COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
April 2023

I. PROTECTION OF PERSONAL DATA

Judgment of the General Court (Eighth Chamber, Extended Composition), 26 April 2023, SRB v EDPS, T-557/20

Link to the full text of the judgment

Protection of personal data – Procedure for granting compensation to shareholders and creditors following the resolution of a bank – Decision of the EDPS in which it found that the SRB failed to fulfil its obligations concerning the processing of personal data – Article 15(1)(d) of Regulation (EU) 2018/1725 – Concept of personal data – Article 3(1) of Regulation 2018/1725 – Right of access to the file

In June 2017, the Single Resolution Board (SRB) adopted a resolution scheme in respect of Banco Popular Español SA, a bank, on the basis of Regulation No 806/2014. [1] In order to determine whether the shareholders and creditors affected by the resolution action would have received better treatment if that bank had entered into normal insolvency proceedings, that regulation requires the involvement of an independent third party who draws up a valuation of difference in treatment. [2] The SRB asked the firm Deloitte to carry out the valuation.

Once that valuation was drawn up, the SRB adopted a preliminary decision on whether compensation needed to be granted to the shareholders and creditors and launched a right to be heard process in order to allow it to adopt a final decision. [3] During that process, which was divided into two phases, the affected shareholders and creditors were first invited to express their interest in exercising their right to be heard, using an online registration form, and to provide supporting documentation proving their rights ('the registration phase'). Second, the affected shareholders and creditors whose status had been verified by the SRB were able to submit their written comments on the SRB's preliminary decision and the valuation ('the consultation phase'). On the first day of the registration phase, the SRB published, on the web page for registering for the right to be heard process, a privacy statement concerning the processing of personal data in the context of that process.

The data collected during the registration phase were accessible to a limited number of SRB staff tasked with processing those data in order to determine the participants' eligibility. Those data were not visible to the SRB staff tasked with processing the comments received in the consultation phase, during which those staff members only received comments identified by reference to an alphanumeric code allocated to each individual comment submitted using the form.

After aggregation, automatic filtering and categorisation of the comments, the SRB transmitted to Deloitte, for assessment, the comments on the valuation carried out. The comments transferred to Deloitte were solely those that were received during the consultation phase and that bore an alphanumeric code. On account of that code, only the SRB could link the comments to the data received in the registration phase. Deloitte had, and still has, no access to the database of data collected during the registration phase.

In that context, given that the privacy statement concerning the processing of personal data published by the SRB did not contain any mention of the transmission to third parties of the data

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1 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

2 Article 20(16) to (18) of Regulation No 806/2014.

3 Under of Article 76(1)(e) of Regulation No 806/2014.

collected via the form, the affected shareholders and creditors ('the complainants') submitted five complaints under Regulation 2018/1725 [4] to the European Data Protection Supervisor (EDPS). They alleged an infringement by the SRB of its information obligations relating to the processing of personal data under that regulation. [5]

The EDPS adopted an initial decision which, following a request for review by the SRB, was repealed and replaced by a revised decision in which the EDPS found that the SRB had infringed a provision of that regulation in that it had failed to inform the complainants, in its privacy statement, that their personal data might be disclosed to Deloitte. The SRB then brought an action before the General Court seeking, inter alia, annulment of that revised decision of the EDPS.

Ruling in extended composition, the Court upholds the SRB's action and annuls the EDPS's revised decision, clarifying the concept of personal data in the light of the judgments of the Court of Justice in Nowak [6] and Breyer. [7]

Findings of the General Court

In its judgment, the Court clarifies the concept of personal data, within the meaning of Article 3(1) of Regulation 2018/1725, defined as 'any information relating to an identified or identifiable natural person'. In order for information to constitute personal data, two cumulative conditions must be satisfied: first, the information must 'relate' to a natural person and, second, that natural person must be 'identified or identifiable'.

In the first place, the Court examines whether the EDPS was entitled to conclude that the information transmitted to Deloitte 'related' to a natural person within the meaning of that provision.

As a preliminary point, the Court notes that, in the revised decision, the EDPS classified as 'personal data' all the comments made by the affected shareholders and creditors in the context of the consultation phase and did not limit his assessment solely to the information transmitted to Deloitte. In so far as the infringement by the SRB of its obligations concerning the processing of personal data under Regulation 2018/1725 found in the revised decision concerned only the fact that the SRB did not mention, in the privacy statement, that Deloitte was a potential recipient of certain data, the Court finds that it is appropriate to limit its examination to whether the information transmitted to Deloitte was personal data within the meaning of Article 3(1) of Regulation 2018/1725.

In that context, the Court recalls the aim of the legislature to assign a wide scope to the concept of personal data, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it 'relates' to the data subject.

In that regard, the Court also finds that, in its judgment in Nowak, cited above, the Court of Justice has previously had occasion to rule that that condition is satisfied where the information, by reason of its content, purpose or effect, is linked to a particular person. However, in the revised decision, the EDPS did not examine the content, the purpose or the effect of the information transmitted to Deloitte. It merely stated that the comments produced by the complainants during the consultation phase reflected their opinions or views and concluded, on that basis alone, that they constituted information relating to the complainants, which was sufficient to classify them as personal data. Admittedly, it

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4 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

5 Under Article 15(1)(d) of Regulation 2018/1725, according to which, 'where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with … information [concerning] the recipients or categories of recipients of the personal data, if any'.

6 Judgment of 20 December 2017, Commission v Bulgaria (C-488/16, EU:C:2017:994).

7 Judgment of 19 October 2016, Commission v Bulgaria (C-488/14, EU:C:2016:779).

cannot be ruled out that personal views or opinions may constitute personal data. However, it is apparent from the judgment in Nowak [8] that such a conclusion cannot be based on a presumption such as the one applied by the EDPS, but must be based on the examination of whether, by its content, purpose or effect, a view is linked to a particular person. It follows that, since the EDPS did not carry out such an examination, he could not conclude that the information transmitted to Deloitte constituted information 'relating' to a natural person within the meaning of Article 3(1) of Regulation 2018/1725.

In the second place, the Court examines the EDPS's assessment of whether the information transmitted to Deloitte related to an 'identified or identifiable' natural person within the meaning of that provision.

In that regard, the Court finds that it is not disputed, first, that the alphanumeric code appearing on the information transmitted to Deloitte did not in itself allow the authors of the comments to be identified and, second, that Deloitte did not have access to the identification data received during the registration phase that would have allowed the participants to be linked to their comments by virtue of that code. The EDPS stated that the additional information necessary to identify the authors of the comments consisted of the alphanumeric code and the identification database. It is true that, having regard to the judgment in Breyer cited above, [9] the fact that the additional information necessary to identify the authors of the comments received during the consultation phase was held not by Deloitte, but by the SRB, does not appear such as to exclude a priori that the information transmitted to Deloitte constituted, for Deloitte, personal data. However, it is also apparent from that judgment that, in order to determine whether the information transmitted to Deloitte constituted personal data, it is necessary to put oneself in Deloitte's position in order to determine whether the information transmitted to it relates to 'identifiable persons'.

Therefore, pursuant to the judgment in Breyer cited above, [10] it was for the EDPS to examine whether the comments transmitted to Deloitte constituted personal data for Deloitte. Thus, according to the Court, the EDPS is incorrect to maintain that it was not necessary to ascertain whether the authors of the information transmitted to Deloitte were re-identifiable by Deloitte or whether such re-identification was reasonably possible. The Court states that, in the revised decision, the EDPS concluded that the fact that the SRB held additional information enabling the authors of the comments to be re-identified was sufficient to conclude that the information transmitted to Deloitte was personal data, while acknowledging that the identification data received during the registration phase had not been communicated to Deloitte. Accordingly, it is apparent from the revised decision that the EDPS merely examined whether it was possible to re-identify the authors of the comments from the SRB's perspective and not from Deloitte's. It is apparent from the judgment in Breyer cited above [11] that it was for the EDPS to determine whether the possibility of combining the information that had been transmitted to Deloitte with the additional information held by the SRB constituted a means likely reasonably to be used by Deloitte to identify the authors of the comments.

Therefore, since the EDPS did not investigate whether Deloitte had legal means available to it which could in practice enable it to access the additional information necessary to re-identify the authors of the comments, the EDPS could not conclude that the information transmitted to Deloitte constituted information relating to an 'identifiable natural person' within the meaning of Article 3(1) of Regulation 2018/1725. Consequently, the Court annuls the revised decision of the EDPS.

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8 Paragraphs 34 and 35 of the judgment.

9 Paragraph 43 of the judgment.

10 Paragraph 44 of the judgment.

11 Paragraph 45 of the judgment.

II. BORDER CONTROLS, ASYLUM AND IMMIGRATION: IMMIGRATION POLICY

Judgment of the Court of Justice (Third Chamber), 18 April 2023, Afrin, C-1/23 PPU

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Border controls, asylum and immigration – Immigration policy – Directive 2003/86/EC – Right to family reunification – Article 5(1) – Submission of an application for entry and residence for the purposes of exercising the right to family reunification – Legislation of a Member State requiring the sponsor's family members to submit the application in person to the competent diplomatic post of that Member State – Impossibility or excessive difficulty to reach that post – Charter of Fundamental Rights of the European Union – Articles 7 and 24

Ms X and Mr Y, Syrian nationals, were married in 2016 in Syria. They had two children, born in 2016 and 2018 respectively. In 2019, Mr Y left Syria to travel to Belgium while Ms X and their two children remained in the town of Afrin, located in north-west Syria, where they are still currently located. In August 2022, Mr Y was recognised as a refugee in Belgium.

By email of 28 September 2022, sent to the Office des étrangers (Immigration Office, Belgium) ('the Office'), the lawyer for the applicants submitted an application for family reunification on behalf of Ms X and the two children, so that they could join Mr Y in Belgium. That email stated that the application had been submitted by the applicants' lawyer to the Office, as Ms X and her children were in exceptional circumstances which prevented them in practice from travelling to a Belgian diplomatic post in order there to submit their application for family reunification, as required by Belgian law.

On 29 September 2022, the Office replied that, according to Belgian law, it was not possible to submit such an application via email and invited the applicants to contact the competent Belgian embassy. By interlocutory application of 9 November 2022, the applicants brought an action against the État belge (Belgian State) before the referring court to have their application for family reunification registered. They argue that Belgian law, which allows a refugee's family members to apply for entry and residence only in person and at a diplomatic post, even where those persons are unable to travel there, is not consistent with EU law.

The referring court confirms that, under Belgian law, no derogation from the requirement to appear in person at the beginning of the procedure is provided for in a situation such as that in the present case. However, that court observes that Ms X and her children have no real possibility of leaving Afrin to travel to a competent Belgian diplomatic post, since the bordering countries where those posts are located are unsafe for persons fleeing Syria or appear to be inaccessible, due to the need to cross a front line. Although Article 5(1) of Directive 2003/86 [12] leaves it to the Member States to determine who – the sponsor or his or her family members – may submit an application for family reunification, in the present case, the choice made by the Belgian legislature is tantamount to denying Ms X and her children any possibility of submitting such an application. The referring court therefore seeks to determine whether that refusal undermines the effectiveness of that directive or whether it infringes the fundamental rights [13] which it seeks to protect.

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12 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

13 This includes the right to respect for private and family life, guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), the right to have regard to the best interests of the child and the right of the child to maintain on a regular basis a personal relationship with both parents, enshrined in Article 24 of the Charter.

In the context of the urgent preliminary ruling procedure, the Court of Justice states that Directive 2003/86, [14] read in conjunction with the Charter, [15] precludes national legislation which requires, for the purposes of submitting an application for entry and residence with a view to family reunification, that the sponsor's family members, in particular those of a recognised refugee, appear in person at the diplomatic or consular post of a Member State competent in respect of the place of their temporary or permanent residence abroad, including in a situation where it is impossible or excessively difficult for them to travel to that post. However, that Member State retains the possibility of requiring those family members to appear in person at a later stage of the application procedure for family reunification.

Findings of the Court

To reach that conclusion, first, the Court notes that, in order to achieve the objective of Directive 2003/86 of promoting family reunification, the Member States must show, in situations such as that at issue in the main proceedings, the necessary flexibility to enable the persons concerned to submit their application for family reunification in good time, by facilitating the submission of that application and by permitting, in particular, the use of remote means of communication. In the absence of such flexibility, the requirement to appear in person at a competent diplomatic or consular post when the application is submitted does not make it possible to take account of any obstacles that might prevent the submission of that application, in particular where the sponsor's family members are in a country where there is armed conflict. Furthermore, as regards the particular situation of refugees, the absence of any flexibility on the part of the Member State concerned, preventing their family members from submitting their application for family reunification, irrespective of the circumstances, may have the consequence that the persons concerned will not be able to comply with the time limit laid down in the third subparagraph of Article 12(1) of Directive 2003/86, [16] which means that the family reunification of those persons could be subject to additional conditions, contrary to the aim of paying particular attention to the situation of refugees. Consequently, the requirement to appear in person when an application for reunification is submitted, without allowing for derogations in order to take account of the specific situation of the sponsor's family members, results in the exercise of the right to family reunification becoming impossible in practice, so that such legislation, applied without the necessary flexibility, undermines the objective pursued by Directive 2003/86 and deprives it of its effectiveness.

Second, the Court states that a national provision which requires, without exception, the sponsor's family members to appear in person in order to submit an application for family reunification, even where that is impossible or excessively difficult, infringes the right to respect for family unity laid down in Article 7 of the Charter, read, where appropriate, in conjunction with Article 24(2) and (3) thereof. Such an obligation constitutes a disproportionate interference with the right to respect for family unity in relation to the aim, which is nevertheless legitimate, of combating fraud relating to family reunification. Since the application procedure for family reunification takes place in stages, the

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14 In relation to Article 5(1) of Directive 2003/86.

15 The Court refers to Article 7 and Article 24(2) and (3) of the Charter.

16 According to that provision, 'Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status'. Article 7(1) of Directive 2003/86 provides for its part: 'When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

Member States may request the sponsor's family members to appear in person at a later stage of that procedure, without it being necessary to impose, for the purposes of processing the application for family reunification, the requirement for them to be there in person at the time when the application is submitted. However, in order not to undermine the aim pursued by Directive 2003/86 of promoting family reunification and the fundamental rights which that directive seeks to protect, where the Member State requires the sponsor's family members to appear in person at that later stage, that Member State must facilitate such an appearance, in particular by issuing consular documents or laissez-passers, and reduce the number of appearances to the strict minimum.

III. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN ARREST WARRANT

Judgment of the Court of Justice (Grand Chamber), 18 April 2023, E. D. L. (Ground for refusal based on illness), C-699/21

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Article 23(4) – Surrender procedures between Member States – Grounds for non-execution – Article 4(3) TEU – Duty of sincere cooperation – Postponement of the execution of the European arrest warrant – Article 4 of the Charter of Fundamental Rights of the European Union – Prohibition of inhuman or degrading treatment – Serious, chronic and potentially irreversible illness – Risk of serious harm to health affecting the person concerned by the European arrest warrant

In 2019, a Croatian court issued a European arrest warrant for E.D.L., who resides in Italy, for the purposes of conducting a criminal prosecution. In the context of the execution of that arrest warrant, the Corte d'appello di Milano (Court of Appeal, Milan, Italy) required E.D.L. to be assessed by a psychiatrist; the psychiatrist's report revealed that he was suffering from a psychotic disorder requiring treatment that made him unsuitable for prison life. On the basis, Court of Appeal, Milan, held that the execution of the European arrest warrant would interrupt E.D.L.'s treatment and lead to a deterioration in his general state of health, or even to an increased risk of suicide. However, the provisions of Italian law [17] transposing Framework Decision 2002/584 [18] on the European arrest warrant make no provision to the effect that the surrender of a requested person can be refused for such health reasons.

The Court of Appeal, Milan, had doubts as to the constitutionality of those national provisions and therefore referred them to the Corte costituzionale (Constitutional Court, Italy). Additionally, according to the latter court, the situation of a serious threat to the health of the person concerned

17 Legge n. 69 – Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (Law No 69, Provisions to bring national law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States), of 22 April 2005 (GURI No 98 of 29 April 2005, p. 6), as amended and in the version applicable to the facts in the main proceedings.

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

due to chronic illnesses of a potentially indefinite duration, such as those from which E.D.L. is suffering, is not one of the grounds for refusing to execute a European arrest warrant provided for in Framework Decision 2002/584. It therefore decided to make a reference to the Court of Justice on how to interpret that framework decision in such a situation.

In its judgment, the Court of Justice, sitting in its Grand Chamber formation, gives a ruling on the conditions in which the executing judicial authority has the power or the obligation, under Framework Decision 2002/584, to postpone the surrender of a requested person and to refuse to execute a European arrest warrant where there is a risk of serious harm to the health of that person and on the obligation, in such circumstances, to enter into dialogue with the issuing judicial authority.

Findings of the Court

In the first place, the Court holds that Framework Decision 2002/584 does not provide that the executing judicial authorities may refuse to execute a European arrest warrant solely on the ground that the person who is the subject of such an arrest warrant suffers from serious, chronic and potentially irreversible illnesses. Having regard to the principle of mutual trust which underlies the area of freedom, security and justice, [19] there is a presumption that the care and treatment provided in the Member States for the management of, inter alia, such illnesses will be adequate, including in a prison setting.

Nevertheless, having regard to Article 23(4) of Framework Decision 2002/584, [20] the executing judicial authority may postpone the surrender of the requested person temporarily provided that there are serious reasons for believing, on the basis of objective material, such as medical certificates or expert reports, that the execution of the arrest warrant manifestly risks endangering the health of that person, for example because of a temporary illness or condition of that person existing before the date on which he or she is to be surrendered.

In the second place, the Court holds that it cannot be ruled out that the surrender of a person who is seriously ill may cause that person to be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, either as a result of or, in certain circumstances, regardless of the level of quality of the care available in the issuing Member State, in cases where that treatment reaches a minimum level of severity exceeding the unavoidable level of suffering inherent in detention.

Where the executing judicial authority has, in the light of the objective material before it, substantial and established grounds for believing that the surrender of the requested person, who is seriously ill, would expose him or her to a real risk of a significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health, that authority must postpone the surrender temporarily. In addition, it must ask the issuing judicial authority to provide it with all the information necessary to ensure that the manner in which the criminal proceedings on which the European arrest warrant is based will be conducted or the conditions of any detention of that person make it possible to rule out the risk at issue. If such safeguards are provided by the issuing judicial authority, the European arrest warrant must be executed and a new surrender date must be agreed.

In the third place, the Court holds that it would, however, be contrary to the general scheme of Article 23(4) of Framework Decision 2002/584, which refers to the 'temporary' nature of the postponement of the surrender, for an executing judicial authority to be able to defer the surrender of a requested person for a considerable or even indefinite period of time in order to avoid a risk of serious harm to health materialising.

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19 That field of EU law is governed by Article 67 et seq. of the TFEU and covers, inter alia, judicial cooperation in criminal matters.

20 According to that provision 'the surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health'.

Consequently, in exceptional circumstances, in the light of the information provided by the issuing judicial authority, and of any other information available to the executing judicial authority, the latter authority may come to the conclusion, first, that there are substantial and established grounds for believing that, if he or she is surrendered to the issuing Member State, the requested person will be subject to a risk of serious harm to his or her health and, second, that that risk cannot be ruled out within a reasonable period of time. In such circumstances, the executing judicial authority must, in accordance with Article 1(3) of Framework Decision 2002/584, [21] read in the light of Article 4 of the Charter, refuse to execute the European arrest warrant.

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

Judgment of the Court of Justice (First Chamber), 20 April 2023, Repsol Comercial de Productos Petrolíferos, C-25/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Vertical restrictions of competition – Article 101(1) and (2) TFEU – Principle of effectiveness – Regulation (EC) No 1/2003 – Article 2 – Directive 2014/104/EU – Article 9(1) – Binding effect of the final decisions of the national competition authorities finding an infringement of the competition law rules – Temporal and material application – Actions for damages and for a declaration of nullity for infringements of the EU competition law provisions

By decisions of 11 July 2001 and 30 July 2009, the Spanish competition authorities found, in essence, that, by having fixed, in the context of its contractual relations with certain Spanish service stations, fuel retail prices, Repsol had infringed the competition law rules. [22] As the actions seeking to challenge those decisions were unsuccessful, the decisions became final.

Following the said decisions, the owners of a service station brought before the Juzgado de lo Mercantil No 2 de Madrid (Commercial Court No 2, Madrid, Spain; 'the national court'), first, an action for a declaration of nullity of the exclusive supply contracts concluded with Repsol during the period from 1987 to 2009 in connection with the operation of that service station and, second, an action for damages seeking compensation for the harm allegedly caused by those contracts. To that end, they rely on those decisions to demonstrate the existence of the infringement concerned.

In those circumstances, the national court notes from the outset that, under Article 2 of Regulation No 1/2003, [23] the burden of proof of an infringement of Article 101 TFEU is to rest on the party alleging the infringement. It adds that, in principle, in accordance with Article 9(1) of Directive

21 According to that provision, Framework Decision 2002/584 is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

22 The decisions at issue will hereinafter be referred to together as 'the decisions of the Spanish competition authorities'.

23 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

2014/104, [24] in an action for damages brought following a decision of a national competition authority which has become final, the applicant concerned may be able to discharge its burden of proof concerning the existence of an infringement by demonstrating that that decision relates specifically to the contractual relationship at issue. In that context, the national court raises the question of the binding effect of the decisions of the Spanish competition authorities as regards the existence, in the present case, of an infringement of the competition law rules. In addition, that court asks what consequences flow from the possible nullity of the exclusive supply contracts concluded between the service station owners and Repsol.

By its judgment, the Court answers the said questions and rules on the temporal and material applicability of Directive 2014/104.

Findings of the Court

In the first place, to the extent that the national court refers to Article 9(1) of Directive 2014/104, the Court states that that provision could be relevant to the outcome of the dispute in the main proceedings only if that dispute fell within its material and temporal scope.

In that regard, the Court notes at the outset that the material scope of Directive 2014/104 is limited solely to actions for damages brought for infringements of the competition rules and, therefore, does not extend to other types of action concerning infringements of the competition law provisions, such as actions for a declaration of nullity brought under Article 101(2) TFEU.

So far as concerns the temporal applicability of Article 9(1) of Directive 2014/104 to the action for damages brought by the owners of the service station at issue in the main proceedings, the Court notes that that provision establishes an irrefutable presumption as to the existence of an infringement of competition law and thus pertains to the existence of one of the constituent elements of civil liability for infringements of the competition law rules. In those circumstances, such a rule must be classified as a substantive rule within the meaning of Article 22 of that directive, which governs its temporal application. [25]

Taking into account the substantive nature of Article 9 of that directive and of the operational arrangements of that provision, the Court emphasises that the point in time at which it is necessary to determine whether the irrefutable presumption referred to in that provision is applicable *ratione temporis* is that corresponding to the date on which the decision of the national competition authority concerned became final. In the present case, however, Directive 2014/104 was not transposed into Spanish law within the time limit for its transposition. Thus, the decisions of the Spanish competition authorities having become final before the date of expiry of that time limit, the situations at issue in the main proceedings are therefore established. It follows that, in the case at hand, Article 9(1) of that directive is not applicable *ratione temporis*. In those circumstances, the Court considers that, in the present case, it is necessary to examine the national legislation in the light of Article 101 TFEU, as implemented by Article 2 of Regulation No 1/2003.

In the second place, the Court examines, as to the substance, the question of the binding effect of the final decisions of national competition authorities finding an infringement of the competition law rules in the context of an action for a declaration of nullity and an action for damages.

In that regard, it recalls that, although Article 2 of Regulation No 1/2003 expressly governs the burden of proof for an infringement of Article 101 TFEU, whether it be national proceedings or EU proceedings, the fact remains that that regulation does not contain any provisions relating to the effects of the final decisions of a national competition authority in the context of actions for a

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

25 Article 22(1) of Directive 2014/104 rules out any retroactive application of the provisions of that directive that are substantive in nature.

declaration of nullity under Article 101(2) TFEU and/or actions for damages for infringement of competition law.

Thus, in the absence of EU rules governing the matter that are applicable *ratione materiae* or *ratione temporis*, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to seek a declaration of nullity of agreements or decisions under Article 102 TFEU and of the right to compensation for the harm resulting from an infringement of Article 101 TFEU, including those on the binding effects of final decisions of national competition authorities in the context of such types of action, provided that the principles of equivalence and effectiveness are observed.

The enforcement of claims for damages due to breaches of Article 101 TFEU would be rendered excessively difficult if the final decisions of a competition authority were to be accorded no effect whatsoever in civil actions for damages or in actions seeking to establish the invalidity of agreements or decisions prohibited under that article, brought following such final decisions and before a court of the same Member State as that in which that authority exercises its jurisdiction.

Thus, the Court considers that, in order to guarantee the effective application of Articles 101 and 102 TFEU in the context of those actions, the existence of an infringement of EU competition law found in such decisions must be deemed to be established by the applicant until proof to the contrary is adduced, thereby shifting the burden of proof defined by Article 2 of Regulation No 1/2003 to the defendant, provided that the nature and the material, personal, temporal and territorial scope of the alleged infringements that are the subject matter of the actions brought by the applicant correspond to those of the infringement found in those decisions. However, where the correspondence thus required is only partial, the findings in such a decision constitute an indication of the existence of the facts to which those findings relate.

In the third and last place, the Court considers that, provided that an applicant succeeds in establishing the existence of an infringement of Article 101 TFEU which is the subject of its action for a declaration of nullity brought under Article 101(2) TFEU and of its action for damages in respect of that infringement, it is for the national court to draw all the consequences from it and infer, inter alia, the automatic nullity of all those contractual provisions which are incompatible with Article 101(1) TFEU.

V. JUDGMENTS PREVIOUSLY DELIVERED

1. APPROXIMATION OF LAWS

1.1. COMMUNITY DESIGNS

Judgment of the General Court (Third Chamber, Extended Composition), 22 March 2023, B&Bartoni v EUIPO – Hypertherm (Electrode to insert into a torch), T-617/21

Link to the full text of the judgment

Community design – Invalidity proceedings – Registered Community design representing an electrode to insert into a torch – Ground for invalidity – Article 4(2) of Regulation (EC) No 6/2002 – Component part of a complex product

Hypertherm, Inc. is the holder of a Community design representing an electrode to insert into a torch forming part of a plasma cutting system. The company B&Bartoni spol. s r.o filed an application for a declaration of invalidity against that Community design with the European Union Intellectual Property Office (EUIPO) on the ground that it did not meet the requirements for protection of Community

designs, since the electrode was not visible during normal use of the torch. [26] That application was first of all upheld by the Invalidity Division but was subsequently dismissed by the Board of Appeal, which took the view that the product represented in the contested Community design, namely the electrode at issue, could not be regarded as a component part of a complex product.

Sitting as a chamber in extended composition, the General Court interprets the concept of 'component part of a complex product' as set out in Article 4(2) of Regulation No 6/2002. This is the first time that the Court rules on the question whether a consumable, such as the electrode in the present case, can constitute a component part of a complex product.

Findings of the Court

At the outset, the Court states that the question whether a product comes within the concept of 'component part of a complex product' must be assessed on a case-by-case basis, according to a set of relevant factors. Therefore, in order to assess whether the electrode at issue constitutes a component part of a complex product, the Court examines the relevance of four factors taken into account by the Board of Appeal in the contested decision.

In the first place, the Court takes the view that the consumable nature of the electrode is a relevant factor in assessing whether the electrode constitutes a component part of a complex product. More specifically, since the concept of 'component part of a complex product' has not been defined in Regulation No 6/2002, the standard characteristics of a consumable, such as the absence of a firm and durable connection with the complex product and the regular purchase and replacement of the electrode on account of its short lifespan are relevant factors for identifying what constitutes a component part of a complex product. In that regard, the Court observes that the component parts of a complex product are components intended to be assembled into a complex industrial or handicraft item, which can be replaced permitting disassembly and re-assembly of such an item. The electrode at issue, as a consumable item for a torch, is intended to be easily attached to the torch, consumed and used quickly, and easily replaced by the end user without that operation requiring disassembly and re-assembly of that torch. In addition, the end user, who regularly purchases and replaces electrodes, is able to perceive and assess its characteristics, irrespective of its visibility once inserted into the torch.

In the second place, the Court takes the view that the question whether the replacement of a product requires disassembly and re-assembly of a complex product is also a relevant factor to be taken into consideration in determining whether such a product constitutes a component part of that complex product. The Board of Appeal's taking into account of 'disassembly' and 're-assembly' is based on Regulation No 6/2002 [27] and on the case-law of the Court of Justice. [28] Thus, a product which, when being replaced, does not require the disassembly and reassembly of the product in which it is incorporated and which is specifically intended to be replaced regularly and in a straightforward manner by end users is less likely to constitute a component part of a complex product than a product which is normally replaced by professionals with specific expertise to carry out that replacement. In the present case, the replacement of the electrode remains a simple operation for the end user which cannot be regarded as 'disassembly' and 're-assembly' of the torch within the meaning of Regulation No 6/2002.

In the third place, the Court finds, first, that the completeness of the complex product, without the electrode at issue, is a relevant factor for the purpose of assessing the concept of 'component part of

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26 Under Article 4 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), a design applied to or incorporated in a product which constitutes a component part of a complex product is only to be considered to be new and to have individual character if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter.

27 In particular, Article 3(8) of Regulation No 6/2002.

28 Judgment of 20 December 2017, Tibor-Trans (C-451/16, EU:C:2017:992, paragraph 65).

a complex product'. In that regard, the Court makes clear that, when purchasing a torch without an electrode or when the electrode is removed from the torch, the end user will not perceive that torch as being broken or incomplete. By contrast, without its component parts, a complex product will not, in principle, be perceived by the end user as a complete product capable of being subject to normal use or as a product in good condition. Furthermore, although the torch and the plasma cutting system cannot fulfil their function, namely to cut or gouge metal, without an electrode fitted in the torch, this does not mean that the electrode must be regarded as a component part of a complex product. Indeed, to claim that, in the case where a product cannot fulfil the function for which it is intended without another product, that other product must be regarded in all cases as a component part of the first product would mean that a large number of separate products, in particular of a consumable nature, without which complex products cannot fulfil the function for which they are intended, would wrongly be regarded as component parts of those complex products.

Secondly, the fact that the torch can be offered on the market without the electrode and that the electrode is commonly advertised and sold separately is also a relevant factor in order to determine whether the electrode at issue constitutes a component part of a complex product. It is true that each producer remains free to market the complex product with its component parts or to sell them separately and such a commercial decision is not a decisive factor in assessing whether a product constitutes a component part of a complex product. However, it is unusual for the purchase of a complex product not to include its actual component parts. In the present case, the complex product at issue, namely the torch, is sold either with or without the electrodes at issue.

In the fourth and last place, the Court takes the view that the interchangeability of the electrode is a factor to be taken into account in that analysis. A product which cannot be replaced by another non-identical product or be used in different complex products is, in principle, more likely to be linked in a durable and tailored manner to that complex product, and thus to constitute a component part of that complex product. Consequently, the fact that the electrode at issue can be replaced by a different electrode and that torches of different types can use the electrode at issue is a factor to be taken into account in determining that that electrode does not constitute a component of a complex product.

In the light of the foregoing, the Court holds that the factors relied on by the Board of Appeal are relevant and concludes that it did not err in finding that the electrode at issue constitutes a separate product and not a component part of a complex product.

1.2. CHEMICALS

Judgment of the General Court (Fourth Chamber), 29 March 2023, Nouryon Industrial Chemicals and Others v Commission, T-868/19

Link to the judgment as published in extract form

REACH – Evaluation of registration dossiers and compliance check of information provided by registrants – Request for further studies for the purposes of the registration dossier for dimethyl ether – Pre-natal developmental toxicity study – Extended one-generation reproductive toxicity study – Preliminary dose-range finding study – Article 51(7) of Regulation (EC) No 1907/2006 – Animal testing – Article 25 of Regulation No 1907/2006 – Manifest error of assessment – Proportionality

The applicants are manufacturers or importers of dimethyl ether established in the European Union or exclusive representatives acting on behalf of manufacturers of that chemical substance established

outside the European Union. In accordance with the principle of 'no data, no market', [29] they filed with the European Chemicals Agency (ECHA) an application for registration of dimethyl ether for manufactured or imported quantities of 1 000 tonnes or more per year per manufacturer or per importer.

In the context of a procedure for a compliance check of the registration, [30] as the ECHA Member State Committee had not reached a unanimous agreement on a draft ECHA decision, ECHA sent the dossier to the European Commission for it to adopt a final decision. [31] In that decision ('the contested decision'), the Commission concluded that the registration of dimethyl ether did not comply with the information requirements as regards two different effects relating to reproductive toxicity, namely the effects on pre-natal development and the effects on one-generation reproduction. Consequently, in the contested decision, the Commission required the registrants to provide information in that regard after the carrying out of additional testing on rabbits and rats.

Hearing an action for annulment, which it dismisses, the General Court provides important clarifications, in the light of the provisions of the REACH Regulation and its annexes, as regards, in particular, the Commission's power in respect of a compliance check of a registration dossier, laboratory testing on animals which it is compulsory to carry out or which may be required, and the conditions for carrying out such testing, the conditions for adaptation of the requirements set out in a decision adopted following such a compliance check and the role of the court before which an action is brought against that decision.

Findings of the Court

In the first place, the Court rejects the plea alleging that the Commission infringed the REACH Regulation by adopting the contested decision which, in part, covers aspects on which the Member State Committee reached a unanimous agreement.

In that regard, first, the Court finds that, contrary to what is claimed by the applicants, it is not apparent from Article 51(7) of the REACH Regulation that if a disagreement within the Member State Committee concerns only part of ECHA's draft decision, ECHA must divide the final decision into one part, the subject matter of the agreement, which would be adopted by it on the basis of paragraph 6 of that article, and into another part, the subject matter of the disagreement, which would be adopted by the Commission in accordance with paragraph 7 of that article. The Court concludes, following a literal, contextual and teleological approach, that paragraph 7 of that article, which is the legal basis for the contested decision, can be understood only as meaning that any disagreement within the Member State Committee on an aspect of a draft ECHA decision examined in the context of a compliance check of registrations constitutes a disagreement on that draft considered as a whole, which confers on the Commission the power to prepare a new draft decision evaluating a registration dossier and then to adopt a final decision in that regard.

Secondly, the Court states that that conclusion is not called into question by the argument that the applicants would have benefited from more guarantees if the final decision, as regards the aspects on which the Member State Committee had reached a unanimous agreement, had been adopted by ECHA, since the review carried out by the Board of Appeal of ECHA is not limited, as in the case of the General Court, to verifying whether there are manifest errors. That difference is a result of the

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29 Principle set out in Article 5 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1; 'the REACH regulation').

30 On the basis of Article 41 of the REACH Regulation.

31 Article 51(7) of the REACH Regulation.

legislature's choice to establish, in certain cases, a review of an administrative nature and, in other cases, a review of a judicial nature.

In the second place, the Court rejects the plea alleging that the Commission infringed the REACH Regulation [32] and made a manifest error of assessment by requesting tests that run counter to the applicable legal requirements and are not technically feasible without presenting hazards. The Court finds that the arguments set out in support of that plea have no factual basis and that the applicants have not demonstrated in any way that, in the contested decision, the Commission required, contrary to the legally applicable provisions, that dangerous concentrations be reached for acute inhalation toxicity tests. The Court also finds that it is apparent from the case file that some laboratories consider that they are capable of carrying out the tests in question.

In the third place, the Court rejects the plea alleging that the Commission made a manifest error of assessment by requiring tests that do not produce any relevant information on dimethyl ether.

After noting the layout and role of the annexes to the REACH Regulation, the Court states, inter alia, that the information which must, in principle, be provided, concerns chemical substances and is intended, as set out in Article 1 of the REACH Regulation, to ensure that the hazards associated with those substances, when manufactured, placed on the market and used, are known and that those substances, when used, do not adversely affect human health or the environment. The Court infers from that that, in the light of the potential hazards of chemical substances and applying the precautionary principle, but also taking into account the objective of preventing unnecessary testing on vertebrate animals, the legislature has already made choices in order to request registrants to carry out studies on vertebrate animals only if those studies appear relevant in view of the relevant quantities of substance. Accordingly, since they do not challenge the legality of those annexes, the applicants cannot validly claim that they are exempt from carrying out studies which must in all cases be carried out according to the provisions of those annexes, on the ground that those studies are irrelevant.

Next, the Court examines the arguments put forward in support of the third plea seeking to call into question the Commission's assessment as to the usefulness of the various requested studies, in so far as those studies are not in any event mandatory. The Court states that, since such an assessment falls within the category of assessments of highly complex scientific and technical facts by an administrative authority, it must confine itself to ascertaining whether that assessment is vitiated by a manifest error or by a misuse of powers, or whether that authority has manifestly exceeded the limits of its discretion. After rejecting the applicants' request that an independent expert be used, due to that being unnecessary in order to rule on the present action, the Court finds, as regards the arguments relating to specific uses in humans and relating to the assessment and management of risks in that regard, which seek to demonstrate that, where the substance is used in its industrial, professional or domestic applications, it cannot lead to narcotic effects in humans, that registration of a substance is not intended solely to ensure its non-hazardous use in its normal applications, but also to know about the substance and its effects on living organisms and on the environment as such, in other words, to know its intrinsic characteristics, which may require tests recreating conditions that differ from those in its normal applications. It concludes that the Commission did not make a manifest error of assessment by requesting the tests listed in the contested decision.

In the fourth place, the Court rejects the argument that the Commission erred in law by distorting the scope of the wording 'particular concerns' set out in an annex to the REACH Regulation. [33] It holds that, despite the lack of a precise definition as to what is a particular concern on developmental neurotoxicity, it follows from the very wording used in the provision in question that, for such a concern to exist, information of a certain nature held by the registrants or by the competent authority

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32 Article 13(3) of the REACH Regulation.

33 Second paragraph of column 2 of Section 8.7.3. of Annex X to the REACH Regulation.

must establish that the substance in question has developmental neurotoxic effects, or even merely gives reasonable grounds for fearing that that substance might have those effects. Where there is such information, the purpose of the extended one-generation reproductive toxicity study including cohorts 2A and 2B is then to clarify, confirm or disprove the developmental neurotoxic effects of the substance. It is therefore for the competent authority, in the absence of a spontaneous initiative to that effect by the registrants, to consider whether concerns on developmental neurotoxicity exist. Thus, in the present case, the Commission was not required to put forward evidence, at that stage, that dimethyl ether has serious and severe neurotoxicity effects.

In the fifth place, the Court rejects the plea alleging that the Commission erred in law [34] by requiring that the extended one-generation reproductive toxicity study be preceded by a preliminary dose-range finding study. First of all, the Court rules that the Commission is authorised to request that a preliminary dose-range finding study be carried out prior to an extended one-generation reproductive toxicity study. Next, in so far as, in view of the quantities declared in the present case, the level of the substances manufactured or imported per year per manufacturer or per importer in quantities of 1 000 tonnes or more has been reached, the applicants cannot rely on the adaptation possibilities the application of which concerns substances manufactured or imported in quantities of 10 tonnes or more. Lastly, as regards the line of argument that the carrying out of a preliminary dose-range finding study disregards the objective [35] of carrying out tests on vertebrate animals only if there is no other solution, the Court finds, in the present case, that the fact that that study was requested in the context of the carrying out of an extended one-generation reproductive toxicity study enabled the precautionary principle to be reconciled with the requirement to reduce animal testing.

In the sixth place, the Court rejects the plea alleging that the Commission erred in law [36] on the ground that the contested decision does not allow the applicants to remedy the non-compliance of the registration of dimethyl ether by submitting adaptations of the studies requested in that decision. The Court states that the relevant general provisions of the REACH Regulation and the objective of limiting animal testing mean that a registrant whom ECHA has requested to supplement its registration dossier on the basis of a study involving animal testing has, in so far as possible from a scientific and technical perspective, the option and even the obligation to respond to that request by providing appropriate information in the light of the grounds justifying that request, but from sources other than that study. Furthermore, ECHA is under a corresponding obligation to check the compliance of such alternative information with the applicable requirements and, more specifically, to determine whether it is to be classified as adaptations in accordance with the rules laid down in the relevant annexes to the REACH Regulation. According to the Court, there is no reason why a different solution should be used where, as in the present case, the decision requesting the registrant to supplement its registration dossier on the basis of a study involving animal testing is adopted [37] not by ECHA, but by the Commission because of the lack of unanimity in the Member State Committee on the draft ECHA decision. The Court therefore concludes that the contested decision cannot be interpreted as prohibiting the applicants from responding to it by proposing adaptations and, therefore, in the technical file, appropriate information in the light of the grounds which justified the requests for studies on animals set out in that decision, but from sources other than those studies.

As regards the plea alleging that, by requesting that a pre-natal developmental toxicity study be carried out on rabbits, the Commission made in particular an error in law and a manifest error of assessment, [38] the Court rejects that plea. It holds that the error of law is not established, since the

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34 Infringement of column 1 of Section 8.7.3. of Annex X to, and of Article 25 of, the REACH Regulation.

35 Set out in Article 25(1) of the REACH Regulation.

36 Infringement of Article 41 of, and of Annex XI to, the REACH Regulation.

37 In the context of the procedure laid down in Article 51 of the REACH Regulation on the adoption of decisions under dossier evaluation.

38 Infringement of column 2 of Section 8.7.2. of Annex IX to the REACH Regulation.

provision of Annex IX according to which 'the study shall be initially performed on one species' and 'a decision on the need to perform a study at this tonnage level or the next on a second species should be based on the outcome of the first test and all other relevant available data', [39] highlighted by the applicants, means only that the requirement for a study on a second species for a substance manufactured or imported in quantities between 100 tonnes and 999 tonnes per year per manufacturer or per importer may, where the conditions for carrying out such a study are met, possibly be postponed until such time as the substance comes under the 'next level', namely when the substance is manufactured or imported in quantities of 1 000 tonnes or more per year per manufacturer or per importer. However, that provision of Annex IX is not itself transposed to the latter level, which is the subject of Annex X. Therefore, as regards the manifest error of assessment that was allegedly made by requesting that a pre-natal developmental toxicity study be carried out on a second species when the conditions were not met, the Court rules that the requirement in column 1 of Section 8.7.2. of Annex X to have a 'toxicity study … single species' carried out must be interpreted as differing from the requirement set out in similar terms in column 1 of Annex IX for the same section, which means that both studies in question must each concern a different species. As no adaptation is provided for in that regard in Section 8.7.2. of Annex X, the pre-natal developmental toxicity study carried out on a second species is mandatory where the substance is produced or imported at the levels referred to in Annex X, unless adaptations are possible under the provisions set out elsewhere.

Nota bene:

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 the Court of Justice (Fifth Chamber), 20 April 2023, DIGI Communications, (C-329/21, EU:C:2023:303)
- Judgment of the General Court (First Chamber), 8 March 2023, Bulgaria v Commission, (T-235/21, EU:T:2023:105)
- Judgment of the General Court (Fourth Chamber, Extended Composition), 8 March 2023, Assaad v Council, (T-426/21, EU:T:2023:114)
- Judgment of the General Court (Sixth Chamber), 26 April 2023, OHB System v Commission, (T-54/21, EU:T:2023:210)
- Judgment of the General Court (Seventh Chamber), 26 April 2023, Activa – Grillküche v EUIPO – Targa (Apparatus for grilling), (T-757/21, EU:T:2023:216)

39 Provision set out in column 2 of Section 8.7.2. of Annex IX to the REACH Regulation.