particular, Article 31 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ 2014 L 141, p. 1).

40 Under Section 2 of Chapter III of the SSM Regulation.

Judgment of the General Court (Fourth Chamber, Extended Composition), 7 December 2022, PNB Banka v ECB, T-301/19

Link to the full text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Article 6(5)(b) of Regulation (EU) No 1024/2013 – Need for the ECB's direct supervision of a less significant credit institution – Request by the national competent authority – Article 68(5) of Regulation (EU) No 468/2014 – ECB decision classifying PNB Banka as a significant entity subject to its direct prudential supervision – Obligation to state reasons – Proportionality – Rights of the defence – Access to the administrative file – Report laid down in Article 68(3) of Regulation No 468/2014 – Article 106 of the Rules of Procedure – Request for a hearing lacking a statement of reasons

The applicant, PNB Banka AS, is a credit institution incorporated under Latvian law which, before 1 March 2019, was considered to be a 'less significant' [41] credit institution and was therefore subject to direct prudential supervision by the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission, Latvia; 'the FCMC'). In 2017, it was classified as a 'less significant institution in crisis', which entailed it being subject to specific supervision by a crisis management group composed of the FCMC and the European Central Bank (ECB). On 21 December 2018, the FCMC requested the ECB to take over the direct prudential supervision of the applicant. On 1 March 2019, the Secretary of the Governing Council of the ECB notified the applicant of the ECB's decision to classify it as a 'significant' entity subject to its direct prudential supervision [42] ('the contested decision').

Hearing an action for annulment of that decision, the General Court rules on a number of issues which have not previously been addressed. First of all, it determines the purpose of, and conditions for, the adoption of a decision of the ECB to exercise directly itself prudential supervision of a less significant credit institution in order to ensure a consistent application of high supervisory standards. Next, it examines the issue of the right of access to the file in the context of a supervisory procedure. Finally, it clarifies the subject matter of the report accompanying a request from the national competent authority to the ECB for the latter to decide to exercise direct prudential supervision. The Court dismisses the action in its entirety.

Findings of the Court

First, the Court rules that, where the ECB decides to carry out itself direct prudential supervision of a less significant credit institution in accordance with the applicable legislation, [43] in order to ensure a consistent application of high supervisory standards, it must adopt a decision classifying that institution as significant.

It states that a decision to classify an entity as significant, where the ECB decides to exercise direct prudential supervision of that entity, relates only to the determination of the competent authority and does not alter either the prudential rules applicable to that institution or the supervisory powers which the competent authority has in respect of that entity for the purposes of the supervisory tasks conferred on the ECB under the Single Supervisory Mechanism (SSM).

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41 Within the meaning of Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation').

42 Under Article 6(5)(b) of the SSM Regulation and Part IV of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ 2014 L 141, p. 1).

43 Under Article 6(5)(b) of the SSM Regulation and Article 68(5) of the SSM Framework Regulation.

It adds that the implementation of the legislative provisions [44] on the basis of which that decision is adopted is not subject to there being exceptional circumstances.

Secondly, as regards the right of access of a party concerned to the file in the context of a supervisory procedure, the Court rules that such access requires the submission of a request by that party. When sufficiently precise information has been disclosed, enabling the entity concerned properly to state its point of view on the planned measure, the principle of respect for the rights of the defence does not mean that that the ECB is obliged spontaneously to grant access to the documents in the file.

Thirdly, as regards the purpose of the report [45] accompanying a request from the national competent authority to the ECB for the latter to decide to exercise direct prudential supervision in order to ensure the consistent application of high supervisory standards, the Court points out that, even though the report is compulsory, its purpose is, inter alia, to ensure the proper transmission of information between the national competent authority and the ECB. More specifically, the report enables the ECB to assess the request for the taking-over of prudential supervision submitted by the national competent authority and helps to ensure, if the ECB grants that request, a harmonious transfer of the competences associated with that supervision. That report does not therefore constitute a procedural guarantee intended to protect the interests of the credit institution concerned or, a fortiori, an essential procedural requirement within the meaning of Article 263 TFEU.

Judgment of the General Court (Fourth Chamber, Extended Composition), 7 December 2022, PNB Banka v ECB, T-330/19

Link to the full text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Article 22 of Directive 2013/36/EU – Opposition of the ECB to the acquisition of qualifying holdings in a credit institution – Starting point of the assessment period – Intervention by the ECB during the initial stage of the procedure – Criteria of financial stability of the proposed acquirer and compliance with prudential requirements – Existence of reasonable grounds for opposing the acquisition on the basis of one or more assessment criteria – Article 106 of the Rules of Procedure – Request for a hearing without a statement of reasons

The applicant, PNB Banka AS, is a credit institution incorporated under Latvian law which, on the date of the contested decision, was a 'less significant' [46] credit institution and was therefore subject to direct prudential supervision by the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission, Latvia; 'the FCMC'). On 1 October 2018, the applicant notified the FCMC of its intention to acquire directly a qualifying holding in another Latvian credit institution ('the acquisition'). On 1 March 2019, the FCMC submitted to the European Central Bank (ECB) a proposal for a decision, [47] to the effect of an opposition to the proposed acquisition. By decision notified on 21 March 2019, the ECB opposed the acquisition, since neither the criterion of financial soundness of the proposed acquirer nor the criterion of compliance with prudential requirements was satisfied ('the contested decision').

Hearing an action for annulment of that decision, the General Court rules on a number of issues which have not previously been addressed. It examines, first of all, the ECB's right to intervene in the

44 Namely Article 6(5)(b) of the SSM Regulation.

45 Under Article 68(3) of the SSM Framework Regulation.

46 Within the meaning of Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation').

47 Within the meaning of Article 15(2) of the SSM Regulation.

procedure for authorisation of the acquisition of a qualifying holding in a credit institution from the start of that procedure. It then specifies the conditions under which the ECB may oppose the acquisition on the basis of the criterion of financial soundness of the proposed acquirer. Finally, it determines the conditions under which the competent authority may oppose the acquisition of a credit institution. The Court dismisses the action in its entirety.

Findings of the Court

First, the Court rules that, in view of the particular mechanism for collaboration which the EU legislature intended to establish between the ECB and the national competent authority for the examination of applications for authorisation prior to any acquisition or increase in qualifying holdings in credit institutions, the ECB may intervene in the procedure before that national competent authority sends a proposal for a decision, [48] even from the beginning of the procedure.

The Court states that, where the legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between that institution and those national authorities a specific mechanism which is based on the exclusive decision-making power of the EU institution. Under the applicable legislation, [49] the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition at the end of the procedure in question. The Court adds that, within the framework of relations governed by the principle of sincere cooperation, [50] the national authorities' role consists in registering applications for authorisation and in assisting the ECB, which alone has the decision-making power, in particular by providing it with all the information necessary for carrying out its tasks, by examining such applications and then by forwarding to the ECB a proposal for a decision, which is not binding on the ECB and which, moreover, EU law does not require to be notified to the applicant.

Secondly, as regards the conditions under which the ECB may oppose the acquisition on the basis of the criterion of financial soundness of the proposed acquirer, the Court rules that, for that purpose, in the light of the legislation in force, [51] the ECB is not required, first, to demonstrate that the proposed acquisition would have a material adverse effect compared with a situation in which that acquisition is not carried out or, secondly, to carry out a counterfactual analysis of the situation in which that acquisition does not take place.

In the present case, the Court finds, on the contrary, that the relevant legislation defines the financial soundness of the proposed acquirer as its ability to finance the proposed acquisition and to maintain, for the foreseeable future, a sound financial structure for itself and the target undertaking, and does not refer to any ground of opposition based on the material adverse effect of the proposed acquisition, nor does it require an analysis of the situation in which that acquisition does not take place.

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48 Under Article 15(2) of the SSM Regulation.

49 Under Article 4(1)(c) of the SSM Regulation, read in conjunction with Article 15(3) of that regulation and with Article 87 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities SSM Framework Regulation) (OJ 2014 L 141, p. 1).

50 Under Article 6(2) of the SSM Regulation.

51 Article 23(1) and (2) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and the Joint Guidelines of the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) on the prudential assessment of acquisitions and increases of qualifying holdings in entities in the financial sector, published on 20 December 2016 (JC/GL/2016/01).

Thirdly, the Court rules that the competent authority may oppose the acquisition of a credit institution without examining, in its decision, all of the assessment criteria set out in Directive 2013/36. [52] It states that, in accordance with the objective of ensuring the sound and prudent management of the credit institution in which an acquisition is proposed, laid down in that directive, it is sufficient if there are reasonable grounds for opposing the acquisition on the basis of one or more of those criteria.

VI. SOCIAL POLICY: TEMPORARY AGENCY WORKERS

Judgment of the Court of Justice (Second Chamber), 15 December 2022, TimePartner Personalmanagement, C-311/21

Link to the full text of the judgment

Reference for a preliminary ruling – Employment and social policy – Temporary agency work – Directive 2008/104/EC – Article 5 – Principle of equal treatment – Need to respect, in the event of derogation from that principle, the overall protection of temporary agency workers – Collective agreement providing for lower pay than that of staff recruited directly by the user undertaking – Effective judicial protection – Judicial review

Between January and April 2017, TimePartner Personalmanagement GmbH, a temporary-work agency, employed CM as a temporary agency worker under a fixed-term contract. For the duration of her assignment, CM worked at a retail user undertaking as an order handler.

For that work, she received a gross hourly wage of EUR 9.23, in accordance with the collective agreement applicable to temporary agency workers concluded between two trade unions, of which TimePartner Personalmanagement and CM were members respectively.

That collective agreement derogated from the principle of equal treatment recognised in German law, [53] by establishing, for temporary agency workers, a lower pay than that granted to the workers of the user undertaking pursuant to the provisions of a collective agreement for retail workers in the Land of Bavaria (Germany), namely, a gross hourly wage of EUR 13.64

CM brought a claim before the Arbeitsgericht Würzburg (Labour Court, Würzburg, Germany) seeking additional pay of EUR 1 296.72, a sum equivalent to the difference in pay between the temporary agency workers and comparable workers recruited directly by the user undertaking. In that regard, she relied on a breach of the principle of equal treatment of temporary agency workers enshrined in Article 5 of Directive 2008/104. [54] After that claim was rejected in the first instance and on appeal, CM lodged an appeal on a point of law before the Bundesarbeitsgericht (Labour Federal Court, Germany), which referred five questions to the Court of Justice for a preliminary ruling on the interpretation of that provision.

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52 Criteria referred to in Article 23 of Directive 2013/36.

53 For the time between January and March 2017, in the first sentence of Paragraph 10(4) of the Arbeitnehmerüberlassungsgesetz (Law on temporary agency work) of 3 February 1995 (BGBl. 1995 I, p. 158), in its version applicable until 31 March 2017 and, for April 2017, in Paragraph 8(1) of that law in its version applicable as from 1 April 2017.

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

The Court defines the conditions to be met by a collective agreement concluded by the social partners in order to be able to derogate from the principle of equal treatment of temporary agency workers under Article 5(3) of Directive 2008/104. [55] It specifies, inter alia, the scope of the concept of 'overall protection of temporary agency workers', which collective agreements must respect in accordance with that provision, and provides criteria to assess whether that overall protection is effectively respected. The Court also concludes that such collective agreements must be amenable to effective judicial review.

Findings of the Court

After recalling the dual objective of Directive 2008/104 to ensure the protection of temporary agency workers and respect for the diversity of labour markets, the Court states that Article 5(3) of that directive, by referring to the concept of 'overall protection of temporary agency workers', does not require any account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law.

However, where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them, in return, advantages in terms of basic work and employment conditions [56] which are such as to compensate for the difference in treatment they suffer.

If such an agreement serves only to weaken one or more of those basic conditions with regard to temporary agency workers, the overall protection of those workers would necessarily be diminished.

Moreover, pursuant to the derogation contained in Article 5(3) of Directive 2008/104 it is necessary to assess compliance with the obligation to respect the overall protection of temporary agency workers in concrete terms by comparing, for a given job, the basic working and employment of conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order thus to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered.

That obligation to respect the overall protection of temporary agency workers does not require the temporary agency worker concerned to have a permanent contract of employment with the temporary-work agency since Article 5(3) of Directive 2008/104 allows derogation from the principle of equal treatment with regard to any temporary agency worker, irrespective of whether their contract of employment with a temporary-work agency is a fixed-term contract or a contract of indefinite duration.

In addition, that obligation does not require Member States to prescribe in detail the conditions and criteria with which collective agreements must comply.

That being said, while they enjoy a broad discretion in the negotiation and conclusion of collective agreements, the social partners must act in accordance with EU law in general and Directive 2008/104 in particular.

Thus, while the provisions of that directive do not require Member States to adopt specific legislation designed to respect the overall protection of temporary agency workers, within the meaning of Article

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55 Under that paragraph 3, Member States may give the social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions of temporary agency workers, provided that the overall protection of temporary agency workers is respected.

56 The basic working and employment conditions are defined in Article 3(1)(f) of Directive 2008/104. They concern the conditions relating to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.

5(3) thereof, the fact remains that the Member States, including their courts, must ensure that collective agreements which authorise differences in treatment with regard to basic working and employment conditions ensure, inter alia, the overall protection of temporary agency workers.

Accordingly, those collective agreements must be amenable to effective judicial review in order to determine whether the social partners have complied with their obligation to respect that protection.

VII. INTERNATIONAL AGREEMENTS: INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court of Justice (Second Chamber), 22 December 2022, Udlændingenævnet (Language test for foreign nationals), C-279/21

Link to the full text of the judgment

Reference for a preliminary ruling – EEC-Turkey Association Agreement – Article 9 – Decision No 1/80 – Article 10(1) – Article 13 – Standstill clause – Family reunification – National rule introducing new more restrictive conditions in the area of family reunification for spouses of Turkish nationals who hold a permanent residence permit in the Member State concerned – Requirement that Turkish workers successfully take a test demonstrating a certain level of knowledge of the official language of that Member State – Justification – Objective of ensuring successful integration

Y is a Turkish national who has resided in Denmark since 1979. He has held a permanent residence permit in that Member State since 1985. X, his wife, entered Denmark in 2015 and, the same year, submitted an application for a residence permit there for the purpose of family reunification with her spouse.

The Udlændingestyrelsen (Immigration Office, Denmark) rejected that application on the ground that Y had not demonstrated that he had fulfilled the condition, laid down by the national legislation at issue in the main proceedings, of having successfully taken a Danish language test [57] and that there were no special reasons justifying a derogation in that regard. The Immigration Office added that that decision was not called into question by the standstill clauses set out in the Association Agreement between the European Economic Community and Turkey [58] and in the instruments relating thereto, [59] as interpreted in the case-law of the Court of Justice.

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57 That condition is laid down in Paragraph 9(12)(5) of the udlændingeloven (Law on Foreign Nationals), according to which, save for special reasons, including considerations of family unity, a residence permit may be issued only if the person resident in Danish territory has successfully taken the *Prøve i Dansk 1* test, in accordance with Paragraph 9(1) of the lov om danskuddannelse til voksne udlændinge m.fl (Law on Danish language courses for adult foreign nationals) or a Danish test at an equivalent or higher level.

58 Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1964 217, p 3685; 'the Association Agreement').

59 As regards those standstill clauses, in particular Article 13 of Decision No 1/80 of the Association Council set up by the Association Agreement of 19 September 1980, cited above, on the development of the Association between the European Economic Community and Turkey ('Decision No 1/80'), lays down a standstill clause which prohibits the contracting parties from introducing new restrictions on freedom of movement for workers with effect from 1 December 1980.

The administrative appeal lodged by X against the section of that decision which included an assessment in the light of the Association Agreement and the instruments relating thereto, inter alia, the standstill clauses, was dismissed. She then brought an action for annulment of the decision of the Udlændinge-og Integrationsministeriet (Ministry of Immigration and Integration, Denmark) confirming that the standstill clauses did not preclude the rejection of her application for family reunification under the relevant national law.

The case was referred back to the referring court, the Østre Landsret (High Court of Eastern Denmark, Denmark), which asks the Court whether national legislation introduced after the entry into force of Decision No 1/80 in the Member State concerned which, as a condition for the grant of a residence permit for the purpose of family reunification to the spouse of a Turkish national residing legally and working in the host Member State, requires that a test demonstrating a certain level of knowledge of the official language of that Member State be successfully taken by that national constitutes a 'new restriction' within the meaning of the standstill clause in Article13 of Decision No 1/80, and, if so, whether such a restriction may be justified by the objective of ensuring the successful integration of that spouse.

The Court hereby rules that such national legislation constitutes a 'new restriction' within the meaning of Article 13 of Decision No 1/80. Such a restriction cannot be justified by the objective of ensuring successful integration of the spouse of the worker concerned, since that legislation does not allow the competent authorities to take account of that spouse's own ability to integrate or of factors, other than successfully taking such a test demonstrating the effective integration of that worker in the Member State concerned and, therefore, his or her ability to help his or her spouse integrate into that Member State.

Findings of the Court

The Court notes that the standstill clause contained in Article 13 of Decision No 1/80 prohibits generally the introduction of any new national measure that has the object or effect of making the exercise by a Turkish national of the freedom of movement for workers on the territory of the Member State concerned subject to conditions that are more restrictive than those which applied to him or her at the time when that decision entered into force in the territory of that Member State. The national legislation at issue in the main proceedings, which makes family reunification between a Turkish worker residing legally in Denmark and his or her spouse subject to the condition that that worker has successfully taken a test demonstrating a certain level of knowledge of the official language of that Member State, was introduced after the date on which Decision No 1/80 entered into force in that country and brings about a tightening of the conditions for the exercise of the free movement for workers in the territory of that country. It therefore constitutes a 'new restriction' within the meaning of Article 13 of that decision.

Furthermore, while that national legislation pursues an objective which is to ensure successful integration of the family member applying for a right of residence in the Member State concerned for the purpose of family reunification – an objective which may constitute an overriding reason in the public interest for the purposes of Decision No 1/80 – it does not in any way allow account to be taken of that family member's own ability to integrate or of factors which are capable of demonstrating the effective integration of the Turkish worker concerned by the application for family reunification. On the contrary, it is based exclusively on the premiss that the successful integration of the family member concerned for the purpose of family reunification is not sufficiently guaranteed if the Turkish worker concerned by that application for family reunification does not satisfy the condition of having a successful knowledge of the official language of the Member State concerned.

The legislation concerned does not allow the national authorities to take account of factors such as the possible perfect command of Danish by the member of the family seeking family reunification or the effective integration of the Turkish worker concerned which would enable him or her, notwithstanding his or her failure to pass the test in question, to contribute, if necessary, to the integration of his or her family member in that Member State.

Therefore, the Court holds that national legislation such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective pursued.

VIII. COMMON COMMERCIAL POLICY: ANTI-SUBSIDIES

Judgment of the General Court (Fourth Chamber, Extended Composition), 14 December 2022, PT Wilmar Bioenergi Indonesia and Others v Commission, T-111/20

Link to the full text of the judgment

Subsidies – Imports of biodiesel originating in Indonesia – Implementing Regulation (EU) 2019/2092 – Definitive countervailing duty – Article 3(1)(a) of Regulation (EU) 2016/1037 – Financial contribution – Article 3(2) of Regulation 2016/1037 – Benefit – Article 7(1)(a) of Regulation 2016/1037 – Calculation of the amount of the countervailable subsidy – Article 3(1)(a)(iv) and (2) of Regulation 2016/1037 – Action consisting in 'entrusting' or 'directing' a private body to carry out a function constituting a financial contribution – Less than adequate remuneration – Income or price support – Article 28(5) of Regulation 2016/1037 – Use of available information – Article 3(2) and Article 6(d) of Regulation 2016/1037 – Benefit – Article 8(8) of Regulation 2016/1037 – Threat of material injury to the Union industry – Article 8(5) and (6) of Regulation 2016/1037 – Causal link – Attribution analysis – Non-attribution analysis

At the end of an anti-subsidy investigation initiated in 2018, the European Commission adopted Implementing Regulation 2019/2092 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia ('the product under consideration').

The Indonesian companies PT Wilmar Bioenergi Indonesia, PT Wilmar Nabati Indonesia and PT Multi Nabati Sulawesi, which produce biodiesel and export it to the European Union, brought an action for annulment of that implementing regulation.

In dismissing their action, the General Court clarifies the scope of several concepts in Basic Anti-Subsidy Regulation 2016/103. [60] In addition, it examines the impact of imports of biodiesel from Argentina on the causal link between imports of biodiesel originating in Indonesia and the threat of material injury to Union industry.

Findings of the Court

First of all, the Court rejects the complaint alleging a manifest error of assessment on the part of the Commission inasmuch as it concluded that the payments made by the Oil Palm Plantation Fund, a public body, to Indonesian biodiesel producers, constituted a 'financial contribution' by a government in the form of a direct transfer of funds, in accordance with Article 3(1)(a)(i) of the basic anti-subsidy regulation.

In that regard, the Court observes, first, that the concept of 'financial contribution by a government' within the meaning of that provision contains no details as to the origin of the funds transferred and thus covers all the financial means a government may actually use. It follows that the origin of the funds paid by the government to biodiesel producers has no bearing on their classification as a financial contribution. Moreover, the fact that those funds come from the export levy paid by exporting producers does not mean that when they are transferred to biodiesel producers there is no cost for the body which pays them.

Second, the Court states that in order to determine whether a direct transfer of funds may justify the imposition of a countervailing duty, the absence of consideration, or of equivalent consideration, on the part of the undertaking receiving that transfer must be taken into account. In

60 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55), as amended by Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 (OJ 2018 L 143, p. 1) ('the basic anti-subsidy regulation').

that context, since the applicants have not proved that those payments were due in a purchase contract concluded between the Indonesian Government and the biodiesel producers, the Commission was entitled to recognise the existence of a financial contribution in the form of a direct transfer of funds.

The Court also rejects the complaints alleging that the Commission made an error in its calculation of the advantage conferred on Indonesian biodiesel producers by the payments made by the Oil Palm Plantation Fund. According to the applicants, the Commission should have determined the advantage conferred on biodiesel producers by deducting from the amount of countervailable subsidy the transport costs for the delivery of biodiesel, in accordance with Article 7(1)(a) of the basic anti-subsidy regulation. In that regard, the Court notes that, in order to calculate the amount of the subsidy, the Commission was fully entitled to rely on its Guidelines for the calculation of the amount of subsidy in countervailing duty investigations. [61] According to those guidelines, fees or costs may be deducted only if, inter alia, they are paid directly to the government during the investigation period and it is shown that their payment is compulsory in order to receive the subsidy. Those conditions being compatible with the basic anti-subsidy regulation, the applicants failed to prove both that the transport costs at issue were paid directly to the Indonesian Government and that they were compulsory.

Next, the Court holds that, by means of export restrictions on crude palm oil ('CPO'), [62] introduced by the Indonesian Government in the form of an export tax and an export levy, and the setting of prices by a CPO producer owned by the Indonesian Government, the Indonesian Government had 'entrusted' or 'directed', within the meaning of the second indent of Article 3(1)(a)(iv) of the basic anti-subsidy regulation, CPO suppliers to provide their goods for less than adequate remuneration.

In that regard, the Court notes that the second indent of Article 3(1)(a)(iv) of the basic anti-subsidy regulation is an anti-circumvention provision and that, in order to ensure that that provision is fully effective, 'entrusting' must be understood as including any action of the government which amounts, directly or indirectly, to conferring on a private body the responsibility of performing a function of the type referred to in Article 3(1)(a)(i) to (iii) of that regulation, and 'directing' must be understood as including any act of the government which consists, directly or indirectly, in exercising its powers over a private body so that that body performs such a function. That was the situation in the present case, since the export restrictions at issue had been designed by the government with the express aim of benefiting the Indonesian biodiesel industry by keeping domestic CPO prices artificially low. Moreover, since those export restrictions had the effect of restricting the freedom of action of domestic producers of CPO by limiting their ability to decide the market on which to sell their products, the conduct of the Indonesian Government could not be regarded as a mere encouragement of domestic producers of CPO.

Moreover, those export restrictions may also be classified as subsidies in the form of 'income or price support within the meaning of Article XVI of the GATT 1994' within the meaning of Article 3(1)(b) of the basic anti-subsidy regulation, inasmuch as they contribute to the income received by biodiesel producers by allowing them to have access to their main raw material and main cost component at a price below the world market price. 'Income or price support' within the meaning of that provision encompasses any act of the government which amounts, directly or indirectly, to maintaining or increasing revenue stability or prices, and the reference to Article XVI of the GATT means that account must also be taken of the effects of that action on exports and imports.

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61 Information from the Commission – Guidelines for the calculation of the amount of subsidy in countervailing duty investigations (OJ 1998 C 394, p. 6).

62 Crude palm oil is a production source for Indonesian biodiesel.

Lastly, the Court rejects the complaints alleging that the Commission erred in finding that there was a threat of material injury to the Union industry, inasmuch as it concluded that there was a causal link between the imports from Indonesia and the threat of material injury to the Union industry, without taking into account the impact of imports of biodiesel originating in Argentina.

In that regard, the Court recalls that, in accordance with Article 8(6) of the basic anti-subsidy regulation, when examining a causal link between the injury caused to the Union industry and the imports of the subsidised product, the Commission must disregard any injury resulting from other factors and thus ascertain that the effects of those other factors are not capable of breaking the causal link that it has established. However, in order for a causal link to exist, it is not necessary for the imports of the subsidised product to be the sole cause of the injury caused to the Union industry, since the Commission may attribute responsibility for injury to the subsidised imports even if their effects are only part of wider injury attributable to other factors.

It is in the light of those considerations that the Court finds, first, that the persistence of a threat of injury linked to imports of biodiesel from Argentina does not preclude the existence of another threat of injury caused by imports of biodiesel from Indonesia. Second, since the imports from Argentina had already been the subject of countervailing measures, they were not capable of breaking the causal link between imports from Indonesia and the threat of injury to the Union industry. The Court also holds that, despite those imports from Argentina, the threat of injury caused by imports from Indonesia was significant and the causal link between those imports and the threat of injury to the Union industry could be established.

In the light of the foregoing, the Court dismisses the action in its entirety.

Judgment of the General Court (Fourth Chamber, Extended Composition), 14 December 2022, PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo v Commission, T-143/20

Link to the full text of the judgment

(Subsidies – Imports of biodiesel originating in Indonesia – Implementing Regulation (EU) 2019/2092 – Definitive countervailing duty – Article 8(1) and (2) of Regulation (EU) 2016/1037 – Price undercutting – Price pressure – Article 8(5) of Regulation 2016/1037 – Causal link – Article 3(1)(a)(iv) and (2) of Regulation 2016/1037 – Action consisting in 'entrusting' or 'directing' a private body to carry out a function constituting a financial contribution – Less than adequate remuneration – Income or price support – Article 3(2) and Article 6(d) of Regulation 2016/1037 – Benefit – Article 3(1)(a)(i) and (2) of Regulation 2016/1037 – Direct transfer of funds – Article 7 of Regulation 2016/1037 – Calculation of the amount of the benefit – Article 8(1) and (8) of Regulation 2016/1037 – Threat of material injury – Rights of the defence)

At the end of an anti-subsidy investigation initiated in 2018, the European Commission adopted Implementing Regulation 2019/2092 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia [63] ('the product under consideration').

The Indonesian companies PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo, which produce biodiesel and export it to the European Union, brought an action for annulment of that implementing regulation.

63 Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia (OJ 2019 L 317, p. 42).

In dismissing their action, the General Court provides clarifications as regards the analysis of price undercutting of imports subject to anti-subsidy investigations. In addition, it clarifies the scope of several concepts in Basic Anti-Subsidy Regulation 2016/1037. [64]

Findings of the Court

In the first place, as regards the question whether there had been significant price undercutting by the imports of biodiesel from Indonesia as compared with the price of biodiesel originating in the European Union, the Court rejects the complaint alleging that the Commission did not carry out a proper comparison of those two prices. In that regard, the applicants claimed, more specifically, that, by comparing, in the context of one of the three methods of calculation used, all imports of biodiesel from Indonesia to all sales of biodiesel in the European Union without adjusting the price, the Commission disregarded the difference in terms of the cold filter plugging point ('CFPP') level between Indonesian biodiesel and biodiesel sold by Union producers.

In that regard the Court notes, first, that the Commission's decision not to make price adjustments on the basis of CFPP levels was based on objective factors, namely the complexity of the competitive relationships, the difference in market conditions between biodiesels with different CFPP levels and the absence of a direct correlation between the CFPP level and the price. Second, the applicants have not shown that the adjustment requested was necessary in order to make the prices in question comparable.

As regards the applicants' argument that an obligation on the Commission to establish undercutting for the product under consideration as a whole can be based, in the present case, on an application by analogy of the judgment in Changshu City Standard Parts Factory and Ningbo Jinding Fastener v Council, [65] the Court notes that the conclusions drawn from that judgment, which concerns the determination of the dumping margin, are not applicable to the analysis of the impact of dumped or subsidised imports on Union industry prices. The latter analysis involves a comparison of sales not of the same undertaking, as is the case with the determination of the dumping margin which is calculated on the basis of the data of the exporting producer concerned, but of several undertakings, namely the sampled exporting producers and the undertakings forming part of Union industry included in the sample. Having made that clarification, the Court states that, in any event, the Commission calculated price undercutting first for 20%, then for 55%, and finally for all of the Union producers' sales.

In the second place, the Court rejects the complaint alleging a manifest error of assessment inasmuch as the Commission considered that, by means of restrictions on the export of crude palm oil ('CPO'), established by the Indonesian Government in the form of an export tax and an export levy, [66] and de facto control through PTPN of domestic CPO prices, the Indonesian Government sought to obtain from CPO producers the provision of that product on the Indonesian market for less than adequate remuneration. According to the applicants, it could not be considered that, by those measures, the Indonesian Government had 'entrusted' or 'directed', within the meaning of the second indent of Article 3(1)(a)(iv) of the basic anti-subsidy regulation, [67] CPO suppliers to provide their goods in return for less than adequate remuneration.

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64 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55), as amended by Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 (OJ 2018 L 143, p. 1) ('the basic anti-subsidy regulation').

65 Judgment of 5 April 2017, Changshu City Standard Parts Factory and Ningbo Jinding Fastener v Council C-376/15 P and C-377/15 P, EU:C:2017:269).

66 Crude palm oil is a production source for Indonesian biodiesel.

67 In accordance with this provision, a subsidy is deemed to exist when a government 'entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i), (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments'.

In that regard, the Court notes that the second indent of Article 3(1)(a)(iv) of the basic anti-subsidy regulation is an anti-circumvention provision and that, in order to ensure that that provision is fully effective, 'entrusting' must be understood as including any action of the government which amounts, directly or indirectly, to conferring on a private body the responsibility of performing a function of the type referred to in Article 3(1)(a)(i) to (iii) of that regulation, and 'directing' must be understood as including any act of the government which consists, directly or indirectly, in exercising its powers over a private body so that that body performs such a function. That was the situation in the present case, since the export restrictions at issue had been designed by the government with the express aim of benefiting the Indonesian biodiesel industry by keeping domestic CPO prices artificially low.

Moreover, those export restrictions may also be classified as subsidies in the form of 'income or price support within the meaning of Article XVI of the GATT 1994' within the meaning of Article 3(1)(b) of the basic anti-subsidy regulation, inasmuch as they contribute to the income received by biodiesel producers by allowing them to have access to their main raw material and main cost component at a price below the world market price. 'Income or price support' within the meaning of that provision encompasses any act of the government which amounts, directly or indirectly, to maintaining or increasing revenue stability or prices, and the reference to Article XVI of the GATT means that account must also be taken of the effects of that action on exports and imports.

In the third place, the Court holds that the payments made by the Oil Palm Plantation Fund, a public body, to Indonesian biodiesel producers also constituted a 'financial contribution' by a government in the form of a direct transfer of funds, in accordance with Article 3(1)(a)(i) of the basic anti-subsidy regulation. Under that provision, the concept of 'financial contribution' covers all the financial means a government may actually use. Furthermore, in order to determine whether a direct transfer of funds may justify the imposition of a countervailing duty, the absence of consideration, or of equivalent consideration, on the part of the undertaking receiving that transfer must be taken into account. In that context, since the applicants have not proved that those payments were due in a purchase contract concluded between the Indonesian Government and the biodiesel producers, the Commission was entitled to recognise the existence of a financial contribution in the form of a direct transfer of funds.

The Court also rejects the complaints alleging that the Commission made an error in its calculation of the advantage conferred on Indonesian biodiesel producers by the payments made by the Oil Palm Plantation Fund. According to the applicants, the Commission should have determined the advantage conferred on biodiesel producers by deducting from the amount of countervailable subsidy the transport costs for the delivery of biodiesel, in accordance with Article 7(1)(a) of the basic anti-subsidy regulation. In that regard, the Court notes that, in order to calculate the amount of the subsidy, the Commission was fully entitled to rely on its Guidelines for the calculation of the amount of subsidy in countervailing duty investigations. [68] According to those guidelines, fees or costs may be deducted only if, inter alia, they are paid directly to the government during the investigation period and it is shown that their payment is compulsory in order to receive the subsidy. Those conditions being compatible with the basic anti-subsidy regulation, the applicants failed to prove both that the transport costs at issue were paid directly to the Indonesian Government and that they were compulsory.

Lastly, referring to settled case-law on anti-dumping matters, the Court confirms the Commission's conclusion that, during the investigation period, imports from Indonesia had constituted a threat of material injury to the Union industry, in accordance with Article 8(8) of the basic anti-subsidy regulation.

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[68] Information from the Commission – Guidelines for the calculation of the amount of subsidy in countervailing duty investigations (OJ 1998 C 394, p. 6).

IX. JUDGMENTS PREVIOUSLY DELIVERED

1. FUNDAMENTAL RIGHTS: PRINCIPLES AND FUNDAMENTAL RIGHTS ENSHRINED IN THE CHARTER

Judgment of the Court of Justice (Grand Chamber), 22 November 2022, WM and Sovim SA v Luxembourg Business Registers, Joined Cases C-37/20 and C-601/20

Link to the full text of the judgment

Reference for a preliminary ruling – Prevention of the use of the financial system for the purposes of money laundering or terrorist financing – Directive (EU) 2018/843 amending Directive (EU) 2015/849 – Amendment to Article 30(5), first subparagraph, point (c), of Directive 2015/849 – Access for any member of the general public to the information on beneficial ownership – Validity – Articles 7 and 8 of the Charter of Fundamental Rights of the European Union – Respect for private and family life – Protection of personal data

For the purposes of combating and preventing money laundering and terrorist financing, the anti-money-laundering directive [69] requires Member States to keep a register containing information on the beneficial ownership [70] of companies and of other legal entities incorporated within their territory. Following an amendment of that directive by Directive 2018/843, [71] some of that information must be made accessible in all cases to any member of the general public. In accordance with the anti-money-laundering directive as thus amended ('the amended anti-money-laundering directive'), Luxembourg legislation [72] established a Register of Beneficial Ownership (RBO) designed to retain and make available a series of information on the beneficial ownership of registered entities, access to which is open to any person.

In that context, the tribunal d'arrondissement de Luxembourg (Luxembourg District Court) was seised of two actions, brought by WM and Sovim SA, respectively, challenging the rejection by Luxembourg Business Registers, the administrator of the RBO, of their applications seeking to preclude the general public's access to information relating, in the first case, to WM as the beneficial owner of a real estate company and, in the second case, to the beneficial owner of Sovim SA. In those two cases, since it had doubts in particular as to the validity of the provisions of EU law establishing the system of public access to information relating to beneficial ownership, the Tribunal d'arrondissement de Luxembourg (Luxembourg District Court) made a reference to the Court of Justice for a preliminary ruling on validity.

By its judgment, the Court, sitting as the Grand Chamber, declares Directive 2018/843 invalid in so far as it amended the anti-money-laundering directive in such a way that Member States must ensure

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69 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73; 'the anti-money-laundering directive').

70 Under Article 3(6) of the anti-money-laundering directive, beneficial owners are any natural persons who ultimately own or control the customer and/or the natural persons on whose behalf a transaction or activity is being conducted.

71 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ 2018 L 156, p. 43).

72 Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (Mémorial A 2019, nº 15) (Law of 13 January 2019 establishing a Register of Beneficial Ownership).

that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public. [73]

Findings of the Court

In the first place, the Court finds that the general public's access to information on beneficial ownership, provided for in the amended anti-money-laundering directive, constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data, enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ('the Charter') respectively.

In that regard, the Court observes that, since the data concerned include information on identified individuals, namely the beneficial owners of companies and other legal entities incorporated within the Member States' territory, the access of any member of the general public to those data affects the fundamental right to respect for private life. In addition, making available those data to the general public constitutes the processing of personal data. It adds that making personal data available to the general public in that manner constitutes an interference with the abovementioned fundamental rights, whatever the subsequent use of the information communicated. [74]

As regards the seriousness of that interference, the Court notes that, in so far as the information made available to the general public relates to the identity of the beneficial owner as well as to the nature and extent of the beneficial interest held in corporate or other legal entities, that information is capable of enabling a profile to be drawn up concerning certain personal identifying data, the state of the person's wealth and the economic sectors, countries and specific undertakings in which he or she has invested. In addition, that information becomes accessible to a potentially unlimited number of persons, with the result that such processing of personal data is liable to enable that information to be freely accessed also by persons who, for reasons unrelated to the objective pursued by that measure, seek to find out about, inter alia, the material and financial situation of a beneficial owner. That possibility is all the easier when the data in question can be consulted on the internet. Furthermore, the potential consequences for the data subjects resulting from possible abuse of their data are exacerbated by the fact that, once those data have been made available to the general public, they can not only be freely consulted, but also retained and disseminated and that it thereby becomes increasingly difficult, or even illusory, for those data subjects to defend themselves effectively against abuse.

In the second place, as part of the examination of the justification for the interference at issue, first, the Court notes that, in the present case, the principle of legality is respected. The limitation on the exercise of the abovementioned fundamental rights, resulting from the general public's access to information on beneficial ownership, is provided for by a legislative act, namely the amended anti-money-laundering directive. In addition, that directive specifies that those data must be adequate, accurate and current, and expressly lists certain data to which the public must be allowed access. It also lays down the conditions under which Member States may provide for exemptions from such access.

Secondly, the Court clarifies that the interference in question does not undermine the essence of the fundamental rights guaranteed in Articles 7 and 8 of the Charter. While it is true that the amended anti-money-laundering directive does not contain an exhaustive list of the data which any member of the general public must be permitted to access, and that Member States are entitled to provide for access to additional information, the fact remains that only adequate information on beneficial owners and beneficial interests held may be obtained, held and, therefore, potentially made accessible to the public, which excludes, inter alia, information which is not adequately related to the

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73 Invalidity of Article 1(15)(c) of Directive 2018/843, amending point (c) of the first subparagraph of Article 30(5) of the anti-money-laundering directive.

74 Judgment of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491, paragraph 96 and the case-law cited).

purposes of the amended anti-money-laundering directive. As it is, it does not appear that making available to the general public information which is so related would in any way undermine the essence of the fundamental rights referred to.

Thirdly, the Court points out that, by providing for the general public's access to information on beneficial ownership, the EU legislature seeks to prevent money laundering and terrorist financing by creating, by means of increased transparency, an environment less likely to be used for those purposes, which constitutes an objective of general interest that is capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Fourthly, in the context of the examination of whether the interference at issue is appropriate, necessary and proportionate, the Court holds that, admittedly, the general public's access to information on beneficial ownership is appropriate for contributing to the attainment of that objective.

However, it finds that that interference cannot be considered to be limited to what is strictly necessary. First, the strict necessity of that interference cannot be demonstrated by relying on the fact that the criterion of the 'legitimate interest' – which, according to the anti-money-laundering directive, in the version prior to its amendment by Directive 2018/843, any person wishing to access information on beneficial ownership had to have – was difficult to apply and that its application could give rise to arbitrary decisions. The fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which the public may access information on beneficial ownership is no reason for the EU legislature to provide for the general public to access that information.

Secondly, nor can the explanations set out in Directive 2018/843 establish that the interference at issue is strictly necessary. [75] To the extent that, according to those explanations, the general public's access to beneficial ownership information is intended to allow greater scrutiny of information by civil society, in particular by the press and civil society organisations, the Court finds that both the press and civil society organisations that are connected with the prevention and combating of money laundering and terrorist financing have a legitimate interest in accessing the information concerned. The same is true of the persons who wish to know the identity of the beneficial owners of a company or other legal entity because they are likely to enter into transactions with them, or of the financial institutions and authorities involved in combating offences of money laundering or terrorist financing.

Nor, moreover, is the interference in question proportionate. In that regard, the Court finds that the substantive rules governing that interference do not meet the requirement of clarity and precision. The amended anti-money-laundering directive provides that any member of the general public may have access to 'at least' the data referred to therein, and provides that Member States may provide for access to additional information, including 'at least' the date of birth or the contact details of the beneficial owner concerned. However, by using the expression 'at least', that directive allows for data to be made available to the public which are not sufficiently defined and identifiable.

Furthermore, as regards the balancing of the seriousness of that interference against the importance of the objective of general interest referred to, the Court recognises that, in view of its importance that objective is capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Nevertheless, first, combating money laundering and terrorist financing is as a priority a matter for the public authorities and for entities such as credit or financial institutions which, by reason of their activities, are subject to specific obligations in that regard. For that reason, the amended anti-money-laundering directive provides that information on beneficial ownership must be accessible, in all

75 The explanations set out in recital 30 of Directive 2018/843 are referred to here.

cases, to competent authorities and Financial Intelligence Units, without any restriction, as well as to obliged entities, within the framework of customer due diligence. [76]

Secondly, in comparison with the former regime – which provided, in addition to access by the competent authorities and certain entities, for access by any person or organisation capable of demonstrating a legitimate interest – the regime introduced by Directive 2018/843 amounts to a considerably more serious interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, without that increased interference being capable of being offset by any benefits which might result from the latter regime as compared against the former regime, in terms of combating money laundering and terrorist financing.

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

Judgment of the General Court (Eighth Chamber, Extended Composition), 30 November 2022, KN v Parliament, T-401/21

Law governing the institutions – Member of the EESC – Discharge procedure in respect of the implementation of the budget of the EESC for the financial year 2019 – Parliament resolution designating the applicant as the perpetrator of psychological harassment – Action for annulment – Act not open to challenge – Inadmissibility – Action for damages – Protection of personal data – Presumption of innocence – Obligation of confidentiality – Principle of good administration – Proportionality – Sufficiently serious breach of a rule of law intended to confer rights on individuals

The applicant, KN, is a member of the European Economic and Social Committee (EESC) and held the post of President of the Employers' Group between April 2013 and October 2020.

After having been informed of allegations concerning the applicant's behaviour towards other members of the EESC and members of its staff, the European Anti-Fraud Office (OLAF) opened an investigation. On 16 January 2020, OLAF recommended to the EESC that it take all necessary measures to prevent any further cases of harassment on the part of the applicant in the workplace. Following those recommendations, on 9 June 2020, the EESC Bureau asked the applicant to resign from his duties as President of the Employers' Group and to withdraw his candidacy for presidency of the EESC. It also discharged him from all activities involving the management of staff.

On 20 October 2020, the European Parliament refused to grant the EESC discharge in respect of the implementation of its budget for the financial year 2018, expressing its concerns about what had been done to follow up on OLAF's recommendations.

Subsequently, by decision of 28 April 2021, the Parliament granted the EESC discharge in respect of the implementation of its budget for the financial year 2019. [77] The following day, the Parliament adopted a resolution in which it recalled that the refusal to grant discharge in respect of the implementation of the budget of the EESC for 2018 was founded inter alia on the insufficient

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76 Article 30(5), first subparagraph, points (a) and (b) of the amended anti-money laundering directive.

77 Decision (EU, Euratom) 2021/1552 of the European Parliament of 28 April 2021 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2019, Section VI – European Economic and Social Committee (OJ 2021 L 340, p. 140).

measures taken by the EESC following acts of psychological harassment found on the part of the applicant. [78]

The applicant has therefore brought before the Court an action, first, for annulment of the two acts of the Parliament cited above and, secondly, for compensation for the damage he claims to have suffered.

The Court, sitting in extended composition, dismisses the applicant's action in its entirety. In its judgment, first, it provides clarification as to whether acts adopted by the Parliament in the context of the annual discharge procedure in respect of the implementation of the budget of EU institutions, bodies, offices and agencies are open to challenge. Secondly, it rules on new questions regarding the processing of personal data and respect for the presumption of innocence by the Parliament when it adopted the resolution with observations forming an integral part of the decision on discharge.

Findings of the Court

In the first place, the Court finds that the claims for annulment are inadmissible. In that regard, it recalls that only the operative part of an act is capable of producing legal effects and the assessments made in the recitals of an act are not capable of forming the subject of an action for annulment. Those assessments can be subject to review by the EU judicature only to the extent that, as grounds for an act adversely affecting a person's interests, they constitute the necessary basis for the operative part of that act. The observations in the contested resolution, which form an integral part of the decision and make it possible to identify the applicant as the perpetrator of psychological harassment, do not constitute the necessary basis for the operative part of that decision relating to discharge in respect of the implementation of the budget of the EESC for the financial year 2019. The claims for annulment are therefore inadmissible for lack of an act open to challenge by the applicant. However, the applicant is not denied access to justice since an action for non-contractual liability [79] is available if the conduct of the Parliament in question is of such a nature as to entail liability on the part of the European Union.

In the second place, the Court finds that, in the present case, the applicant has not demonstrated the existence of unlawful conduct on the part of the Parliament and, consequently, rejects the claim for damages.

In that context, ruling on the infringement alleged by the applicant of his right to the protection of personal data, the Court states that the Parliament has a wide margin of discretion in its observations on the way in which the institutions and bodies of the European Union have implemented the section of the budget relating to them. In the present case, the Parliament considered that the measures taken by the EESC to implement the observations in the resolution relating to the financial year 2018 were insufficient. Thus, the processing of the applicant's personal data appeared to be necessary for the performance of the task of monitoring the implementation of the budget of the EESC for the financial year 2019. The processing of those data by the Parliament was also necessary on account of the fact that the psychological harassment attributed to the applicant was the cause of serious problems within the EESC which resulted in expenditure which could have been avoided. Moreover, in the context of the discharge procedure, the publication of the contested acts, in accordance with the principle of transparency, is intended to strengthen public scrutiny of the implementation of the budget and contribute to the appropriate use of public funds by the administration of the European Union. Consequently, the Parliament did not exceed the limits of its discretion in considering that it

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78 Resolution (EU) 2021/1553 of the European Parliament of 29 April 2021 with observations forming an integral part of the decision on discharge in respect of the implementation of the general budget of the European Union for the financial year 2019, Section VI – European Economic and Social Committee (OJ 2021 L 340, p. 141).

79 Under Article 268 and the second paragraph of Article 340 TFEU.

was necessary to process the applicant's personal data in order to carry out its task of monitoring the implementation of the budget by the EESC.

Ruling on the alleged infringement of the principle of the presumption of innocence, the Court recalls, first of all, the case-law of the European Court of Human Rights, according to which, as long as the person accused of an offence has not been finally convicted by a court, a parliamentary assembly is bound to respect that principle and, therefore, to exercise discretion and restraint when it expresses its views, in a resolution, concerning the acts for which that person is the subject of criminal proceedings. [80]

As regards, more specifically, statements made by a public authority after an OLAF investigation has closed, the Court also points out that respect for the principle of the presumption of innocence does not preclude, in the interests of informing the public of actions implemented in the context of possible failures or fraud, an EU institution from reporting, using balanced and measured wording and in an essentially factual manner, the main findings of the OLAF report concerning a member of an institution. [81] Thus, the mere fact that, in the contested resolution, the Parliament is said to have made it possible to identify the applicant as the perpetrator of psychological harassment, which corresponds to the main conclusion of the OLAF report, does not in itself constitute a breach of that principle. The particular circumstances of the present case make it possible to understand that the statement, in the French version of the contested resolution, that the applicant was 'judged' (jugé) to be responsible for harassment seeks merely to recall OLAF's findings as to the existence of psychological harassment on the part of the applicant. That conclusion is also supported by other language versions of the contested resolution in which the wording used by the Parliament makes no reference to a judgment in the judicial sense.

3. BORDER CONTROLS, ASYLUM AND IMMIGRATION: IMMIGRATION POLICY

Judgment of the Court of Justice (Grand Chamber), 22 November 2022, X v Staatssecretaris van Justitie en Veiligheid, C-69/21

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Articles 4, 7 and 19 of the Charter of Fundamental Rights of the European Union – Prohibition of inhuman or degrading treatment – Respect for private and family life – Protection in the event of removal, expulsion or extradition – Right of residence on medical grounds – Common standards and procedures in Member States for returning illegally staying third-country nationals – Directive 2008/115/EC – Third-country national who is suffering from a serious illness – Medical treatment for pain relief – Treatment is not available in the country of origin – Conditions under which removal must be postponed

X, a Russian national, is suffering from a rare form of blood cancer, for which he is currently receiving treatment in the Netherlands. He is receiving, in particular, analgesic treatment based on medicinal cannabis, which is not permitted in Russia. The Netherlands authorities, having found that that Russian national could not claim, in the Netherlands, refugee status, subsidiary protection or a

80 See inter alia, in that regard, ECtHR, 18 February 2016, Rywin v. Poland, CE:ECHR:2016:0218JUD000609106, paragraphs 207 and 208.

81 See, to that effect, judgment of 6 June 2019, *Dalli* v *Commission* (T-399/17, not published, EU:T:2019:384, paragraphs 175 to 178).

residence permit on the basis of national law, adopted a decision to return him. The person concerned, arguing that the treatment based on medicinal cannabis is so essential to him that he would no longer be able to lead a decent life if that treatment were discontinued, brought an action against that decision before the referring court.

That court raises questions in particular regarding whether EU law, and more specifically the 'Return' Directive [82] and the Charter of Fundamental Rights of the European Union ('the Charter'), preclude a return decision from being made in relation to a person in the situation of the person concerned. More specifically, the referring court seeks to ascertain whether the risk of a significant increase in pain caused by absence of effective medical treatment can constitute an obstacle to removing the person concerned.

The Court of Justice, sitting as the Grand Chamber, responds in the affirmative and provides clarification of the factors to be taken into consideration when assessing such a risk and how that assessment is to be conducted. In addition, it examines Member States' obligations regarding a third country national in the situation of the person concerned in the light of the right to private life.

Findings of the Court

In the first place, the Court states that the 'Return' Directive [83] and the Charter [84] preclude a return decision from being taken or a removal order from being made in respect of a third-country national who is staying illegally on the territory of a Member State and suffering from a serious illness, where there are substantial grounds for believing that the person concerned would be exposed, in the third country to which he or she would be removed, to a real risk of a significant, permanent and rapid increase in his or her pain, if he or she were returned, on account of the only effective analgesic treatment being prohibited in that country.

In that regard, the Court holds that a Member State may infringe the prohibition of inhuman and degrading treatment, laid down in Article 4 of the Charter, where the return decision or removal order adopted by its authorities risks exacerbating the pain caused to a third-country national concerned by an illness to the extent that such pain reaches the severity threshold required under Article 4 of the Charter.

First, there is a risk of a significant and permanent increase in pain, in particular, where it is established that (i) in the receiving country, the only effective analgesic treatment cannot be lawfully administered to the third-country national concerned and (ii) the absence of such treatment would expose him or her to pain of such intensity that it would be contrary to human dignity in that it could cause him or her serious and irreversible psychological consequences, or even lead him or her to commit suicide. It is for the referring court to determine whether that is so in the light of all of the relevant information, in particular the medical information.

As regards, second, the risk of a rapid increase in pain, account must rather be taken of the fact that that increase may be gradual and that a certain period of time may be necessary for that increase to become significant and permanent. Therefore, a Member State may not lay down a predetermined period in absolute terms within which such an increase must be liable to materialise. Any period laid down by national law in that regard must be purely indicative and cannot exempt the competent national authority from an actual examination of the situation of the person concerned in the light of all the relevant information.

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

83 Article 5 of that directive.

84 Articles 1 and 4 as well as Article 19(2) of the Charter.

In the second place, the Court finds that the 'Return' Directive [85] and the Charter [86] preclude the consequences of the removal order in the strict sense on the state of health of a third-country national from being taken into account by the competent national authority solely in order to examine whether he or she is able to travel. In order to be able to adopt a return decision or to remove him or her, the Member State concerned must ensure that, when the state of health of the person concerned so requires, that person receives not only health care during removal but also after that removal, in the receiving country.

In the third and final place, the Court points out, first, that the 'Return' Directive and the Charter [87] do not require the Member State on whose territory a third-country national is staying illegally to grant a right of residence to that national where that national cannot be the subject of a return decision or a removal order, on account of the fact that there are substantial grounds for believing that he or she would be exposed, in the receiving country, to a real risk of a rapid, significant and permanent increase in the pain caused by the serious illness from which he or she is suffering. Second, the Court states that the competent national authority, when examining whether the right to respect for the private life of that national, laid down in the Charter, precludes him or her being the subject of a return decision or removal order, must take account of the state of health of that national and the care he or she receives on that territory, on account of that illness, as well as all the other relevant factors.

In that regard, the Court clarifies that the medical treatment which a third-country national receives on the territory of a Member State forms part of his or her private life, regardless of whether that national is staying illegally on that territory. However, as the right to respect for private life is not an absolute right, limitations can be placed on the exercise of that right, in so far as those limitations are provided for by law, they respect the essence of that right and, in compliance with the principle of proportionality, they are necessary and genuinely meet, in particular, objectives of general interest recognised by the European Union. As the establishment of an effective removal and repatriation policy constitutes such an objective, it is still necessary to examine, in particular, whether the adoption of a return decision or a removal order in respect of a third-country national who is suffering from a serious illness and receiving, in the Member State concerned, analgesic treatment which is unavailable in the receiving country does not affect the essence of his or her right to private life and respects the principle of proportionality. Such an examination presupposes taking into account all the social ties which that national has created within the Member State where he or she is staying illegally, taking due account of the fragility and the state of particular dependency caused by his or her state of health. However, where that national has established his or her private life within that Member State without holding a right of residence there, only exceptional circumstances may preclude him or her from being the subject of a return procedure.

In addition, the adoption of a return decision or removal order does not infringe the right to respect for the private life of a third-country national concerned on the sole ground that, if he or she were returned to the receiving country, that national would be exposed to the risk that his or her state of health deteriorates, where such a risk does not reach the severity threshold required under Article 4 of the Charter.

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85 Article 5 and Article 9(1)(a) of that directive.

86 Articles 1 and 4 as well as Article 19(2) of the Charter.

87 Article 7 of the Charter, which lays down the right to respect for private life, as well as Articles 1 and 4 of the Charter.

4. COMPETITION: AGREEMENTS, DECISIONS AND CONCERTED PRACTICES (ARTICLE 101 TFEU)

Judgment of the General Court (Seventh Chamber, Extended Composition), 23 November 2022, Westfälische Drahtindustrie and Others v Commission, T-275/20

Action for annulment and for damages – Competition – Agreements, decisions and concerted practices – European market for prestressing steel – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Suspension of the obligation to provide a bank guarantee – Payment by instalments on a provisional basis – Judgment annulling in part the decision and setting a fine in an amount identical to the amount of the fine originally imposed – Application of payments made on a provisional basis – Default interest – First paragraph of Article 266 TFEU – Unjust enrichment – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Recovery of undue payments – No legal basis – Unlawfulness

By decision of 30 June 2010, as amended by decision of 30 September 2010 (together, 'the contested decision'), the European Commission imposed a fine on Westfälische Drahtindustrie GmbH ('WDI'), Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG for having participated, with their competitors, in collusive arrangements seeking to restrict competition in the European prestressing steel market. [88]

In accordance with the contested decision, the fine had to be paid within three months of the date of notification of the decision. After the expiry of that period, interest was to be automatically payable at the interest rate applied by the European Central Bank to its main financing operations, plus 3.5 percentage points. The contested decision also provided that, in the event of an appeal being lodged by an undertaking which had been fined, that undertaking could cover the fine by the due date by either providing a bank guarantee or making a provisional payment of the fine.

After having brought an action for annulment of the contested decision, the applicants submitted an application for interim measures seeking, in essence, to suspend the enforcement of that decision until delivery of the judgment in the main proceedings.

By order of 13 April 2011, the President of the General Court upheld in part the application for interim measures by ordering the suspension of the obligation imposed on the applicants to provide the Commission with a bank guarantee in order to avoid immediate collection of the fine, subject to the condition that the applicants pay that institution, provisionally, first, the sum of EUR 2 000 000 and, second, monthly instalments of EUR 300 000 until delivery of judgment in the main proceedings. [89]

By judgment of 15 July 2015, [90] the Court set aside the contested decision in so far as it imposed a fine on the applicants on the ground that the Commission had erred when assessing their ability to pay. In the exercise of its unlimited jurisdiction, the Court however ordered the applicants to pay a fine of an identical amount, determined on the basis of data subsequent to the date of adoption of the contested decision.

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88 Decision C(2010) 4387 final of 30 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (COMP/38344 – Prestressing steel).

89 Order of 13 April 2011, *Westfälische Drahtindustrie and Others* v *Commission* (T-393/10 R, EU:T:2011:178).

90 Judgment of 15 July 2015, *Westfälische Drahtindustrie and Others* v *Commission* (T-393/10, EU:T:2015:515; 'the judgment of 15 July 2015'). The appeal brought against that judgment was dismissed by order of 7 July 2016, *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission* (C-523/15 P, EU:C:2016:541).

Immediately after the judgment of 15 July 2015 was delivered, differences arose between the Commission and the applicants' lawyers as regards the date from which interest on the fine ought to accrue. While the applicants' lawyers considered that the fine was payable only from the date of the judgment, the Commission took the view that interest was payable from the date laid down in the contested decision.

On 27 November 2015, the Commission sent WDI a plan for payment of the fine in instalments until 15 March 2030, on the basis of default interest payable from the date laid down in the contested decision. In accordance with that plan, the instalments of the fine were paid until 16 October 2019. On that date, WDI informed the Commission that it intended to pay the balance of the fine due, calculated by taking into account the interest accrued as from 15 October 2015, being three months after the delivery of the judgment of 15 July 2015.

By letter of 2 March 2020, the Commission gave WDI formal notice to pay it default interest from the date laid down in the contested decision, that is to say 4 January 2011.

The applicants have therefore brought a new action before the Court seeking, inter alia, that the letter of 2 March 2020 be set aside and, in the alternative, that the Commission be ordered to pay compensation for the damage resulting from the alleged unlawful act committed by the Commission in the course of enforcing the judgment of 15 July 2015.

Dismissing that action in its entirety, the Seventh Chamber, Extended Composition, of the Court recalls the criteria for determining the due date of a fine the amount of which was set by the EU Courts, following the exercise, in the particular circumstances of the case, of its unlimited jurisdiction.

Findings of the Court

In the interest of the proper administration of justice, the Court examines first the applicants' claim for compensation, based on a number of infringements of the first paragraph of Article 266 TFEU. All the alleged infringements were based on the premiss that the fine imposed by means of the contested decision had not been 'upheld' by the Court, but had been annulled and replaced by a 'judicial fine'.

After declaring the claim for compensation admissible, the Court recalls that, in accordance with the case-law, the fine set by the EU Courts in the exercise of their unlimited jurisdiction does not constitute a new fine which is legally distinct from that imposed by the Commission. Where it substitutes its own assessment for that of the Commission and reduces the amount of the fine in the exercise of its unlimited jurisdiction, it replaces, in the Commission's decision, the amount originally set in that decision with the amount resulting from its own assessment. On account of the substitution effect of a judgment by the EU Courts, that Commission decision is deemed to have always been the decision which results from the Commission's assessment. The mere fact that the Court ultimately considered it appropriate, in its judgment of 15 July 2015, to maintain an identical fine to that set in the contested decision does not preclude the application of those principles in the present case.

Nor is that assessment called into question by the applicants' arguments alleging, inter alia, that the Court had annulled the fine originally imposed before setting a new amount on the basis of factors subsequent to the contested decision and that, by his order of 13 April 2011, the President of the General Court had ordered the suspension of the obligation to provide a bank guarantee. In that regard, the Court recalls that the adoption of the interim order did not entail suspending the debt from being due, such debt continuing to accrue default interest during the judicial proceedings.

The Court also points out that, where the EU Courts maintain part of or the full amount of the fine in the exercise of its unlimited jurisdiction, the obligation to pay default interest from the outset does not constitute a penalty which is in addition to the fine originally imposed by the Commission. Both the fact that a fine is not legally different when revised by the EU Courts and the principle that actions do not have a suspensory effect preclude the Commission from releasing an undertaking, which has not paid that fine immediately and whose action has been upheld in part, from its obligation to pay, as from the date on which the fine imposed by the Commission is due, interest on the amount of the fine set by the EU Courts.

In the light of those considerations, the Court concludes that there was no sufficiently serious breach of the Commission's obligations under Article 266 TFEU and rejects the applicants' claim for compensation. In view of the fact that the other heads of claim put forward by the applicants were, in essence, also based on the premiss that the Commission infringed that provision, the Court dismisses the action in its entirety without examining the plea of inadmissibility raised by the Commission concerning the application to set aside the letter of 2 March 2020.

5. APPROXIMATION OF LAWS: PLANT PROTECTION PRODUCTS

Judgment of the General Court (Fifth Chamber), 13 July 2022, Delifruit, SA v European Commission, T-629/20

Link to the full text of the judgment

Plant protection products – Active substance chlorpyrifos – Determination of maximum residue levels for chlorpyrifos in or on bananas – Regulation (EC) No 396/2005 – Scientific and technical knowledge available – Other legitimate factors

Chlorpyrifos is an active substance found in plant protection products used as pesticides on certain crops. Its incorporation into plant protection products was first authorised in 2005. [91]

An application for renewal of the approval of chlorpyrifos was submitted in 2013. In July 2019, in the context of the renewal procedure, the European Food Safety Authority (EFSA) issued a statement on the results available from the assessment of risks to human health of that active substance. In that statement, it concluded that the approval conditions applicable to human health laid down in Regulation No 1107/2009 [92] were not met. Consequently, the European Commission did not renew the approval of chlorpyrifos, [93] with the result that the Member States were required to withdraw marketing authorisations for plant protection products containing that active substance.

In May 2020, after that non-renewal, EFSA published on its website a study carried out by the Josep Carreras Institute ('the Josep Carreras study'), which it had commissioned from that institute to investigate, in particular, the genotoxic potential effect of chlorpyrifos in human stem cells at different ontogeny stages and investigate its potential of inducing leukaemia.

Following the withdrawal of all existing authorisations for plant protection products containing chlorpyrifos, the Commission reduced the maximum residue level ('MRL') for chlorpyrifos in or on certain products to 0.01 mg/kg. [94]

Delifruit, an undertaking established in Guayaquil (Ecuador) which produces and exports bananas, in particular to the European Union, seeks, before the General Court, the partial annulment of that

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91 That substance was included in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1), by Commission Directive 2005/72/EC of 21 October 2005 amending Council Directive 91/414/EEC (OJ 2005 L 279, p. 63).

92 In particular, Article 4 of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

93 Commission Implementing Regulation (EU) 2020/18 of 10 January 2020 concerning the non-renewal of the approval of the active substance chlorpyrifos, in accordance with Regulation No 1107/2009, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2020 L 7, p. 14).

94 By Commission Regulation (EU) 2020/1085 of 23 July 2020 amending Annexes II and V to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for chlorpyrifos and chlorpyrifos-methyl in or on certain products (OJ 2020 L 239, p. 7, corrigendum OJ 2020 L 245, p. 31) ('the contested regulation').

regulation in so far as it reduces that maximum level for bananas. The action is dismissed by the General Court.

This case leads the General Court, for the first time, to interpret the provisions of Regulation No 396/2005, [95] in particular Article 14(2)(a) and Article 17, in the context of the removal of the MRL following the revocation of an existing authorisation applicable to a plant protection product.

Findings of the Court

The applicant claimed, in particular that, by failing to take into consideration the Josep Carreras study published before adopting the contested regulation and by failing to refer the matter to EFSA for the relevance of that study to be assessed, the Commission infringed Article 14(2)(a) of Regulation No 396/2005, according to which, for the purposes of adopting a regulation setting, modifying or removing MRLs, account must be taken of 'the scientific and technical knowledge available'.

According to the General Court, account must be taken of the specific rules applicable to the removal of MRLs following the non-renewal of the approval of an active substance. The establishment of an MRL for an active substance is inherently linked to the approval of that substance, on the basis of which marketing authorisations for plant protection products are granted.

Thus, where existing authorisations applicable to plant protection products are withdrawn following the non-renewal of the approval of an active substance, the objective of Article 17 of Regulation No 396/2005 is to enable the Commission to remove, as soon as possible, the MRLs for the active substance concerned, in particular with the aim of protecting human health and consumers from the intake of unauthorised pesticide residues. Since EFSA has already had the opportunity to take a position on the concerns for human health linked to exposure to an active substance in the procedure which culminated in the non-renewal of the approval of such a substance, it would be superfluous to refer the matter to it once again to deliver a new opinion on that substance in the context of the procedure for the removal of the MRLs, unless reliable and new scientific elements show a significant evolution of scientific knowledge since the position was taken by EFSA on that substance.

It follows, in the first place, that the Commission was entitled to adopt the contested regulation without taking into consideration the Josep Carreras study. First, EFSA's statement of 2019 on chlorpyrifos, issued in the context of the non-renewal of approval of that substance, constituted, at the time of the adoption of the contested regulation, both the most complete and the most recent assessment regarding all of the concerns relating to human health linked to exposure to that substance. Secondly, the applicant has not demonstrated that the Josep Carreras study, which is a scientific report external to EFSA and which does not bind it, was an element capable of establishing that the state of scientific knowledge had evolved significantly since the adoption of that statement.

In the second place, in the circumstances of this case, the Commission was not required to have referred the matter to EFSA to assess the relevance of a study published between the adoption of the regulation by which the approval of an active substance was not renewed and the adoption of the regulation removing the MRLs for that substance. Otherwise, Article 17 of Regulation No 396/2005 would be deprived of its effectiveness in so far as, in the event of the publication of any new study relating to a substance during that period, the Commission could not remove the MRLs for that active substance, whose approval had not been renewed, without first referring the matter to EFSA, even though that new study did not significantly alter the state of scientific and technical knowledge.

In this case, as from April 2020, products containing chlorpyrifos could no longer be marketed or used within the European Union. Since the use of that substance is still authorised in some third countries, until the MRLs for chlorpyrifos had been removed it remained possible lawfully to import into the

95 Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Directive 91/414 (OJ 2005 L 70, p. 1).

European Union foodstuffs in or on which residues of that substance were found at levels likely to present risks to human health and consumers. Accordingly, if the Commission had been required to refer the matter to EFSA so that it could rule on the relevance of the Josep Carreras study, it would have been necessary to interrupt the procedure for the adoption of the contested regulation, which would have significantly delayed its entry into force, thus extending the period during which foodstuffs in or on which chlorpyrifos residues could be found could be legally imported into the European Union.

In such circumstances, a referral to EFSA to assess the relevance of that study would have involved an extension of the procedure to remove the MRLs for chlorpyrifos, contrary to the objective pursued by Regulation No 396/2005.

6. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Fourth Chamber, Extended Composition), 30 November 2022, PKK v Council, Joined Cases T-316/14 RENV and T-148/19

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures against the PKK with a view to combating terrorism – Freezing of funds – Common Position 2001/931/CFSP – Applicability to situations of armed conflict – Terrorist group – Factual basis of the fund-freezing decisions – Decision taken by a competent authority – Authority of a third State – Review – Proportionality – Obligation to state reasons – Rights of the defence – Right to effective judicial protection – Modification of the application

Since 2002 the Kurdistan Workers' Party (PKK) has been listed as an organisation involved in acts of terrorism on the lists of persons or entities subject to fund-freezing measures annexed to Common Position 2001/931/CFSP and Regulation No 2580/2001. [96] In the measures that it had adopted in 2014 against that organisation, the Council relied on national decisions adopted by a UK authority and by US authorities respectively, in addition to relying, from 2015, on judicial decisions adopted by French courts.

By judgment of 22 April 2021, *Council* v *PKK* (Case C-46/19 P), [97] the Court of Justice had set aside the judgment of the General Court of 15 November 2018 in the Case *PKK* v *Council* (T-316/14), [98] which itself had annulled several measures adopted by the Council of the European Union between 2014 and 2017 [99] which had retained the PKK on the lists at issue. That case was referred back to the

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96 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). Those measures were subject to regular updates.

97 Judgment of 22 April 2021, *Council* v *PKK*, C-46/19 P, EU:C:2021:316.

98 Judgment of 15 November 2018, *PKK* v *Council*, T-316/14, EU:T:2018:788.

99 Council Implementing Regulation (EU) No 125/2014 of 10 February 2014 (OJ 2014 L 40, p. 9); Council Implementing Regulation (EU) No 790/2014 of 22 July 2014 (OJ 2014 L 217, p. 1); Council Decision (CFSP) 2015/521 of 26 March 2015 (OJ 2015 L 82, p. 107); Council Implementing Regulation (EU) 2015/513 of 26 March 2015 (OJ 2015 L 82, p. 1); Council Decision (CFSP) 2015/1334 of 31 July 2015 (OJ 2015 L 206, p. 61); Council Implementing Regulation (EU) 2015/1325 of 31 July 2015 (OJ 2015 L 206, p. 12); Council Implementing Regulation (EU) 2015/2425 of 21 December 2015 (OJ 2015 L 334, p. 1); Council Implementing Regulation (EU) 2016/1127 of 12 July 2016 (OJ 2016 L 188, p. 1); Council Implementing Regulation (EU) 2017/150 of 27 January 2017 (OJ 2017 L 23, p. 3); Council Decision (CFSP) 2017/1426 of 4 August 2017 (OJ 2017 L 204, p. 95); and Council Implementing Regulation (EU) 2017/1420 of 4 August 2017 (OJ 2017 L 204, p. 3).

General Court (T-316/14 RENV) and was joined to the Case *PKK* v *Council* (T-148/19), in which the PKK also sought annulment of the measures adopted against it by the Council between 2019 and 2020. [100]

By its judgment in both cases, the General Court annuls the regulations adopted by the Council in 2014 in so far as they retain the PKK on the lists at issue, on the ground that the Council failed to comply with its obligation to update the assessment of whether there was an ongoing risk that the PKK was involved in terrorism. As regards the acts adopted subsequently by the Council, the Court concludes, however, that the pleas raised by the applicant concerning the US and UK national decisions do not call into question the Council's assessment – which is based, inter alia, on subsequent incidents and facts – as to whether that risk was ongoing. The General Court also took the opportunity to clarify its case-law on the scope of Article 266 TFEU in relation to restrictive measures.

Findings of the Court

The Court notes, first of all, the principles governing the initial adoption of the restrictive measures and their review by the Council under Common Position 2001/931/CFSP. [101] In the absence of means on the part of the European Union to carry out its own investigations, the procedure that may lead to the adoption of an initial fund-freezing measure takes place on two levels: national level, through the adoption by a competent national authority of a decision in respect of the person concerned, and European level, through the Council's decision to include the person concerned on the list in question, on the basis of precise information or material in the file which shows that such a decision was taken at national level. Such a prior decision has the function of establishing the existence of serious and credible evidence or clues of the involvement of the person concerned in terrorist activities which are considered reliable by those national authorities. Consequently, it is not for the Council to verify whether the events relied on in the national condemnation decisions on which an initial listing was based actually took place and who is responsible for them and the burden of proof borne by it in that regard is therefore relatively limited in scope.

The Court goes on to note that a distinction must be drawn, for each of the contested measures, according to whether they are based on the decisions of competent national authorities justifying the applicant's initial listing or according to whether they are based on subsequent decisions of those national authorities or on material independently relied on by the Council. [102] As regards the material on which the Council may rely in order to demonstrate that there is an ongoing risk of involvement in terrorist activities at the stage of the periodic review of measures adopted previously, [103] it is for the Council, in the event of challenge, to establish that the findings of fact mentioned in the measures maintaining the entity concerned on the lists in question are well founded and for the Courts of the European Union to determine whether they are made out.

The Court notes, moreover, that the Council also remains subject to an obligation to state reasons as regards both the incidents found to have occurred in the national decisions taken into account at the stage when the measures at issue were initially adopted and the incidents found to have occurred in subsequent national decisions or any incidents taken into account by the Council independently.

As regards the order of the UK Home Secretary of 29 March 2001 proscribing the PKK, the Court notes that it has previously held, in its case-law, that that decision emanates from a 'competent authority' within the meaning of Common Position 2001/931/CFSP, which does not preclude the taking into

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100 Council Decision (CFSP) 2019/25 of 8 January 2019 (OJ 2019 L 6, p. 6); Council Decision (CFSP) 2019/1341 of 8 August 2019 (OJ 2019 L 209, p. 15); Council Implementing Regulation (EU) 2019/1337 of 8 August 2019 (OJ 2019 L 209, p. 1); Council Implementing Regulation (EU) 2020/19 of 13 January 2020 (OJ 2020 L 8I, p. 1); Council Decision (CFSP) 2020/1132 of 30 July 2020 (OJ 2020 L 247, p. 18); and Council Implementing Regulation (EU) 2020/1128 of 30 July 2020 (OJ 2020 L 247, p. 1).

101 See Article 1(4) and (6) of Common Position 2001/931/CFSP.

102 Those two types of basis are governed by different provisions of Common Position 2001/931/CFSP, the former falling within Article 1(4) of that position and the latter falling within Article 1(6) thereof.

103 See Article 1(6) of Common Position 2001/931/CFSP.

account of decisions of administrative authorities, where those authorities may be regarded as 'equivalent' to judicial authorities if their decisions are open to a judicial review that covers matters both of fact and of law. Appeals against orders of the UK Home Secretary may be brought before the Proscribed Organisations Appeal Commission and, where appropriate, before an appeal court.

In the present case, after stating that the common position does not require the decision of the competent authority in question necessarily to be taken in the context of criminal proceedings *stricto sensu*, the Court finds that the 2001 order was issued in the context of the fight against terrorism and forms part of national proceedings seeking the imposition on the PKK of measures of a preventive or punitive nature. The Court concludes that the contested measures meet the conditions laid down in that regard by the common position. [104]

However, the Court concludes that it was for the Council to verify the classification of the facts by the competent national authority and whether the acts taken into account by that authority correspond to the definition of terrorist acts established by the common position. It considers it sufficient in that regard that it stated, in the statements of reasons adopted by the Council in support of the contested measures, that it verified that the underlying grounds for the decisions taken by the national competent authorities are covered by the definition of terrorism set out in Common Position 2001/931/CFSP. The Court notes that that verification obligation relates solely to the incidents identified in the decisions of the national authorities on which the initial listing of the entity concerned was based. When it retains the name of an entity on the fund-freezing lists in the context of a periodic review, [105] the Council need only establish that there is an ongoing risk of that entity being involved in such acts.

In the context of that review, the Council is required to verify whether, since the initial inclusion of the name of the person or entity concerned, the factual situation has changed as regards the latter's involvement in terrorist activities and, in particular, whether the national decision has been repealed or withdrawn as a result of new facts or any modification of the competent national authority's assessment. In that regard, the mere fact that the national decision that served as the basis for the initial inclusion is still in force may, in view of the passage of time and in the light of changes in the circumstances of the case, no longer be sufficient to support the conclusion that the risk is ongoing. In such a situation, the Council is then required to base the retention of the restrictive measures on an up-to-date assessment of the situation, which demonstrates that that risk still exists. In that case, the Council may rely on recent material taken not only from national decisions adopted by competent authorities but also from other sources and, therefore, from its own assessments.

The Court observes that, in that situation, the Courts of the European Union are required to determine, as regards whether the obligation to state reasons has been fulfilled, whether the reasons relied on in the statement of reasons underpinning the retention on the fund-freezing lists are sufficiently detailed and specific and, as part of the review of substantive legality, whether those reasons are substantiated and have a sufficiently solid factual basis. Irrespective of whether that material is derived from a national decision adopted by a competent authority or from other sources, it is for the Council, in the event of challenge, to establish that the findings of fact are well founded and for the Courts of the European Union to determine whether the events concerned are made out.

Lastly, as regards Article 266 TFEU, which was relied on by the PKK solely in Case T-148/19, according to which an institution whose act has been declared void is to be required to take the necessary measures to comply with any judgment declaring that act void, [106] the Court notes that that obligation

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104 Article 1(4) of Common Position 2001/931.

105 Under Article 1(6) of Common Position 2001/931/CFSP.

106 Article 266 TFEU: 'The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union. This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.'

is incumbent on it as soon as the judgment at issue is delivered where it declares a decision void, unlike a judgment declaring a regulation void. [107] Accordingly, on the date of adoption of the 2019 decisions concerning the PKK, the Council was required either to withdraw the PKK from the list or to adopt a re-listing measure in accordance with the grounds of the judgment of 15 November 2018 (T-316/14). The Court points out that, without that obligation, the annulment ordered by the Courts of the European Union would be deprived of practical effect.

The Court observes, in that regard, that in the 2019 decisions the Council reproduced the same reasons as those on which it had relied in the 2015 to 2017 measures which had been declared unlawful in the judgment of 15 November 2018. Although the Council lodged an appeal against that judgment, which did not have suspensory effect, such a refusal by the Council to draw the appropriate conclusions from *res judicata* was liable to harm the confidence placed by individuals in compliance with judicial decisions. However, since the judgment of 15 November 2018 (T-316/14) was set aside by the judgment of the Court of Justice of 22 April 2021 (C-46/19 P), in particular in so far as it had itself annulled the 2015 to 2017 measures, and in view of the retroactive nature of that annulment by the Court of Justice, the General Court concludes that the Council's failure to meet its obligations cannot lead to the annulment of the 2019 decisions. Since the applicant was nevertheless entitled to believe that it was justified in bringing the action in Case T-148/19, the Court therefore takes that factor into account in the settlement of costs between the parties.

In the light of the foregoing, the Court concludes, with regard to the periodic review carried out by the Council, [108] that the latter had infringed its obligation to update the assessment of whether there was an ongoing risk that the PKK was involved in terrorism for the purposes of the 2014 measures. Consequently, the Court annuls Council Implementing Regulations No 125/2014 and No 790/2014 in Case T-316/14 RENV. However, as regards the subsequent 2015 to 2017 measures and the 2019 decisions, the Court concludes that the pleas raised by the applicant do not call into question the Council's assessment relating to whether there was an ongoing risk that the PKK was involved in terrorism, which remains validly based on the UK Home Secretary's order, which is still in force, and, as the case may be, on other subsequent incidents. Accordingly, the Court dismisses the action as to the remainder in Case T-316/14 RENV and dismisses the action in Case T-148/19.

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[107] Under the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, judgments declaring regulations void are to take effect only on expiry of the period for bringing an appeal or after the dismissal of the appeal.

[108] Under Article 1(6) of Common Position 2001/931/CFSP.

Nota:

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

- Judgment of 16 June 2022, Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists), C-577/20
- Judgment of 14 July 2022, Procureur général près la cour d'appel d'Angers, C-168/21
- Judgment of 22 December 2022, Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution), C-61/21
- Judgment of 22 December 2022, Louboutin (Use of an infringing sign on an online marketplace), C-148/21 and C-184/21
- Judgment of 4 May 2022, Larko v Commission, T-423/14 RENV
- Judgment of 27 July 2022, RT France v Council, T-125/22
- Judgment of 7 September 2022, BNetzA v ACER, T-631/19
- Judgment of 7 September 2022, JCDecaux Street Furniture Belgium v Commission, T-642/19
- Judgment of 7 September 2022, OQ v Commission, T-713/20
- Judgment of 20 September 2022, SpaceNet and Telekom Deutschland, C-793/19 and C-794/19
- Judgment of 16 November 2022, Netherlands v Commission, T-469/20
- Judgment of 30 November 2022, ADS L. Kowalik, B. Włodarczyk v EUIPO - ESSAtech (Accessory for a wireless remote control), T-611/21
- Judgment of 7 December 2022, CCPL and Others v Commission, T-130/21
- Judgment of 14 December 2022, Pierre Lannier v EUIPO – Pierre Lang Trading (PL), T-530/21
- Judgment of 21 December 2022, Landwärme v Commission, T-626/20
- Judgment of 21 December 2022, Grünig v Commission, T-746/20
- Judgment of 21 December 2022, EOC Belgium v Commission, T-747/20
- Judgment of 21 December 2022, E. Breuninger v Commission, T-260/21
- Judgment of 21 December 2022, Falke v Commission, T-306/21
- Judgment of 21 December 2022, EWC Academy v Commission, T-330/21
- Judgment of 21 December 2022, E. Breuninger v Commission, T-525/21
- Judgment of 21 December 2022, Ekobulkos v Commission, T-702/21