



# MONTHLY CASE-LAW DIGEST

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## I. VALUES OF THE EUROPEAN UNION: RULE OF LAW – JUDICIAL INDEPENDENCE

**Judgment of the Court of Justice (Grand Chamber), 5 June 2023, Commission v Pologne (Independence and private life of judges), C-204/21**

[Link to the full text of the judgment](#)

Failure of a Member State to fulfil obligations – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective legal protection in the fields covered by EU law – Independence of judges – Article 267 TFEU – Possibility of making a reference to the Court for a preliminary ruling – Primacy of EU law – Jurisdiction in relation to the lifting of the immunity from criminal prosecution of judges and in the field of employment law, social security and retirement of judges of the Sąd Najwyższy (Supreme Court, Poland) conferred on the Disciplinary Chamber of that court – National courts prohibited from calling into question the legitimacy of the constitutional courts and bodies or from establishing or assessing the lawfulness of the appointment of judges or their judicial powers – Verification by a judge of compliance with certain requirements relating to the existence of an independent and impartial tribunal previously established by law classified as a ‘disciplinary offence’ – Exclusive jurisdiction to examine questions relating to the lack of independence of a court or judge conferred on the Extraordinary Review and Public Affairs Chamber of the Sąd Najwyższy (Supreme Court) – Articles 7 and 8 of the Charter of Fundamental Rights – Rights to privacy and the protection of personal data – Regulation (EU) 2016/679 – Article 6(1), first subparagraph, points (c) and (e), and Article 6(3), second subparagraph – Article 9(1) – Sensitive data – National legislation requiring judges to make a declaration as to whether they belong to associations, foundations or political parties, and to the positions held within those associations, foundations or political parties, and providing for the placing online of the data contained in those declarations

In 2017, two new chambers were established within the Sąd Najwyższy (Supreme Court, Poland), namely the Izba Dyscyplinarna (Disciplinary Chamber) and the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber).



By a law of 20 December 2019 amending the Law on the Supreme Court, which entered into force in 2020, those two chambers were granted new jurisdiction, in particular, to authorise the initiation of criminal proceedings against judges or to place them in provisional detention.<sup>1</sup> For its part, the Extraordinary Review and Public Affairs Chamber was granted exclusive jurisdiction to examine complaints and questions of law relating to the independence of a court or a judge.<sup>2</sup> In addition, under that amending law, the Supreme Court, including the latter chamber, may not call into question the legitimacy of the courts, the constitutional organs of the State and the organs responsible for reviewing and protecting the law, or establish or assess the lawfulness of the appointment of a judge.<sup>3</sup> That law also clarifies the concept of disciplinary fault on the part of judges.<sup>4</sup>

The same amending law also amended the Law relating to the organisation of the ordinary courts, by introducing similar provisions to those amending the Law on the Supreme Court.<sup>5</sup> It also determines the regime applicable to any criminal proceedings initiated against judges of the ordinary courts.<sup>6</sup> It requires them, furthermore, as well as judges of the Supreme Court, to make declarations concerning membership of associations, non-profit foundations and political parties, including for periods preceding the taking-up of their office and provides that that information be published online.<sup>7</sup> A large number of those new provisions also apply to the administrative courts.<sup>8</sup>

Considering that, by adopting that new disciplinary regime, the Republic of Poland had failed to fulfil its obligations under EU law,<sup>9</sup> the European Commission brought an action for failure to fulfil obligations before the Court of Justice under Article 258 TFEU.

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<sup>1</sup> Amended Law on the Supreme Court, Article 27(1).

<sup>2</sup> Thus the Extraordinary Review and Public Affairs Chamber has jurisdiction, in particular, concerning the exclusion of judges or complaints alleging a lack of independence of a court or a judge, and to hear actions for a declaration that court decisions are unlawful, where that unlawfulness consists in the calling into question of the status of the person appointed to a judicial post who adjudicated in the case (Amended Law on the Supreme Court, Article 26(2) to (6)). It also has exclusive jurisdiction to examine questions of law in relation to the independence of a court or a judge arising before the Supreme Court (Amended Law on the Supreme Court, Article 82(2) to (5)).

<sup>3</sup> Amended Law on the Supreme Court, Article 29(2) and (3).

<sup>4</sup> A judge of the Supreme Court shall be accountable, at the disciplinary level, for breach of professional obligations, including in cases of manifest and flagrant breach of legal rules, acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority or acts calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland (Amended Law on the Supreme Court, Article 72(1)).

<sup>5</sup> Thus, Article 42a of the amended Law relating to the ordinary courts contains the wording of Article 29(2) and (3) of the amended Law on the Supreme Court, while Article 107(1) contains the wording of Article 72(1) of the amended Law on the Supreme Court (see above).

<sup>6</sup> See Articles 80 and 129(1) to (3) of the amended Law relating to the ordinary courts.

<sup>7</sup> Article 88a of the amended Law relating to the ordinary courts states in paragraphs (1) and (4) that:

‘(1) A judge shall be required to submit a written declaration mentioning:

1) his or her membership of an association, including the name and registered office of the association, the positions held and the period of membership;

2) the position held within a body of a non-profit foundation, including the name and registered office of the foundation and the period during which the position was held;

3) his or her membership of a political party prior to his or her appointment to a judge's post and his or her membership of a political party during his or her term of office before 29 December 1989, including the name of that party, the positions held and the period of membership. ...

(4) The information contained in the declarations referred to in paragraph 1 shall be public and published in the [*Biuletyn Informacji Publicznej* (Public Information Bulletin)] ...’

As regards judges of the Supreme Court, see Article 45(3) of the amended Law on the Supreme Court.

<sup>8</sup> See inter alia Article 5(1a) and (1b), Article 8(2), Article 29(1) and Article 49(1) of the amended Law relating to the administrative courts.

<sup>9</sup> The Commission considered that the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU – which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law – under Article 47 of the Charter – relating to the right to an effective remedy and to an independent and impartial tribunal previously established by law – under the second and third paragraphs of Article 267 TFEU – which provides for the option (second paragraph), for some national courts, and the obligation (third subparagraph), for others, to make a reference for a preliminary ruling – under the principle of primacy of EU law and under Articles 7 and 8 of the Charter and points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR, relating to the right to privacy and the right to protection of personal data.

In the judgment delivered in that case, the Court, sitting as the Grand Chamber, upheld the action brought by the Commission. It finds that those new national provisions undermine the independence of judges guaranteed by the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and, moreover, infringe, first, the obligations imposed on national courts in the context of the preliminary ruling procedure and, second, the principle of primacy of EU law. In addition, the provisions establishing declaratory mechanisms in respect of judges and the online publication of the data thus collected infringe the right to respect for private life and the right to the protection of personal data enshrined in the Charter of Fundamental Rights of the European Union ('the Charter') and the General Data Protection Regulation ('the GDPR')<sup>10</sup>.

### *Findings of the Court*

As regards, first, the jurisdiction of the Court to rule on the complaints raised by the Commission concerning the infringements of the provisions of Article 19(1) TEU, in conjunction with Article 47 of the Charter, and of the principle of primacy of EU law, the Court recalls that the European Union is founded on values which are common to the Member States<sup>11</sup> and that respect for those values is a prerequisite for accession to the European Union.<sup>12</sup> The European Union is thus composed of States which have freely and voluntarily committed themselves to those values, respect for those values and their promotion being the fundamental premiss on which mutual trust between the Member States is based. Compliance by a Member State with those values is thus a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State and cannot be reduced to an obligation which a candidate State is required to comply with in order to accede to the European Union and which it may disregard after its accession. The Court notes, in that regard, that Article 19 TEU gives concrete expression to the value of the rule of law set out in Article 2 TEU<sup>13</sup> and provides that it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The Court holds, consequently, that the requirements arising from respect for values and principles such as the rule of law, effective judicial protection and judicial independence are not capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU.

The Court thus points out that, in choosing their respective constitutional model, the Member States are required to comply, *inter alia*, with the requirement that the courts be independent stemming from Article 2 and the second subparagraph of Article 19(1) TEU, and that they are thus required, in particular, to ensure that, in the light of the value of the rule of law, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges.

Furthermore, the Court recalls, in that regard, that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, which imposes on the Member States a clear and precise obligation as to the result to be achieved and which is not subject to any condition, in particular as regards the independence and impartiality of the courts called upon to interpret and apply EU law and the requirement that those courts be previously established by law, has direct effect, in accordance with the principle of primacy of EU law, which means that any provision, case-law or national practice contrary to those provisions of EU law, must be disapplied. Given that the Court has exclusive jurisdiction to give a definitive interpretation of EU law, it is therefore, as required, for the national constitutional court concerned, where appropriate, to alter its own case-law which is

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<sup>10</sup> 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).

<sup>11</sup> Article 2 TEU.

<sup>12</sup> Article 49 TEU.

<sup>13</sup> See, in that regard, judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses (C-64/16, EU:C:2018:117, paragraph 32).



incompatible with EU law, as interpreted by the Court. Consequently, the Court declares that it has jurisdiction to examine the complaints raised by the Commission.

Turning, secondly, to the substance of the complaints raised by the Commission, the Court holds, in the first place, that, by conferring on the Disciplinary Chamber of the Supreme Court, whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges, such as cases concerning the lifting of the criminal immunity of judges and in the field of employment law, social security and retirement of judges of the Supreme Court, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

In that regard, the Court holds that the legal order of the Member State concerned must include guarantees capable of preventing any risk of political control of the content of judicial decisions or pressure and intimidation against judges which could, *inter alia*, lead to an appearance of a lack of independence or impartiality on their part capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in individuals.<sup>14</sup> It is thus essential, as the Court has held previously with regard to the rules applicable to the disciplinary regime for judges,<sup>15</sup> that, having regard to the major consequences likely to result from them both for the career progress of judges and their living conditions, decisions authorising the initiation of criminal proceedings against them, their arrest and detention, and the reduction of their remuneration, or decisions relating to essential aspects of the employment, social security or retirement law schemes applicable to those judges, be adopted or reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence.

In the second place, the Court finds that, by adopting and maintaining the provisions under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a 'disciplinary offence',<sup>16</sup> the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU.

In that regard, the Court recalls that the fundamental right to a fair trial means *inter alia* that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. It also notes that national courts, in various other circumstances, may be obliged to review compliance with the abovementioned requirements and that such a review may relate in particular to whether an irregularity vitiating the procedure for the appointment of a judge could lead to an infringement of that fundamental right. In those circumstances, the fact that a national court performs the tasks entrusted to it by the Treaties and complies with its obligations under those Treaties, by giving effect to provisions such as the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, cannot, by definition, be regarded as a disciplinary offence without those provisions of EU law being infringed *ipso facto*.

The Court observes, first of all, that the definitions of the disciplinary offences at issue are very broad and imprecise, so that they cover situations in which the judges have to examine whether they themselves, the court in which they sit, other judges or other courts satisfy the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Nor do the national provisions at issue ensure that the liability of the judges concerned for the judicial decisions which they are called upon to give is strictly limited to completely exceptional cases and, consequently, that the disciplinary regime applicable to judges cannot be used in order to exert

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<sup>14</sup> See, to that effect, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 216).

<sup>15</sup> See, to that effect, judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 80).

<sup>16</sup> Points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court.



political control over judicial decisions. Furthermore, in the light of the particular conditions and context in which those national provisions were adopted, the Court points out that the terms chosen by the Polish legislature clearly echo a series of questions which led various Polish courts to make a reference to the Court for a preliminary ruling as regards the compatibility with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of various recent legislative amendments affecting the organisation of justice in Poland. The Court considers, consequently, that the risk that those national provisions may be interpreted in such a way that the disciplinary regime applicable to judges may be used in order to prevent the national courts concerned from making certain findings required of them by EU law and influence the judicial decisions of those courts, thus undermining the independence of those judges, is established, and that those provisions of EU law are therefore infringed in that respect. Those national provisions also infringe Article 267 TFEU in that they create a risk of disciplinary penalties being imposed on national judges for having made references to the Court for a preliminary ruling.

As regards, more specifically, the disciplinary offence based on the ‘manifest and flagrant breach of legal rules’ by Supreme Court judges,<sup>17</sup> the Court considers that the national provision providing for it also undermines the independence of those judges since it does not prevent the disciplinary regime applicable to those judges from being used for the purpose of creating pressure and a deterrent effect likely to influence the content of their decisions. That provision also limits the obligation of the Supreme Court to refer questions to the Court for a preliminary ruling in terms of the possibility of initiating disciplinary proceedings.

In the third place, the Court holds that, by adopting provisions prohibiting any national court from reviewing compliance with the requirements arising from EU law relating to the guarantee of an independent and impartial tribunal previously established by law,<sup>18</sup> the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and the principle of primacy of EU law.

In that regard, the Court specifies that those national provisions prohibit not only ‘establish[ing]’, but also ‘assess[ing]’, in the light of their ‘lawfulness’, both the ‘appointment’ itself and the ‘power to carry out tasks in relation to the administration of justice that derives from that appointment’. In addition, those provisions prohibit any ‘calling into question’ of the ‘legitimacy’ of ‘courts and tribunals’ and of the ‘constitutional organs of the State and the organs responsible for reviewing and protecting the law’. Such formulations are capable, especially in the particular context in which they were adopted, of leading to the result that a series of acts which the courts concerned are nevertheless required to adopt, in accordance with the obligations incumbent on them in order to ensure compliance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, may, by reason of their content or effects, fall within the prohibitions thus laid down. Moreover, since those national provisions are capable of preventing the Polish courts from disapplying provisions contrary to those two provisions of EU law, which have direct effect, they are also liable to infringe the principle of the primacy of EU law.

In the fourth place, the Court holds that, by conferring on the Extraordinary Review and Public Affairs Chamber exclusive jurisdiction to examine complaints and questions of law concerning the lack of independence of a court or a judge,<sup>19</sup> the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of primacy of EU law.

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<sup>17</sup> Point 1 of Article 72(1) of the amended Law on the Supreme Court.

<sup>18</sup> Article 42a(1) and (2) and Article 55(4) of the amended Law relating to the ordinary courts, Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court, and Article 5(1a) and (1b) of the amended Law relating to the administrative courts.

<sup>19</sup> Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the Law amending the Law on the Supreme Court and certain other laws.

In that regard, the Court states that the reorganisation and centralisation of jurisdiction at issue relate to certain constitutional and procedural requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, compliance with which must be guaranteed across all the substantive areas of application of EU law and before all national courts seised of cases falling within those areas. In that regard, those provisions are closely linked to the principle of the primacy of EU law, the implementation of which by national courts contributes to ensuring the effective protection of the rights which EU law confers on individuals.

In that context, in so far as, in particular, any national court called upon to apply EU law is obliged to check whether, as composed, it constitutes an independent and impartial tribunal established by law, where serious doubt appears on that point, and since such courts must also, in certain circumstances, be able to verify whether an irregularity vitiating the procedure for the appointment of a judge could lead to an infringement of the fundamental right to such a tribunal, the review, by national courts, of compliance with those requirements is precluded from falling, in a general and indiscriminate manner, within the jurisdiction of a single national body, all the more so if that body cannot, under national law, examine certain aspects inherent in those requirements. In the present case, the Court finds that the purpose of the national provisions at issue is to reserve to a single body the overall review of the requirements relating to the independence of all courts and judges, of both the judicial and administrative order, by depriving of their powers, in that regard, the national courts which previously had jurisdiction to carry out the various types of review required by EU law and to apply the case-law of the Court. It again emphasises the particular context in which the reorganisation of judicial powers at issue carried out by the amending law, which is characterised by the fact that the Polish judges are, moreover, prevented from making certain findings and assessments which they are required to make under EU law.

The Court concludes that the conferral on a single national body of the power to verify compliance with the fundamental right to effective judicial protection, where the need for such verification may arise before any national court, is, combined with the introduction of various prohibitions and disciplinary offences, liable to weaken the effectiveness of the review of observance of that fundamental right. By thus preventing the other courts without distinction from doing what is necessary in order to ensure the observance of the right of individuals to effective judicial protection by disapplying, where appropriate, national rules contrary to the requirements of EU law, the national provisions at issue also infringe the principle of the primacy of EU law. Furthermore, since the very fact of conferring exclusive jurisdiction on the Extraordinary Review and Public Affairs Chamber of the Supreme Court to settle certain questions relating to the application of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter is such as to prevent or discourage other courts from making a reference to the Court for a preliminary ruling, the national provisions at issue also infringe Article 267 TFEU.

In the fifth and last place, the Court holds that, by adopting provisions imposing on judges an obligation to communicate information relating to their activities within associations and non-profit foundations, and to their membership of a political party, before their appointment, and by providing for the publication of that information,<sup>20</sup> the Republic of Poland infringed the right to respect for private life and the right to the protection of personal data guaranteed by the Charter<sup>21</sup> and by the GDPR.<sup>22</sup>

In that regard, after having concluded that the GDPR was applicable and, more specifically, so were points (c) and (e) of the first subparagraph of Article 6(1) and Article 9(1) of that regulation, the Court

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<sup>20</sup> Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts.

<sup>21</sup> Article 7 and Article 8(1) of the Charter.

<sup>22</sup> Point (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR.

finds that the objectives put forward by the Republic of Poland in support of the provisions at issue, consisting of reducing the risk that judges may be influenced, in the performance of their duties, by considerations relating to private or political interests, and reinforcing the confidence of individuals as regards the existence of such impartiality, fall within an objective of general interest recognised by the European Union within the meaning of Article 52(1) of the Charter or a legitimate public interest objective within the meaning of the GDPR.<sup>23</sup> The Court recalls, however, that, while such an objective may therefore authorise limitations on the exercise of the rights guaranteed in Articles 7 and 8 of the Charter, that is only the case, in particular, where those limitations genuinely meet such an objective and are proportionate to it.

Examining the necessity of the measures at issue, the Court notes that the Republic of Poland has not provided clear and concrete explanations as to why the publication of information relating to a judge's membership of a political party before his or her appointment and during the exercise of his or her term of office as a judge before 29 December 1989 would be such as to currently contribute to strengthening the right of individuals to have their case heard by a court meeting the requirement of impartiality. Having regard to the particular context in which the amending law and those measures were adopted, the Court considers, moreover, that those measures were, in fact, adopted for the purpose, *inter alia*, of harming the professional reputation of the judges concerned and the perception of them by individuals. Accordingly, those measures are inappropriate for the purpose of attaining the legitimate objective alleged in the present case.

As regards other information, relating to judges' current or past membership of an association or non-profit foundation, the Court considers that it cannot be ruled out, *a priori*, that the fact of placing such information online might contribute to revealing the existence of possible conflicts of interest liable to influence the impartial performance by judges of their duties in the handling of individual cases, since such transparency may, moreover, contribute, more generally, to strengthening the confidence of individuals in that impartiality and in justice. It notes, however, first, that, in the present case, the personal data concerned relate in particular to periods prior to the date from which a judge is required to make the declaration required. The Court holds that, in the absence of a temporal limitation as regards the previous periods concerned, it cannot be considered that the measures at issue are limited to what is strictly necessary for the purposes of helping to strengthen the right of individuals to have their case heard by a court meeting the requirement of impartiality. Secondly, as regards the balance to be struck between the objective of general interest pursued and the rights at issue, the Court finds, first of all, that the placing online of the named information at issue is, depending on the object of the associations or non-profit foundations concerned, liable to reveal information on certain sensitive aspects of the private life of the judges concerned, in particular their religious or philosophical beliefs. It observes, next, that the processing of the personal data at issue results in those data being made freely accessible on the internet to the general public and, consequently, to a potentially unlimited number of persons. It notes, lastly, that, in the particular context in which the measures at issue were adopted, the placing online of those data is liable to expose the judges concerned to risks of undue stigmatisation, by unjustifiably affecting the perception of those judges by individuals and the public in general, and to the risk that the progress of their careers would be unduly hampered. In those circumstances, the Court concludes that processing of personal data such as that at issue constitutes a particularly serious interference with the fundamental rights of the persons concerned in respect of their private life and in the protection of their personal data.

In doing so, weighing the seriousness of that interference against the importance of the alleged objective of general interest, the Court finds that, having regard to the general and specific national context in which the measures at issue were adopted and the particularly serious consequences liable to stem from them for the judges concerned, the result of that weighing exercise is not balanced. In

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<sup>23</sup> Within the meaning of Article 6(3) and Article 9(2)(g) of the GDPR.



comparison with the status quo ante resulting from the pre-existing national legal framework, the placing online of the personal data concerned represents a potentially significant interference with the fundamental rights guaranteed in Article 7 and Article 8(1) of the Charter, without that interference being capable, in the present case, of being justified by any benefits that might result from it in terms of preventing conflicts of interest on the part of judges and an increase in confidence in their impartiality.

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

**Judgment of the Court of Justice (First Chamber), 22 June 2023, Staatssecretaris van Justitie en Veiligheid (Thai mother of a Dutch minor child), C-459/20**

[Link to the full text of the judgment](#)

Reference for a preliminary ruling – Citizenship of the Union – Article 20 TFEU – Right to move and reside freely within the territory of the Member States – Decision of a Member State refusing residence to a third-country national parent of a minor child who has the nationality of that Member State – Child living outside the territory of the European Union and never having resided in its territory

X, a Thai national, resided legally in the Netherlands where she was married to A, a Dutch national. Their child, of Dutch nationality, was born in Thailand where he has always lived. After the birth of the child, X returned to the Netherlands. In 2017, following the couple's separation, the Netherlands authorities revoked X's residence permit. After the divorce, X applied, in 2019, to reside in the Netherlands with another national of that Member State. In that context, the Netherlands authorities sought to ascertain of their own motion whether she could obtain a derived right of residence under Article 20 TFEU in order to be able to reside with her minor child, a Union citizen, in the territory of the European Union. The Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) rejected that application on 8 May 2019. On the same day, X was deported to Thailand.

Seised by X against that rejection decision, the rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands), which is the referring court, has doubts as to the interpretation to be given to Article 20 TFEU in the present case.

In its judgment, the Court sets out the conditions in which a third-country national may benefit from a derived right of residence based on Article 20 TFEU where the minor child of that national is a Union citizen but is outside the territory of the European Union and has never resided in its territory.

### *Findings of the Court*

At the outset, the Court recalls that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the members of the family of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status. In those situations there must also be, between the third-country national and the Union citizen, who is a member of his or her family, a relationship of dependency such that a decision refusing the right of residence to the third-country national would deprive the family member of the genuine enjoyment of the substance of the rights conferred by the status of Union citizen. That is the case where the latter is compelled to go with the third-country national in question and to leave the territory of the European Union as a whole, or not to be able to enter and reside in the territory of the Member State the nationality of which he or she holds.

In the present case, the minor child, a Union citizen, has lived since birth in a third country, without ever having resided in the European Union. In those circumstances, the Court considers, in the first place, that the refusal of a right of residence to the third-country national parent of such a child is capable of affecting the latter's exercise of his or her rights, pursuant to Article 20 TFEU, only if it is established that he or she will enter and reside in the territory of the Member State of which he or she has the nationality together with the parent, or will join that parent in that territory. It is for the referring court to assess whether that is the case and whether there is a relationship of dependency between the third-country national parent and the minor child.

In the second place, the Court holds that the application for a derived right of residence of that parent, upon whom the child citizen of the Union is dependent, may be rejected only on the ground that the move to the Member State of which the child holds the nationality, which the exercise by that child of his or her rights as a Union citizen presupposes, is not in the real or plausible interests of that child. The right to move and reside freely within the territory of the Member States, which is conferred on every citizen of the Union, flows directly from the status of Union citizen without its exercise being subject to proof of any interest whatsoever in order to rely on its benefits or conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity personally to exercise those rights as a Union citizen.

It is true that the Court has previously found that it is for the competent authorities, when ruling on an application for residence pursuant to Article 20 TFEU, to take into consideration the best interests of the child concerned.<sup>24</sup> However, that finding was relevant not for the rejection of an application for a residence permit but, on the contrary, for the purpose of precluding the adoption of a decision that compelled that child to leave the territory of the European Union.

Lastly, the Court gives details as to the assessment to be made in the context of an application for a derived right of residence, on the issue of whether the minor child, who is a Union citizen, is dependent upon his or her third-country national parent. It states, in particular, that the competent authorities must take account of the situation as it appears to be at the time when they are called upon to make a decision, as those authorities must assess the foreseeable consequences of their decision on the genuine enjoyment, by the child concerned, of the substance of the rights that he or she derives from the status that Article 20 TFEU confers on him or her.

Furthermore, that assessment must always be based on an examination of all of the relevant circumstances of the case at hand. In particular, the fact that the third-country national parent has not always assumed day-to-day care of that child but now has sole care of that child, or that the other parent, who is a Union citizen, could assume the actual day-to-day care of that child, cannot be regarded as decisive in that respect.

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<sup>24</sup> See, to that effect, judgments of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraph 71), and of 5 May 2022, *Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources)* (C-451/19 and C-532/19, EU:C:2022:354, paragraph 53).

### III. INSTITUTIONAL PROVISIONS: PUBLIC PROCUREMENT BY THE INSTITUTIONS OF THE EUROPEAN UNION

#### Judgment of the General Court (Third Chamber), 14 June 2023, Instituto Cervantes v Commission, T-376/21

Public supply contracts – Tendering procedure – Provision of language training for the institutions, bodies and agencies of the European Union – Ranking of a tenderer in the cascade procedure – Obligation to state reasons – Documents in the tender accessible via a hypertext link – Manifest errors of assessment – Misuse of powers

By a contract notice of 20 November 2020, the European Commission launched an open call for tenders relating to language training for the institutions, bodies and agencies of the European Union. The contract was divided into eight lots, including Lot 3, entitled ‘Language learning in Spanish’. According to the specifications for the tendering procedure at issue, the contracting authority would award the contract on the basis of the most economically advantageous tender. The rules on the submission of tenders, in the tender specifications, provided, *inter alia*, that tenders had to be submitted via the eSubmission application.

On 19 April 2021, pursuant to the recommendations of the evaluation committee, the Commission adopted the contested decision. It accordingly awarded Lot 3 (Spanish language) of the contract in first place to the consortium CLL Centre de Langues-Allingua (‘the CLL consortium’) and in second place to the applicant, Instituto Cervantes.

In the tendering procedure, the applicant had submitted via the eSubmission platform certain documents which illustrated the technical proposal described in its tender, and which were accessible only via hypertext links incorporated in the tender. In the tender evaluation grid, the Commission informed the applicant that it had rejected those documents and had not evaluated them, on the grounds that they were not compliant with the tender specifications and that there was a risk that the tender could be modified by means of those hypertext links after the deadline for the submission of tenders. The Commission accordingly found that the documents that were accessible only via those hypertext links were missing.

Hearing an action for annulment of the contested decision, which it has dismissed in its entirety, the General Court rules on the novel question of whether tenderers may use hypertext links to submit documents forming part of their tenders, where that method of communication was not provided for in the specifications, and on the consequences of such use at the stage of evaluating the tenders and awarding points.

#### *Findings of the Court*

In the first place, the Court rejects the pleas in law alleging breach of the duty to state reasons.

First, it dismisses the argument that it was impossible to ascertain the relative advantages of the successful tender. It finds that, although the evaluations for some of the sub-criteria are succinct, (i) it can be seen that the tender of the CLL consortium contains a number of aspects that are superior to those of the applicant’s tender; (ii) the standard of quality of the applicant’s tender is knowable, and is lower; (iii) it must be borne in mind that the incomplete documentation, which relates to a key component of a language course, namely the exercises, is presented as a weakness in the applicant’s tender which led to a loss of points. Similarly, since the incomplete documentation was not the only shortcoming that justified the loss of points in the evaluation of the applicant’s tender, the Court dismisses the argument alleging a manifest error of assessment relating to the lack of a coherent correlation between that assessment and the score awarded.

Second, the Court dismisses the complaint alleging that it was impossible to ascertain the exact number of points deducted as a result of the incomplete documentation. It finds that the tender specifications did not establish a weighting for the various components forming part of the description of each sub-criterion, because these were not ‘sub-sub-criteria’ intended to be evaluated separately but were descriptive of the content of each sub-criterion. Accordingly, it was not necessary

to attach a specific weight to each positive or negative comment in the evaluation, but instead to ensure that the applicant could understand the reasons that led the Commission to award its tender the score given for each sub-criterion, which it was indeed able to do. The Court finds that the evaluation committee indicated the relative advantages of the successful tender under each sub-criterion and that in the present case the Commission cannot be required to assign a specific weight to each positive or negative comment relating to the various components within the description of each sub-criterion.

In the second place, the Court dismisses the plea in law alleging a manifest error of assessment resulting from the fact that the link between the evaluation of certain sub-criteria and the score awarded is irrational, disproportionate and non-transparent. Accordingly, in respect of the allegation that the principle of transparency was breached because the specific weight given to a component of the criterion affected by the incomplete documentation was not indicated in the contract documents, the Court observes that the incomplete documentation was not the only shortcoming justifying the loss of points. The deduction therefore cannot be described as manifestly inconsistent with the shortcomings identified.

Moreover, the specific importance attached to a component of the tender and the award of points for each sub-sub-criterion or each component of a sub-criterion fall within the broad discretion available to the Commission. The Court therefore cannot review the importance, as such, attached to particular components in relation to a sub-sub-criterion, and merely reviews whether a manifest error of assessment has been established. In the present case, the applicant has not demonstrated a manifest error of assessment, since the incomplete documentation identified by the Commission related to a significant component of a language course and could legitimately give rise to a deduction of points, while the deduction of points has not been shown to be manifestly incorrect.

In the third place, the Court dismisses the third plea, alleging a manifest error of assessment as a result of the exclusion of components of the tender that were accessible via a hypertext link.

According to the terms of the tender specifications, the 'tender' had to be uploaded directly to the eSubmission platform and only documents for which that process was followed formed part of the tender. In line with the objective pursued by means of the eSubmission application, of facilitating the submission of tenders via a secure application, the applicant was therefore not entitled to submit certain parts of its tender via hypertext links leading to a document accessible on a website under the control of the tenderer. The Commission cannot therefore be criticised for not taking into account the documents obtained via the hypertext links in question.

Moreover, the Court notes that submission via that secure application enables compliance with the principle of the equal treatment of tenderers since it ensures that the contracting authority can keep control of the documents submitted to it. It therefore guards against any risk of documents being modified where they are accessible only via a hypertext link and therefore have not been uploaded directly in the eSubmission application. The Court accordingly infers that a reasonably well-informed tenderer exercising ordinary care is, in that context, in a position to know that it must submit its tender within the deadline given and that it can no longer modify the tender after that deadline. Such a tenderer cannot therefore infer from the tender specifications in question that it is permissible to include in its tender hypertext links in its tender which lead to a document accessible on a website under its control.

Furthermore, since the applicant was not permitted to include hypertext links in its tender, the Commission was not obliged either to verify whether the documents in question had been modified or to accept those documents. In any event, those documents were on a website under the control of the tenderer and the evidence provided by the applicant seeks to demonstrate that the documents in question were not modified, not that they could not be modified.

Lastly, the argument alleging infringement of the right to be heard cannot succeed because, although tenderers must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision, that right is safeguarded at the time they submit their tenders, and by the fact that tenderers can request clarifications about the provisions of the tender specifications. The fact that no subsequent stage is envisaged in which to provide supplementary explanations, after the tenders have been evaluated, therefore cannot amount to an infringement of the right to be heard.

In the fourth place, the Court rejects the plea in law alleging, in essence, that the Commission failed to discharge its obligation to compare the technical proposal of the CLL consortium with the applicant's technical proposal. There is in fact nothing to suggest that the Commission did not comply with the requirement to identify the 'most economically advantageous' tender on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders. The CLL consortium's tender was evaluated by the committee in the light of the technical award criteria contained in the tender specifications, as was the applicant's tender.

In the fifth place, the Court dismisses the plea in law alleging, in essence, that by awarding all the lots of the contract for language training to a single service provider, that is to say, the CLL consortium, the Commission improperly implemented a practice as a result of which it disregarded the objective pursued by the public procurement legislation of achieving the widest possible opening up of the markets of the EU institutions to competition.

A contracting authority cannot be precluded from awarding all the lots under a public contract to the same tenderer, provided that its tenders were the most economically advantageous compared with all the other tenderers and provided the principle of equal treatment as between tenderers was upheld, with the aim of ensuring healthy and effective competition between the participants in the procurement procedure in question.

The Court also recalls that the requirement of impartiality is twofold. It encompasses, first, the subjective impartiality of the members of a body, in so far as no member of the body concerned may show bias or personal prejudice (impartiality which is presumed in the absence of evidence to the contrary), and, second, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the body concerned. In the present case, first, it has not been claimed that the members of the committee were biased and, second, it has not been shown that the absence of an obligation to evaluate the quality of the technical tender before the price resulted, *inter alia*, in a breach of the principle of equal treatment.

#### **IV. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR ANNULMENT**

##### **Order of the General Court (Sixth Chamber), 21 June 2023, Repasi v Commission, T-628/22**

Action for annulment – Environment – Commission Delegated Regulation (EU) 2022/1214 – Taxonomy – Economic activities relating to fossil gas and nuclear energy – Inclusion in sustainable economic activities – Member of the European Parliament – Lack of direct concern – Inadmissibility

On 18 June 2020, the European Parliament and the Council of the European Union adopted Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment.<sup>25</sup> That regulation establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable, in the light of different environmental objectives defined therein. Climate change mitigation is one of those objectives.<sup>26</sup> Under that provision, transitional economic

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<sup>25</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ 2020 L 198, p. 13).

<sup>26</sup> Articles 3 and 9 of Regulation 2020/852.



activities, namely those for which there are no technically and economically feasible low-carbon alternatives, contribute substantially to climate change mitigation when they lead to climate neutrality, subject to compliance with certain criteria.

It is in that context that the European Commission adopted Delegated Regulation 2022/1214,<sup>27</sup> establishing the technical screening criteria for determining the conditions under which certain economic activities relating to fossil gas and nuclear energy form part of transitional activities that could contribute, inter alia, to the objective of climate change mitigation.

Taking the view that the Commission exceeded the power to adopt delegated acts conferred on it, Mr René Repasi, a Member of the European Parliament, brought an action for annulment of that regulation before the Court, claiming that that regulation had infringed the legislative competence of the Parliament and, therefore, his rights as a Member of the Parliament.

In its order, the Court is ruling for the first time on the standing of a Member of the Parliament to bring proceedings against a Commission Delegated Regulation before dismissing the action as inadmissible.

### *Findings of the Court*

First, the Court notes that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act which is not addressed to that person if the act in question is of direct and individual concern to that person or where it is a regulatory act which is of direct concern to them and does not entail implementing measures. For an individual to be directly concerned by the act being challenged, two cumulative criteria must be met. First, the measure challenged must directly affect the person's legal situation and, second, it must leave no discretion to the addressees who are responsible for its implementation.

As regards the applicant's legal standing to challenge Delegated Regulation 2022/1214, it is apparent from the case-law that an act of the Parliament which affects the conditions under which its Members perform their parliamentary duties is an act which directly affects their legal situation. However, the Court states that that case-law concerned measures of internal organisation of the Parliament which directly affect its Members and cannot be applicable to the present case in which the rights of those Members could be affected only indirectly by the alleged infringement of the Parliament's legislative competence. All the applicant's rights linked to the exercise of the Parliament's legislative competence, such as the right to participate in a proper legislative procedure, the right to respect for the provisions on competence and procedure, the right to defend the democratic powers of the Parliament and the rights to vote, to take initiative and to participate in order to exert political influence, are intended to be exercised only in the context of the Parliament's internal procedures and cannot therefore be regarded as directly affected by the adoption of Delegated Regulation 2022/1214.

In that regard, the Court adds that the principles of representative democracy and of the rule of law relied on by the applicant in support of recognition of his standing to bring proceedings, as well as the protection of the institutional balance and the right to legal protection of the minority, do not call that finding into question, since the Parliament has a right of action against acts of EU law capable of ensuring observance of those principles. The same is true of the applicant's arguments that Members of the Parliament should be directly concerned by acts affecting rules of competence, fundamental provisions of the legislative procedure or acts constituting a misuse of powers.

In the light of those considerations, the Court concludes that the applicant does not have standing to bring proceedings since he is not directly concerned by Delegated Regulation 2022/1214.

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<sup>27</sup> Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022, amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities (OJ 2022 L 188, p. 1).

## V. PROTECTION OF PERSONAL DATA

### Judgment of the Court of Justice (First Chamber), 22 June 2023, Pankki S, C-579/21

[Link to the full text of the judgment](#)

Reference for a preliminary ruling – Processing of personal data – Regulation (EU) 2016/679 – Articles 4 and 15 – Scope of the right of access to information referred to in Article 15 – Information contained in log data – Article 4 – Definition of ‘personal data’ – Definition of ‘recipients’ – Temporal application

J.M. was an employee and a customer of a Finnish banking institution. In 2014, he learned that his own customer data had been consulted by members of staff of that institution, on several occasions, during 2013. In 2018, having doubts as to the lawfulness of those consultations, J.M., who had in the meantime been dismissed from his post at that institution, asked the latter to disclose to him the identity of the persons who had consulted his customer data, the exact dates of the consultations and the purposes of the processing of those data.

The banking institution, in its capacity as data controller,<sup>28</sup> refused to disclose to him the identity of the employees who had carried out the consultation operations on the ground that that information constituted personal data of those employees. It stated that the consultation operations had been carried out, on its instructions, by its internal audit service, in the context of an investigation into a potential conflict of interests between J.M. and another client.

Subsequently, J.M. submitted a request to the Finnish supervisory authority seeking communication of the identity of the persons who had consulted his customer data. Following the rejection of that request on the ground that the log data of the employees who processed his data constituted the personal data of those employees, J.M. brought an action before the referring court. The referring court is uncertain whether the communication of the log data, which contain information on the purposes of the processing, the recipients of the data and the identity of the persons who carried out those operations – in the present case, the controller’s employees – is covered by Article 15 of the GDPR.

By its judgment, the Court rules on the temporal application of Article 15 of the GDPR, in the context of a request for access to information referred to in that provision made after that regulation became applicable. It also specifies the scope of the data subject’s right to obtain from the controller access to the data processed concerning him or her and to information relating to those data.<sup>29</sup>

#### *Findings of the Court*

In the first place, the Court rules that Article 15 of the GDPR is applicable to a request for access to the information referred to in that provision where the processing operations which that request concerns were carried out before the date on which that regulation became applicable, but the request was submitted after that date. Article 15(1) of the GDPR does not concern the conditions under which the processing of the data subject’s personal data is lawful, it merely specifies the scope of that data subject’s right of access to the data and to the information which it covers. Accordingly, that provision confers on data subjects a procedural right consisting of obtaining information about the processing of their personal data. As a procedural rule, it applies to requests for access made from the entry into application of that regulation, such as J.M.’s request.

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<sup>28</sup> Within the meaning of Article 4, point 7, 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) (OJ 2016 L 119, p. 1; ‘the GDPR’).

<sup>29</sup> As provided for in Article 15(1) of the GDPR.

In the second place, the Court points out that information relating to consultation operations carried out on a data subject's personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under Article 15(1) of the GDPR.

First, it follows from the textual analysis of that provision and the concepts contained therein that the right of access it grants to the data subject is characterised by the broad scope of the information that the controller must provide to the data subject.

Next, it is apparent from the context of which that provision forms part that it is intended to ensure the transparency of the manner in which personal data are processed with regard to the data subject, without which the data subject would not be in a position to assess the lawfulness of the processing of his or her data.

Lastly, that interpretation of the scope of the right of access provided for in Article 15(1) of the GDPR is supported by the objectives pursued by that regulation, which include the need to ensure a consistent and high level of protection of natural persons within the European Union and to enable the data subject to ensure that the personal data relating to him or her are correct and that they are processed in a lawful manner.

As regards the information requested by J.M., the Court observes, first, that the consultation operations carried out on J.M.'s personal data constitute 'processing', <sup>30</sup> with the result that they confer on him a right of access to those data and a right to be provided with the information linked to those operations. <sup>31</sup> It points out in that connection that the communication of the dates of the consultation operations would enable the data subject to obtain confirmation that his or her personal data have actually been processed while the date of that processing would enable him or her to verify its lawfulness. In addition, the Court states that the information relating to the purposes of the processing operations is expressly provided for by the GDPR <sup>32</sup> and that the GDPR provides that the controller is to inform the data subject of the recipients to whom his or her data have been disclosed. <sup>33</sup>

As regards the communication of all that information by the provision of the log data relating to the processing operations at issue, the Court specifies, secondly, that the communication of a copy of the information in those files may prove necessary in order for the controller to fulfil the obligation to provide the data subject with access to all the information referred to in Article 15(1) of the GDPR and to ensure fair and transparent processing of his or her data.

On one hand, those log data not only reveal the existence of data processing, <sup>34</sup> but also provide information on the frequency and intensity of the consultation operations. They thus enable the data subject to ensure that the processing carried out is actually motivated by the purposes put forward by the controller.

On the other hand, those files contain information relating to the identity of the persons who carried out the consultation operations. In the present case, although the data subject has the right to obtain from the controller information relating to the recipients or categories of recipients to whom the personal data have been or will be disclosed, <sup>35</sup> the controller's employees cannot be considered to be

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<sup>30</sup> Within the meaning of Article 4, point 2, of the GDPR.

<sup>31</sup> Article 15(1) of the GDPR.

<sup>32</sup> Article 15(1)(a) of the GDPR.

<sup>33</sup> Article 15(1)(c) of the GDPR.

<sup>34</sup> Information to which the data subject must have access under Article 15(1) of the GDPR.

<sup>35</sup> Under Article 15(1)(c) of the GDPR.

'recipients'<sup>36</sup> when processing personal data under the authority of that controller and in accordance with its instructions. Thus, assuming that the disclosure of the information relating to the identity of those employees to the data subject is necessary to ensure that the processing of his or her personal data is lawful, it is nevertheless liable to infringe the rights and freedoms of those employees, in so far as that information itself contains the personal data of those employees. In that situation, it is necessary to weigh the data subject's right of access against the rights and freedoms of others. Accordingly, the Court concludes that Article 15(1) of the GDPR does not lay down a right for the person whose data are being processed to obtain from the controller access to information relating to the identity of the employees of that controller who carried out those operations under its authority and in accordance with its instructions, unless that information is essential in order to enable the data subject effectively to exercise the rights conferred on him or her by that regulation and provided that the rights and freedoms of those employees are taken into account.

In the third and last place, the Court notes that the fact that the controller is engaged in the business of banking and acts within the framework of a regulated activity, and that the data subject whose personal data has been processed in his or her capacity as a customer of the controller was also an employee of that controller, has, in principle, no effect on the scope of the right of access conferred on that data subject by Article 15(1) of the GDPR. As regards the scope of that right, the regulation does not draw a distinction according to the nature of the activities of the controller or the status of the person whose personal data are being processed.

## VI. FREEDOM OF MOVEMENT: FREEDOM OF ESTABLISHMENT

**Judgment of the Court of Justice (First Chamber), 8 June 2023, *Prestige and Limousine*, C-50/21**

[Link to the full text of the judgment](#)

Reference for a preliminary ruling – Article 49 TFEU – Article 107(1) TFEU – Private-hire vehicles (PHVs) – Licencing scheme involving the issue, in addition to a licence to provide urban and interurban transport services throughout the national territory, of a second operating licence in order to be able to provide urban transport services in a metropolitan area – Limitation of the number of licences for PHV services to one thirtieth of the licences for taxi services

*Prestige and Limousine*, SL ('P&L') provides private-hire vehicle services ('PHV services') in the Barcelona metropolitan area (Spain). P&L and 14 other companies providing the same services, including companies linked to international online platforms, are challenging before the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain) the validity of a regulation of the Àrea Metropolitana de Barcelona (Barcelona Metropolitan Area, Spain) ('the AMB') relating to the organisation of such services in the Barcelona conurbation. In the context of the present dispute, that court has doubts as to the compatibility of the legislation in question with, in particular, the freedom of establishment.

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<sup>36</sup> Within the meaning of Article 15(1)(c) of the GDPR.

In addition to the national licence required to provide urban and interurban PHV services in Spain, that regulation requires, first, an additional licence to provide PHV services in the Barcelona conurbation. Secondly, it limits the number of PHV service licences to one thirtieth of the taxi service licences granted for that conurbation. According to the referring court, the essential aim of that legislation was to reduce competition between PHV services and taxi services.

To justify the measures at issue, the AMB invokes in particular the objective of ensuring the quality, safety and accessibility of taxi services. It points out that those services are considered to be a 'service of general interest' in so far as the taxi trade is highly regulated, with taxi services subject to licence quotas, regulated fares, an obligation to provide universal transport and accessibility for people with reduced mobility. In that regard, the AMB points out that the economic viability of that activity appears to be jeopardised by growing competition from PHV services.

By its judgment, the Court of Justice concludes that the requirement of an additional specific licence to operate PHV services in the Barcelona conurbation may, under certain conditions, be compatible with Article 49 TFEU. By contrast, that article precludes the limitation of the number of licences for PHV services, since that measure appears to go beyond what is necessary to achieve the objectives of sound management of transport, traffic and public space in that conurbation and of protection of the environment.

### *Findings of the Court*

First, the Court rejects the arguments put forward by the parties to the main proceedings in support of the alleged inadmissibility of the reference for a preliminary ruling. In the Court's view, the fact that the answers to be given to the questions referred clearly follow from its case-law does not have the effect of rendering such a reference inadmissible, but empowers it to answer, where appropriate, by way of an order.<sup>37</sup> Furthermore, the fact that a national supreme court has already considered, in the context of a dispute similar to that at issue in the main proceedings, the potential relevance of the provisions of EU law referred to by the referring court is not such as to render inadmissible a reference for a preliminary ruling seeking a ruling from the Court on the interpretation of those provisions, in accordance with Article 267 TFEU.

Second, having concluded that the two measures provided for by the legislation at issue do not appear to confer State aid, within the meaning of Article 107(1) TFEU, on undertakings providing taxi services, the Court examines the compatibility of those measures with Article 49 TFEU. In that regard, the Court notes, first of all, that they effectively limit access to the market for any newcomer, restricting the number of PHV service providers established in the AMB, and must therefore be classified as restrictions on the freedom of establishment guaranteed by that provision.

Next, as regards the existence of overriding reasons in the public interest capable of justifying such restrictions, the Court considers that the objective of sound management of transport, traffic and public space in a conurbation and the objective of protecting the environment in such a conurbation may constitute such reasons. However, that is not the case as regards the objective of ensuring the economic viability of taxi services, since the preservation of a balance between the two modes of urban transport in question is a matter of purely economic considerations. The fact that taxi services are described in Spanish law as a 'service of general interest' is irrelevant in that regard. While the characteristics put forward by the AMB certainly show that the regulation of taxi services is intended, inter alia, to ensure the quality, safety and accessibility of taxi services, for the benefit of users, it appears, by contrast, that the measures at issue in the main proceedings do not in themselves pursue those objectives. The Court also finds that it does not appear that taxi service providers have been entrusted with a specific public service task capable of falling, where appropriate, within the concept of a service of general economic interest (SGEI) within the meaning of Article 106(2) TFEU.

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<sup>37</sup> See Article 99 of the Rules of Procedure of the Court.



Finally, the Court analyses the proportionality of the requirement for an additional licence and the limitation of PHV licences to one thirtieth of taxi licences. It concludes that the first measure appears appropriate for achieving the objectives mentioned and can be considered necessary to achieve them. Given the nature of the service in question and the impossibility of distinguishing between vehicles used to provide PHV services and those used privately over a vast urban area, it may be considered that an a posteriori control would come too late to guarantee its real effectiveness. The requirement of an additional licence may thus be justified, provided, however, that such licencing is based on objective, non-discriminatory criteria which are known in advance and that exclude any arbitrariness and do not duplicate controls which have already been carried out under the national licencing procedure, but which meet the particular needs of the conurbation concerned. It is for the referring court to determine whether those conditions are satisfied in the present case.

By contrast, the second measure does not appear to guarantee the attainment of the objectives of sound management of transport, traffic and public space. First of all, the arguments put forward in favour of PHV services, which seek to demonstrate that those services can in fact promote the attainment of those objectives, in particular by reducing the use of private cars, by the contribution of those services to the objective of efficient and inclusive mobility, through their level of digitalisation and flexibility in the provision of services, and by the use of alternative energy vehicles, encouraged by the State rules on PHV services, have not been overturned before the Court.

Next, it cannot be ruled out that any impact of the PHV fleet on transport, traffic and public space in the Barcelona conurbation could adequately be limited by measures that are less restrictive than a restriction on licences. Thus, the Court refers, by way of example, to measures for the organisation of PHV services, limitations on those services during certain time periods or restrictions on traffic in certain areas. The Court added that it could not be ruled out that the objective of protecting the environment in the Barcelona conurbation could be achieved by measures less prejudicial to the freedom of establishment, such as emission limits applicable to vehicles circulating in that conurbation.

## VII. BORDER CONTROLS, ASYLUM AND IMMIGRATION: IMMIGRATION POLICY

**Judgment of the Court of Justice (Second Chamber), 29 June 2023, Stadt Frankfurt am Main and Stadt Offenbach am Main (Renewal of a residence permit in the second Member State), C-829/21 and C-129/22**

[Link to the full text of the judgment](#)

Reference for a preliminary ruling – Immigration policy – Status of third-country nationals who are long-term residents – Directive 2003/109/EC – Second subparagraph of Article 9(4), Article 14(1), second subparagraph of Article 15(4), Article 19(2) and Article 22 – Right of third-country nationals to long-term resident status in a Member State – Grant by the first Member State of a ‘long-term resident’s EU residence permit’ of unlimited duration – Third-country national absent from the territory of the first Member State for a period of more than six years – Consequent loss of entitlement to long-term resident status – Application for renewal of a residence permit issued by the second Member State pursuant to the provisions of Chapter III of Directive 2003/109/EC – Application rejected by the second Member State because of the loss of that entitlement – Conditions

TE, a Ghanaian national, and EF, a Pakistani national, obtained long-term resident’s EU residence permits in Italy bearing, inter alia, the word ‘*illimitata*’ (unlimited (duration)). In 2013 and 2014 respectively, they entered Germany from Italy. On the basis of the long-term resident status

conferred on them in Italy, the German authorities granted them, in accordance with German legislation on residence of foreign nationals,<sup>38</sup> residence permits that were valid for one year.

Subsequently, the German authorities rejected applications by TE and EF for renewal of their residence permits. TE and EF challenged the non-renewal before the courts. In particular, in the case of EF, the refusal to renew was based on the ground, provided for in the second subparagraph of Article 9(4) of Directive 2003/109,<sup>39</sup> that he was no longer entitled to long-term resident status in Italy because he had not resided in that Member State for more than six years. The same ground was raised in TE's case in proceedings in which she challenged the rejection of her application for renewal.

The German courts seised of the actions brought by TE and EF, respectively, namely the Hessischer Verwaltungsgerichtshof (Higher Regional Court, Hesse, Germany) and the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany), decided to refer a number of questions of interpretation of Directive 2003/109 to the Court of Justice.

In its judgment, the Court clarifies, *inter alia*, the conditions governing a decision, such as the decisions at issue in the main proceedings, refusing to renew a residence permit of a third-country national on the ground that that person was absent for a period of more than six years from the territory of the Member State that granted long-term resident status and was, therefore, no longer entitled to that status.

### *Findings of the Court*

First of all, the Court notes that entitlement to long-term resident status in the 'first Member State'<sup>40</sup> is a mandatory precondition that must be met by a third-country national wishing to obtain or renew a residence permit in the 'second Member State'<sup>41</sup> under the provisions of Chapter III of Directive 2003/109. Consequently if the second Member State finds that the third-country national concerned is no longer entitled to maintain long-term resident status in the first Member State on the ground, in particular, as provided for in the second subparagraph of Article 9(4) of Directive 2003/109, that he or she has been absent from the territory of the first Member State for a period of more than six years, that finding precludes the renewal of such a residence permit.

Next, as regards the relevant date for assessment of the condition relating to the right to long-term resident status, the Court states that this is the date on which the third-country national concerned lodged his or her application for renewal of the residence permit pursuant to the provisions of Chapter III of Directive 2003/109. However, there is nothing to prevent the second Member State from adopting a new decision refusing that renewal or withdrawing the residence permit pursuant to Article 22 of that directive if it considers that the loss of entitlement to long-term resident status in the first Member State occurred during the administrative procedure or judicial proceedings concerning the renewal application.

Lastly, the Court states that the burden of proof of entitlement to long-term resident status in the first Member State lies, as a matter of principle, with the third-country national concerned. It follows however from Directive 2003/109<sup>42</sup> that a long-term resident's EU residence permit gives rise to a presumption that that third-country national remains entitled to that status. Admittedly, that

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<sup>38</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal Territory) of 30 July 2004 (BGBl. 2004 I, p. 1950), in the version applicable to the disputes in the main proceedings.

<sup>39</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 132, p. 1).

<sup>40</sup> According to Article 2(c) of Directive 2003/109, this is the Member State which for the first time granted long-term resident status to a third-country national.

<sup>41</sup> According to Article 2(d) of Directive 2003/109, the term refers to 'any Member State other than the one which for the first time granted long-term resident status to a third-country national and in which that long-term resident exercises the right of residence'.

<sup>42</sup> Specifically, the first subparagraph of Article 15(4) of Directive 2003/109, read in the light of recital 11 thereof.

presumption is not irrebuttable, since the second Member State may find it necessary to examine one of the grounds for loss of long-term resident status referred to in Article 9 of Directive 2003/109. Nevertheless, any such challenge is subject to a finding that there is sufficiently specific and consistent evidence that one of those grounds may apply.

In that context, the Court specifies the checks which the second Member State must carry out, where such evidence exists, in the light of the ground provided for in the second subparagraph of Article 9(4) of Directive 2003/109, seeking, if necessary, the assistance of the first Member State, in accordance with the principle of sincere cooperation.<sup>43</sup> On the one hand, the third-country national must first be invited to produce proof of his or her presence (if any) in the territory of the first Member State during the six-year period referred to in that provision, a presence in that territory of a total duration of only a few days being sufficient to prevent the loss of entitlement to long-term resident status. On the other hand, in the event of any absence from that territory for a period of more than six years, the second Member State must check, in accordance with the third subparagraph of Article 9(4) of Directive 2003/109, whether the first Member State has made use of the option to provide that, 'for specific reasons', the long-term resident is to maintain his or her status in that Member State in the event of such an absence and, if that is the case, whether such a specific reason is established.

## VIII. JUDICIAL COOPERATION IN CRIMINAL MATTERS

### 1. EUROPEAN ARREST WARRANT

**Judgment of the Court of Justice (Grand Chamber), 6 June 2023, O. G. (European arrest warrant issued against a third-country national), C-700/21**

[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 – Grounds for optional non-execution of the European arrest warrant – Article 4(6) – Objective of social rehabilitation – Third-country nationals staying or residing on the territory of the executing Member State – Equal treatment – Article 20 in the Charter of the Fundamental Rights of the European Union

O.G., a Moldovan national, was convicted and sentenced in Romania to five years' imprisonment for tax evasion and misappropriation of funds due for payment of income tax and value added tax (VAT), committed between September 2003 and April 2004. On 13 February 2012, the Judecătoria Braşov (Court of First Instance, Braşov, Romania) issued a European arrest warrant against O.G., who in the meantime had moved to Italy, for the purposes of executing a custodial sentence.

By a first judgment of 7 July 2020, the competent Court of Appeal<sup>44</sup> ordered that O.G. be surrendered to the issuing judicial authority. O.G. appealed against that decision before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which set aside that judgment and referred the case back to the Court of Appeal.

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<sup>43</sup> This principle is set out in Article 4(3) TEU.

<sup>44</sup> Corte d'appello di Bologna (Court of Appeal, Bologna, Italy; 'the Court of Appeal').

Under EU law,<sup>45</sup> Member States may only refuse to execute a European arrest warrant on the grounds laid down in Framework Decision 2002/584,<sup>46</sup> which include optional grounds for non-execution, namely grounds that the Member States have the power – but not the obligation – to make provision for when transposing that framework decision. One of those grounds concerns the option for the executing judicial authority to refuse to execute that warrant if it has been issued for the purpose of executing a custodial penalty where the requested person is staying in, or is a national or a resident of the executing Member State, and that State undertakes to execute the sentence or detention order in accordance with its domestic law.<sup>47</sup>

The Court of Appeal held that the law transposing that ground of optional non-execution into Italian law limits the option of refusing surrender to Italian nationals and nationals of other Member States only, to the exclusion of third-country nationals, even where the latter prove that they have established stable economic, occupational and emotional ties in Italy.

Finding that O.G.'s stable family and employment situation in Italy was sufficiently proven, that court raised questions as to the constitutionality of that law before the Corte costituzionale (Constitutional Court, Italy), which is the referring court in this case. The referring court asks whether, by imposing surrender on third-country nationals residing permanently in Italy for the purposes of executing a custodial sentence abroad, that law improperly restricts the scope of the ground of optional non-execution laid down in Article 4(6) of the framework decision, the objective of which is to ensure the social rehabilitation of the sentenced person after the end of his or her sentence, which presupposes the maintenance of the sentenced person's family and social connections.

The referring court considers that it is necessary, before ascertaining whether the national law at issue in the main proceedings is consistent with the Italian constitution, to examine whether it complies with EU law.

Asked by the referring court as to the interpretation of Article 4(6) of the framework decision, the Court of Justice, sitting as the Grand Chamber, held that that provision precludes a law of a Member State which, in transposing it, excludes, absolutely and automatically, any third-country national staying or residing in the territory of that Member State from benefiting from the ground for optional non-execution of a European arrest that it lays down, without the executing judicial authority being able to assess the connections that that national has with that Member State. It also clarifies the nature of the assessment that that authority must undertake to determine whether it is appropriate to refuse to execute the European arrest warrant issued against a third-country national who is resident in the executing Member State, and as to the elements which are capable of showing that there are, between that person and the executing Member State, connections demonstrating sufficient integration into that State such that the execution in that Member State of the custodial sentence pronounced against that person in the issuing Member State will contribute to increasing the chances of social rehabilitation after that sentence has been executed.

### *Findings of the Court*

As a first step, the Court recalls that, in accordance with the principle of mutual recognition, the execution of the European arrest warrant constitutes the rule. The refusal of execution, which is only possible on the grounds of mandatory or optional non-execution laid down in the framework decision, is intended to be an exception, which must be interpreted strictly.

As regards the grounds for optional non-execution of the European arrest warrant listed in the framework decision, it is clear from the case-law of the Court that, when transposing that framework

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<sup>45</sup> Article 1(2) and Articles 4 and 4a of 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).

<sup>46</sup> Hereinafter, 'the framework decision'.

<sup>47</sup> Optional ground for non-execution laid down in Article 4(6) of the framework decision.

decision into national law, the Member States have a margin of discretion. Therefore, they are free to transpose those grounds into their domestic law or not to do so. They may also choose to limit the situations in which the executing judicial authority may refuse to execute a European arrest warrant, thus facilitating the surrender of requested persons, in accordance with the principle of mutual recognition.

There are, however, limits to the discretion available to Member States when transposing a ground for optional non-execution laid down in Article 4(6) of the framework decision.

In the first place, a Member State choosing to transpose that ground must comply with the fundamental rights and principles of EU law, which include the principle of equality before the law, guaranteed by Article 20 in the Charter of the Fundamental Rights of the European Union,<sup>48</sup> which requires that similar situations must not be treated differently and that different situations must not be treated in the same manner, unless such different treatment is objectively justified.

The requirement that situations must be comparable, for the purpose of determining whether there is a breach of the principle of equality before the law, must be assessed in the light, in particular, of the subject matter and purpose of the act that makes the distinction in question, taking into account the principles and objectives of the field to which the act relates.

The Court notes, in that regard, that the difference in treatment resulting from the national law at issue in the main proceedings between Italian nationals and those of other Member States, on the one hand, and third-country nationals on the other hand, was established with a view to transposing Article 4(6) of framework decision, which makes no distinction depending on whether the person, who is the subject of the European arrest warrant and who is not a national of the executing Member State, is or is not a national of another Member State.

It follows from the wording of that provision and the objective that it pursues that it cannot be assumed that a third-country national, who is the subject of such a European arrest warrant and staying or resident in the executing Member State, is necessarily in a situation that is different from that of a national of that Member State or that of a national of another Member State staying or resident in the executing Member State and is the subject of such a warrant. On the contrary, those persons may be in comparable situations, for the purpose of applying the ground of optional non-execution provided for in that provision, when they are integrated to a certain extent in the executing Member State.

Therefore, a national law transposing Article 4(6) of the framework decision does not comply with Article 20 of the Charter if it treats differently, on the one hand, its own nationals and other citizens of the Union and, on the other hand, third-country nationals, by refusing the latter, absolutely and automatically, the benefit of the ground for optional non-execution provided for in the framework decision, even where those third-country nationals are staying or resident in the territory of that Member State and without account being taken of their degree of integration within the society of that Member State. That difference of treatment cannot be regarded as objectively justified.

However, there is nothing to preclude a Member State, when transposing that provision into its domestic law, from making the benefit of the ground of optional non-execution that that provision lays down subject to the condition that that national has stayed or resided continuously in that Member State for a minimum period of time, provided that that condition does not go beyond what is necessary to ensure that the requested person is integrated to a certain degree in the executing Member State.

In the second place, a transposition of Article 4(6) of the framework decision cannot have the effect of depriving the executing judicial authority of the discretion necessary to be able to decide whether or

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<sup>48</sup> 'The Charter'.



not, having regard to the intended objective of social rehabilitation, to refuse to execute the European arrest warrant.

A law such as the one in issue undermines the objective of social rehabilitation by depriving the executing judicial authority of the power to assess whether the connections of the third-country national referred to in an European arrest warrant to the executing Member State are sufficient to decide that the execution of the sentence in that Member State would increase the chances of rehabilitation after the end of that sentence.

As a second step, the Court states that, in order to assess whether it is appropriate to refuse to execute the European arrest warrant issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must make an overall assessment of all of the specific elements characterising the situation of the requested person capable of showing that there are connections between that person and the executing Member State that may lead to the conclusion that that person is sufficiently integrated into that State. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State.

In particular, where the requested person has established the centre of his or her family life and his or her interests in the executing Member State, account must be taken of the fact that the social rehabilitation of that person after he or she has served his or her sentence will be assisted by the fact that he or she may maintain regular and frequent contact with his or her family and persons close to him or her.

## 2. RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

**Judgment of the Court of Justice (Grand Chamber), 22 June 2023, K.B. and F.S. (Raising ex officio of an infringement in criminal proceedings), C-660/21**

[Link to the full text of the judgment](#)

Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in criminal matters – Directive 2012/13/EU – Articles 3 and 4 – Obligation for the competent authorities to inform suspects and accused persons promptly of their right to remain silent – Article 8(2) – Right to invoke a breach of that obligation – National legislation prohibiting the trial court from raising such a breach of its own motion – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union

On 22 March 2021, K.B. and F.S. were questioned by police officers and arrested in the act of committing theft of fuel.

The French court before which criminal proceedings were brought against K.B. and F.S. found that certain investigative acts had been carried out, and certain self-incriminating statements taken, before K.B. and F.S. had been informed of their rights, contrary to the national law <sup>49</sup> transposing Articles 3 and 4 of Directive 2012/13. <sup>50</sup> Owing to the delay in placing them in custody and informing them of

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<sup>49</sup> Article 63-1 of the French Code of Criminal Procedure provides in particular that a person who is placed in custody is to be immediately informed by a senior police officer or, under the latter's supervision, by a police officer, that he or she has the right, at the hearings, after having stated his or her identity, to make statements, to answer the questions put to him or her or to remain silent.

<sup>50</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

their rights, in particular the right to remain silent, that court considered that the right not to incriminate oneself had been infringed. In those circumstances, the vehicle search, the suspects' detention in custody and all the consequential acts should, in principle, be annulled. However, in French criminal law,<sup>51</sup> pleas of procedural invalidity, such as breach of the obligation to inform a person of the right to remain silent at the time when that person is placed in custody, must be raised by the person concerned or that person's lawyer before any defence on the merits. Neither the suspects nor their lawyer raised a plea of invalidity alleging breach of that obligation before putting forward a defence on the merits.

Furthermore, the referring court states that, according to the Cour de cassation (Court of Cassation, France), trial courts are prohibited from raising of their own motion a plea of invalidity of the procedure, apart from lack of jurisdiction, since, as in the present case, the accused person, who has the right to be assisted by a lawyer when he or she appears or is represented before a trial court, can plead such invalidity before mounting a defence on the merits, and, moreover, can do so on appeal if he or she did not appear or was not represented at first instance.

In that context, the referring court asked the Court of Justice whether the prohibition on it raising of its own motion a breach of an obligation such as the obligation, laid down in Articles 3 and 4 of Directive 2012/13, to inform suspects and accused persons promptly of their right to remain silent, is compatible with EU law.

In its judgment, the Court, sitting as the Grand Chamber, replies that Articles 3 and 4 and Article 8(2) of Directive 2012/13, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), do not preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion, with a view to the annulment of the procedure, a breach of the obligation imposed on the competent authorities to inform suspects or accused persons promptly of their right to remain silent, where those suspects or accused persons have not been deprived of a practical and effective opportunity to have access to a lawyer,<sup>52</sup> if necessary having obtained legal aid,<sup>53</sup> and where they, like their lawyers, if any, have had a right of access to their file and the right to invoke that breach within a reasonable period of time.

#### *Findings of the Court*

The Court recalls that Directive 2012/13<sup>54</sup> is based on the rights set out, inter alia, in Articles 47 and 48 of the Charter and seeks to promote those rights with regard to suspects or accused persons in criminal proceedings. The right to remain silent is safeguarded not only by Article 48 of the Charter, relating to the presumption of innocence and right of defence, but also by the second paragraph of Article 47 of the Charter, relating to the right to a fair hearing.

Article 3(1)(e) and (2) and Article 4(1) and (2) of Directive 2012/13 lay down an obligation, for the competent authorities of the Member States, to inform suspects or accused persons promptly of their rights, in particular the right to remain silent. In any event, that information must be provided at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

Under Article 8(2) of Directive 2012/13, Member States must ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the

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<sup>51</sup> In this case, Article 385 of the Code of Criminal Procedure.

<sup>52</sup> In accordance with Article 3 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1).

<sup>53</sup> As provided in Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016 L 297, p. 1).

<sup>54</sup> See recital 14 of Directive 2012/13.

possible failure or refusal of the competent authorities to provide information in accordance with that directive. Since that provision is particularly intended to be applied in a situation in which information about the right to remain silent has been given late, suspects or accused persons or their lawyers must be able to challenge that failure of communication.

The provision referred to above, however, specifies neither the procedure under and time limits within which suspects and accused persons, and their lawyers, if any, may invoke a breach of the obligation to inform such suspects and accused persons promptly of their right to remain silent, nor the possible procedural consequences of a failure to invoke such a breach, such as the power, for the trial court in a criminal case, to raise such a breach of its own motion with a view to the annulment of the procedure. Member States thus have some leeway to establish that procedure and those consequences.

Nevertheless, when implementing Article 3(1)(e), Article 4(1) and Article 8(2) of Directive 2012/13, the Member States must, in accordance with Article 51(1) of the Charter, ensure that the requirements arising both from the right to an effective remedy and to a fair hearing laid down in the first and second paragraphs of Article 47 of the Charter, and the rights of defence laid down in Article 48(2) of the Charter, to which specific expression is given by those provisions of Directive 2012/13, are respected.

In that regard, the Court notes that, according to the explanations given by the French Government, French criminal law<sup>55</sup> allows suspects or accused persons and also their lawyers, if any, to invoke at any time, between their being placed in custody and the submission of the defence on the merits, any breach of the obligation to inform suspects or accused persons promptly of their right to remain silent, and it should be made clear that both suspects and accused persons as well as their lawyers have a right of access to the file and, in particular, to the record of notification of the custodial measure and the associated rights.

It is open to the Member States, by virtue of the leeway given to them by Directive 2012/13, to limit the time within which such a breach may be invoked to the stage preceding submission of the defence on the merits. In particular, the prohibition on the trial court raising that breach of its own motion with a view to the annulment of the procedure respects, in principle, the rights affirmed by the Charter, as long as the suspects, the accused persons or their lawyers had a practical and effective opportunity to invoke the breach concerned and had a reasonable period of time within which to do so as well as access to the file.

However, that conclusion applies only in so far as, throughout the period within which those persons could invoke an infringement of Article 3(1)(e) and Article 4(1) of Directive 2012/13, they – practically and effectively – had the right of access to a lawyer, as laid down in Article 3 of Directive 2013/48 and as facilitated by the system of legal aid provided for by Directive 2016/1919.

The fact that suspects and accused persons must be offered a practical and effective opportunity under national law to consult a lawyer does not however preclude them, if they waive that opportunity, from having, in principle, to bear the possible consequences of that waiver where it has been given in accordance with Directive 2013/48. In that regard, the suspect or accused person must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right of access to a lawyer and the possible consequences of waiving it, and the waiver must be given voluntarily and unequivocally.

Lastly, the Court notes that, under the case-law of the European Court of Human Rights, where a procedural defect has been identified, it falls to the domestic courts to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being *prima facie* incompatible with the requirements

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<sup>55</sup> In particular, Article 63-1(3), Article 63-4-1 and Article 385 of the Code of Criminal Procedure.

of a fair trial according to Article 6 of the European Convention on Human Rights.<sup>56</sup> Thus, where a suspect has not been informed in due time of the privilege against self-incrimination and the right to remain silent, it is necessary to assess whether, notwithstanding that failure, the criminal proceedings as a whole can be considered fair, taking into account a series of factors, including whether the statements taken without such information having been given formed an integral or significant part of the probative evidence, and the strength of the other evidence in the case.<sup>57</sup>

## IX. COMPETITION

### 1. STATE AID

#### **Judgment of the General Court (Ninth Chamber), 14 June 2023, Ryanair and Airport Marketing Services v Commission, T-79/21**

[Link to the judgment as published in extract form](#)

State aid – Agreements concluded with the airline Ryanair and its subsidiary Airport Marketing Services – Marketing services – Decision declaring the aid incompatible with the internal market and ordering its recovery – Advantage – ‘Real need’ test – Articles 41 and 47 of the Charter of Fundamental Rights – Right of access to the file – Right to be heard

In 2017, the European Commission received a complaint from Air France alleging that the airline Ryanair DAC had received unlawful State aid to support its air transport operations to and from Montpellier airport.

At the end of the formal investigation procedure, the Commission found that State aid had been granted to Ryanair and its subsidiary Airport Marketing Services Ltd (‘AMS’) in the form of marketing services agreements concluded by those companies with the Association de promotion des flux touristiques et économiques (Association for the Promotion of Tourist and Economic Flows) (‘the APFTE’), the decisions of which were imputable to the French State. The Commission found that the aid thus granted was unlawful and incompatible with the internal market and, by decision of 2 August 2019,<sup>58</sup> ordered France to recover it.

Ryanair and AMS brought an action seeking annulment of that decision. That action has nevertheless been dismissed by the General Court. In those circumstances, the Court provides clarification on the applicability of the market economy operator test (‘the “MEO” test’) in order to assess whether a State measure confers an advantage for the purposes of Article 107(1) TFEU.

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<sup>56</sup> ECtHR, 28 January 2020, Mehmet Zeki Çelebi v. Turkey, CE:ECHR:2020:0128JUD002758207, § 51.

<sup>57</sup> See ECtHR, 13 September 2016, Ibrahim and Others v. the United Kingdom, CE:ECHR:2016:0913JUD005054108, §§ 273 and 274.

<sup>58</sup> Commission Decision (EU) 2020/1671 of 2 August 2019 on State aid SA.47867 2018/C (ex 2017/FC) granted by France to Ryanair and Airport Marketing Services (OJ 2020 L 388, p. 1; ‘the contested decision’).

### *Findings of the Court*

In support of their action for annulment, the applicants, Ryanair and AMS, challenged, *inter alia*, the analysis in the contested decision that the marketing services agreements concluded with the APFTE conferred an economic advantage on them.

In that regard, the Court recalls that only State measures which are likely directly or indirectly to favour certain undertakings or which are to be regarded as an economic advantage which the undertaking who is the beneficiary thereof would not have obtained under normal market conditions may be classified as State aid for the purposes of Article 107(1) TFEU. The assessment of the conditions under which such an advantage was conferred is carried out, as a rule, by applying the 'MEO' test.

In the contested decision, the Commission had nevertheless considered that the 'MEO' test was inapplicable for two reasons relating, in essence, to the fact that the APFTE had concluded the marketing services agreements as a public authority and to the fact that the purchase of those services by the APFTE did not meet a real need of that association.

As was claimed by the applicants, neither of those reasons was such as to rule out the applicability of the market economy operator principle in the present case.

As regards, first, the reason relating to the fact that the APFTE was acting as a public authority, it is apparent from the case-law that, although the application of the 'MEO' test must be examined without reference to public policy objectives, the pursuit of such objectives does not preclude the applicability of that test.

As regards, secondly, the reason relating to the purchase of marketing services which did not meet a real need of the APFTE, the Court observes that, in order to examine whether there is a real need on the part of the State to purchase goods and services, it is necessary, by definition, to assess whether a private operator in a situation as close as possible to that of the State would have adopted the same conduct under normal market conditions. Such an assessment therefore falls within the scope of the 'MEO' test.

Accordingly, in concluding that the 'MEO' test was not applicable in the present case, the Commission had erred in law.

However, in so far as, first, the Commission had also examined, in the contested decision, whether the purchase of marketing services met a real need of the APFTE, and, secondly, its assessment in that regard was not vitiated by error, the error of law found by the Court was not such as to lead to the annulment of that decision.

In that regard, the Court finds, in the first place, that the ambiguity in the analysis of the existence of an economic advantage in the contested decision was not such as to vitiate that decision with a contradiction liable to affect its validity, in so far as, in accordance with the case-law, the applicants were in a position to ascertain the real reasons for it and to challenge its merits, *inter alia*, in the context of their action for annulment. In rejecting, in the second place, the various complaints disputing the lack of a real need on the part of the APFTE to purchase the applicants' marketing services, the Court concludes that that ground was capable of providing a basis for the operative part of the contested decision as regards the existence of an economic advantage which the applicants would not have obtained under normal market conditions.

As the other pleas raised by the applicants have also proved to be unfounded, the Court dismisses the action in its entirety.



## 2. CONCENTRATIONS

### Judgment of the General Court (Third Chamber, Extended Composition), 14 June 2023, Polwax v Commission, T-585/20

Competition – Concentrations – Upstream market for slack wax – Downstream market for paraffin waxes – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Absence of commitment to supply slack wax – Vertical effects – Foreclosure of the input market

Polski Koncern Naftowy Orlen S.A. ('Orlen') and Grupa Lotos S.A. ('Lotos') are two vertically integrated undertakings that are mainly active in the refining and marketing of fuel and related products in Poland. Orlen is also active in those sectors in Czechia, Lithuania and Germany.

On 3 July 2019, Orlen notified the Commission of a proposed concentration consisting of the acquisition of sole control of Lotos. Taking the view that the transaction raised serious doubts as to its compatibility with the internal market, the Commission decided to open an in-depth investigation. Upon the conclusion of that investigation, the concentration was declared compatible with the internal market and with the Agreement on the European Economic Area (EEA), subject to Orlen's compliance with certain commitments.<sup>59</sup>

The Polish company, Polwax SA, which produces and markets paraffin waxes and paraffin products, brought an action before the General Court for annulment of that decision. However, that action was dismissed by the Third Chamber, Extended Composition, of the General Court.

#### *Findings of the Court*

As a preliminary point, the General Court rejects Polwax's request that an expert's report be ordered concerning the effects of the concentration on competition.

While it is true that the General Court may adopt a measure of inquiry at any stage in the proceedings, the fact remains that a request to that effect must be rejected where it goes beyond the subject matter of the measures of inquiry referred to in Article 91 of the Rules of Procedure of the General Court, which consists of allowing the accuracy of the factual claims made by a party in support of its pleas in law to be proved. However, given that the purpose of the expert's report requested by Polwax was, in reality, to re-examine the assessments contained in the Commission's decision as to the compatibility of the proposed concentration with Regulation No 139/2004,<sup>60</sup> the General Court would have exceeded its jurisdiction by adopting such a measure.

On the substance, Polwax claimed in particular that the Commission had relied on an incorrect definition of the relevant markets for the purposes of its assessment of the concentration under Article 2 of Regulation No 139/2004.

As regards the relevant markets, the Commission found that Lotos and Orlen both produce slack wax, which is primarily used as a raw material for paraffin waxes. Having regard to the fact that Lotos sells slack wax while Orlen uses it for its own production of paraffin waxes, the Commission held that the product markets affected by the concentration comprised an upstream market consisting of the supply of slack wax in Poland and a downstream market consisting of the supply of paraffin waxes in the EEA.

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<sup>59</sup> Commission Decision of 14 July 2020 (case M.9014), adopted on the basis of Article 8(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

<sup>60</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

In that regard, Polwax appeared to criticise the Commission for not having taken account of the existence of three different markets for 'light-grade' slack wax, 'medium-grade' slack wax and 'heavy-grade' slack wax. Nevertheless, such an objection must, in any event, be dismissed as unfounded.

In the light of the method set out in the Commission Notice on the definition of relevant market,<sup>61</sup> it was for Polwax to adduce, in support of such an objection, compelling indications showing that the various types of slack wax were not sufficiently substitutable on the demand and supply side for them to belong to the same market. As regards the interchangeability of the different types of slack wax from the point of view of demand, Polwax merely put forward simple assertions. What is more, the question of possible supply side substitutability had not even been addressed by Polwax.

In support of its action, Polwax also claimed that the Commission had erred in its assessment of the effects of the concentration on the relevant markets under Article 2(1)(b) of Council Regulation (EC) No 139/2004. In that regard, Polwax challenged, first, the failure to examine the horizontal effects of the concentration on the slack wax market and, second, the merits of the examination of the vertical effects of the concentration on the paraffin waxes market.

First, the General Court rejects the objection alleging failure to examine the horizontal effects of the concentration on the slack wax market. After noting that horizontal mergers may significantly impede effective competition on the market as a result of the creation or strengthening of a dominant position, the General Court emphasises that the concentration at issue could not have resulted in a reduction in supply on the slack wax market, since it is not disputed that Orlen did not market the slack wax that it produced. From that point of view, the concentration could not lead to the elimination of an important competitive constraint on that market or the creation of increased market power for the undertakings present on that market, nor would it be likely to facilitate coordination on the market.

Moreover, the Commission cannot be criticised for having failed to examine the possibility that the concentration would produce anti-competitive effects as a result of the combination of an undertaking already present on the market, Lotos, and a potential competitor, Orlen. In order for the concentration to have significant horizontal effects, it would have been necessary for the possibility of Orlen entering the slack wax market on the supply side to constitute, prior to that concentration, a significant constraint on the suppliers currently present on that market. However, the existence of such a constraint was excluded since Orlen was a purchaser on that market.

Secondly, the General Court also rejects the complaint alleging an incorrect examination of the vertical effects of the concentration on the paraffin waxes market.

In that regard, Polwax disputed in particular the Commission's finding that, following the acquisition of Lotos, Orlen would not have the ability to pursue a strategy of foreclosing access to slack wax on the paraffin waxes market.

On that point, the General Court notes that, when assessing the likelihood of an anti-competitive input market foreclosure scenario, the Commission examines, first, whether the merged entity would, post-merger, have the ability to significantly foreclose access to inputs; second, whether it would have the incentive to do so; and, third, whether a market foreclosure strategy would have a significant negative impact on downstream competition. As those three conditions are cumulative, the absence of any one of them is sufficient to rule out the risk of input foreclosure.

More specifically, as regards the first condition, the Commission concluded that Orlen has no ability to foreclose access to slack wax, since, post-merger, more than 60 to 70% of the market would remain available as a source of supply of slack wax.

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<sup>61</sup> Commission Notice on the definition of relevant market for the purposes of [EU] competition law (OJ 1997 C 372, p. 5).

In that regard, the General Court finds that the Commission was correct to include slack wax imported into Poland in its definition of the slack wax market. Consequently, the Commission was also correct to find that a substantial proportion of the supply of slack wax on the market would be unaffected by the concentration. The existence of imports of slack wax into Poland also made it unlikely that, post-merger, Orlen would have the ability to foreclose access to the slack wax market. In any event, Polwax remained able to switch to alternative sources of supply, without Orlen being able to have a negative influence on the overall availability of inputs to the downstream market in terms of price or quality.

On that basis, the Commission was right to find that the first of the conditions to be cumulatively met in order for input market foreclosure to be present was not satisfied in the case at hand.

Since the other objections raised by Polwax have also proven to be unfounded, the General Court dismisses the action in its entirety.

## X. APPROXIMATION OF LAWS

### 1. EU TRADE MARK

**Judgment of the General Court (Sixth Chamber), 7 June 2023, Société des produits Nestlé v EUIPO – European Food (FITNESS), T-519/22**

[Link to the full text of the judgment](#)

EU trade mark – Procedure for the revocation of decisions or the cancellation of entries – Revocation of a decision containing an obvious error attributable to EUIPO – Article 103(1) of Regulation (EU) 2017/1001 – No obvious error

Société des Produits Nestlé SA has, since 20 November 2001, been the proprietor of the EU word mark FITNESS, registered with the European Union Intellectual Property Office (EUIPO) in respect of various goods.<sup>62</sup> On 2 September 2011, the company European Food SA filed an application for a declaration of invalidity of that mark,<sup>63</sup> which was rejected.

During the appeal proceedings, European Food submitted further evidence in support of its claim. However, the Fourth Board of Appeal of EUIPO rejected that evidence as belated, without taking it into consideration. The General Court, before which an action was brought,<sup>64</sup> went on to annul that decision and referred the case back to the Second Board of Appeal of EUIPO which, taking that evidence into account, considered that the contested mark was descriptive. Nevertheless, that decision was also annulled by a second judgment of the Court.<sup>65</sup> The case was therefore referred back to the First Board of Appeal of EUIPO, which, after having exercised its discretion, found that

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<sup>62</sup> Goods in Classes 29, 30 and 32 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.

<sup>63</sup> Under Article 52(1)(a) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), read in conjunction with Article 7(1)(b) and (c) of that regulation (now Article 59(1)(a) and Article 7(1)(b) and (c) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

<sup>64</sup> Judgment of 28 September 2016, European Food v EUIPO – Société des produits Nestlé (FITNESS) (T-476/15, EU:T:2016:568).

<sup>65</sup> Judgment of 10 October 2019, Société des produits Nestlé v EUIPO – European Food (FITNESS) (T-536/18, not published, EU:T:2019:737).

European Food had not adequately justified the late submission of the evidence and, consequently, dismissed the action.

That last decision was revoked ('the revoked decision') by the decision of 27 June 2022 ('the contested decision') of the First Board of Appeal of EUIPO on account of several errors of law.

In the present judgment, the Court examines the application of Article 103(1) of Regulation 2017/1001 relating to EUIPO's power to revoke its decisions, and implements the criteria previously set out in the case-law.<sup>66</sup>

### *Findings of the Court*

As a first step, the Court examines the Board of Appeal's finding that it was clearly erroneous to rely on Rule 50(1) of Regulation No 2868/95,<sup>67</sup> relating to opposition proceedings, and to apply it by analogy in the context of invalidity proceedings. In that connection, it notes that, although it is common ground that that rule is not applicable in the context of invalidity proceedings based on absolute grounds for invalidity, neither the contested decision nor the revoked decision shows that the reference to that rule may have had an influence on the findings of the Board of Appeal as regards the possibility of accepting the newly submitted evidence to the extent that the error committed did not allow the operative part of the revoked decision to be maintained without a new analysis.

The conclusion reached by the Board of Appeal in the revoked decision that, in the absence of any acceptable justification for the late submission of the evidence, it was obliged to exercise its discretion negatively and not accept the additional evidence flows from the second annulment judgment of the Court.<sup>68</sup> In order to reach that conclusion, the Board of Appeal referred first of all to that judgment, from which it was apparent that evidence submitted late was not automatically admissible, and that it was for the party presenting that evidence to justify why it had been submitted at that stage of the proceedings and demonstrate that submission during the proceedings before the Cancellation Division was impossible. Next, it found that, although evidence submitted for the first time at the appeal stage was *prima facie* pertinent, there was nothing to demonstrate that it was not possible to submit it before the Cancellation Division. Last, it considered that the Cancellation Division's finding that the evidence presented initially was insufficient could not be regarded as a new factor justifying the submission of additional evidence.

It is apparent from those considerations that it has not been shown that the incorrect reference to Rule 50(1) of Regulation No 2868/95 had an impact on the reasoning followed by the Board of Appeal in the revoked decision or on its finding.

As a second step, the Court examines the Board of Appeal's assessment in the revoked decision that it was erroneous to refer to the judgment in *Cesea Group v OHIM – Mangini & C. (Mangiami)*,<sup>69</sup> concerning the application of Rule 22(2) of Regulation No 2868/95, which applied to proof of use, and to consider that that case-law was fully transposable to the invalidity context at issue. On that point, the Court recalls that the Board of Appeal took the view that the principles laid down in that judgment were fully transposable to the invalidity context and that, consequently, allowing supplementary evidence submitted for the first time at the appeal stage without sound justification would deprive Rule 37(b)(iv) and Rule 39(3) of Regulation No 2868/95 of their effect. The Board of Appeal also referred to that judgment when it stated that it had to examine whether the cancellation applicant

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<sup>66</sup> Inter alia, in the judgment of 22 September 2021, *Marina Yachting Brand Management v EUIPO – Industries Sportswear (MARINA YACHTING)* (T-169/20, EU:T:2021:609).

<sup>67</sup> Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

<sup>68</sup> Judgment of 10 October 2019, *Société des produits Nestlé v EUIPO – European Food (FITNESS)* (T-536/18, not published, EU:T:2019:737).

<sup>69</sup> Judgment of 22 September 2011, *Cesea Group v OHIM – Mangini & C. (Mangiami)* (T-250/09, not published, EU:T:2011:516).

had justified the late submission of additional evidence and when it considered that the Cancellation Division's decision could not be regarded as a new factor justifying the submission of such evidence.

However, the Court considers that, assuming that it is not possible to transpose considerations related to justifying the submission of additional evidence in the context of the application of Rule 22(2) of Regulation No 2868/95 to invalidity proceedings, the possible error made by the Board of Appeal in the revoked decision cannot be categorised as obvious within the meaning of Article 103(1) of Regulation 2017/1001. First, in the revoked decision, the Board of Appeal did not apply that rule; rather, it referred, by analogy, to case-law on the application of that provision. Second, Rule 22(2) of Regulation No 2868/95, on the one hand, and Rule 37(b)(iv) and Rule 39(3) of that regulation, on the other hand, are comparable procedural contexts, given that in both cases EUIPO establishes a time limit for the submission of evidence and is to reject the applications where that evidence is not submitted. Accordingly, the fact that they are different procedures cannot, by itself, constitute sufficient reason to consider that it is manifestly not possible to transpose the case-law relating to proof of use to invalidity proceedings.

Consequently, the Court finds that the mere application by analogy of the case-law relating to the interpretation of Rule 22(2) of Regulation No 2868/95 in the present case cannot constitute an obvious error within the meaning of Article 103(1) of Regulation 2017/1001.

## 2. PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS

### Judgment of the Court of Justice (Second Chamber), 8 June 2023, UFC – Que choisir and CLCV, C-407/21

[Link to the full text of the judgment](#)

Reference for a preliminary ruling – Package travel and linked travel arrangements – Directive (EU) 2015/2302 – Article 12(2) to (4) – Termination of a package travel contract – Unavoidable and extraordinary circumstances – COVID-19 pandemic – Refund of payments made by the traveller concerned for a package – Refund in the form of a sum of money or equivalent refund in the form of a credit note ('voucher') – Obligation to provide that traveller with a refund not later than 14 days after the relevant contract is terminated – Temporary derogation from that obligation – Adjustment of the temporal effects of a decision taken in accordance with national law annulling national legislation that is contrary to that obligation

In the context of the COVID-19 pandemic, the French Government adopted legislation with the aim of temporarily releasing package travel organisers from their obligation to provide a refund of the payments made by travellers in the event of termination of a package travel contract.<sup>70</sup> Two consumer protection associations sought, before the Conseil d'État (Council of State, France), the annulment of that legislation, claiming an infringement of the right of travellers who had entered into such a contract to terminate it following the occurrence of 'unavoidable and extraordinary

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<sup>70</sup> Under Article 1 of ordonnance No 2020-315 du 25 mars 2020 relative aux conditions financières de résolution de certains contrats de voyages touristiques et de séjours en cas de circonstances exceptionnelles et inévitables ou de force majeure (Order No 2020-315 of 25 March 2020 concerning the financial conditions for the rescission of certain tourist travel and holiday contracts in the event of unavoidable and extraordinary circumstances or force majeure), travel organisers were authorised, as regards any 'rescission' notified between 1 March and 15 September 2020, to fulfil their reimbursement obligation by offering the traveller concerned, not later than three months after notification of the 'rescission' of the relevant package travel contract, a voucher for an amount equal to the payments made for that package, with that offer being valid for a period of 18 months.

circumstances' and to be provided with a full refund of any payments made for the package not later than 14 days after termination, as provided for by the Package Travel Directive.<sup>71</sup>

That court expresses doubts, in particular, as to the interpretation of the concept of 'refund' provided for by that directive and as to the compatibility with that directive of national legislation relating to the temporary exemption of package travel organisers from their reimbursement obligation.

By its judgment, the Court of Justice clarifies the concept of 'refund' in the context of the Package Travel Directive. In addition, it rules on the incompatibility of the national legislation with that directive<sup>72</sup> and on the adjustment of the temporal effects of a national decision annulling that same legislation, held to be incompatible with EU law.

### *Findings of the Court*

In the first place, the Court holds that, on a literal interpretation, the concept of 'refund' within the meaning of the Package Travel Directive<sup>73</sup> refers to the reimbursement of any payments made for a package solely in the form of a sum of money. The possibility of replacing that obligation to pay a sum of money with a benefit in another form, such as, in particular, the offer of vouchers, is not expressly provided for in that directive. That right to reimbursement in money, which consumers are able to dispose of freely, contributes to the objective of protecting their interests.

In the second place, the Court holds that the Package Travel Directive precludes the temporary release of package travel organisers,<sup>74</sup> in the context of the COVID-19 pandemic, from their obligation to provide the travellers concerned, not later than 14 days after a contract is terminated, with a full refund of any payments made under the terminated contract. That conclusion remains the same even where such a national measure is intended to prevent, due to the large number of anticipated reimbursement claims, the solvency of those travel organisers from being affected to the point of jeopardising their existence and thus to preserve the viability of the sector concerned.

The Court analyses, first of all, the concept of 'unavoidable and extraordinary circumstances'.<sup>75</sup> In accordance with the principle of legal certainty and with regard to consumer protection, that concept is capable of covering the COVID-19 pandemic, in so far as it entails the existence of 'serious risks to human health',<sup>76</sup> and may be applied to terminations of package travel contracts where such terminations are based on the consequences caused by such an event.

Next, the Court points out that the concept of 'unavoidable and extraordinary circumstances' is akin to the concept of 'force majeure' and constitutes, in the light, in particular, of the travaux préparatoires for the Package Travel Directive, an exhaustive implementation of the latter concept for

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<sup>71</sup> See Article 12 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015 L 326, p. 1; 'the Package Travel Directive'). Under the first sentence of Article 12(2), the traveller has the right to terminate a package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination.

<sup>72</sup> See in particular Article 4 and Article 12(2) to (4) of the Package Travel Directive.

<sup>73</sup> See in particular Article 12(2) and (3) of the Package Travel Directive. The second sentence of Article 12(2) provides that, in the event of termination of a package travel contract, that traveller is entitled to a full refund of any payments made for the package. Furthermore, in accordance with Article 4 and Article 12(3)(b) of that directive, if the tour organiser concerned is prevented from performing a package travel contract because of 'unavoidable and extraordinary circumstances', it may terminate that contract and provide the traveller with a full refund of any payments made for the package, with such refund to be made without undue delay and, in any event, not later than 14 days after the package travel contract is terminated.

<sup>74</sup> See Article 4 and Article 12(2) to (4) of the Package Travel Directive.

<sup>75</sup> As provided for in Article 12(2) and (3)(b) of the Package Travel Directive. The concept of 'unavoidable and extraordinary circumstances' is defined in Article 3(12) of that directive as a 'situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken'.

<sup>76</sup> In accordance with recital 31 of the Package Travel Directive, which clarifies the scope of the concept of 'unavoidable and extraordinary circumstances', serious risks to human health come within that concept.



the purposes of that directive. Thus, Member States may not release, on the grounds of force majeure, even if only temporarily, package travel organisers from their reimbursement obligation laid down by that directive, since that directive does not provide for any exception to the imperative nature of that obligation.

Lastly, even if Member States were able to argue, before their national courts, that the non-conformity of national legislation with the provisions of a directive is justified on the grounds of force majeure, the Court states that national legislation which temporarily releases, in the circumstances of a global health crisis such as the COVID-19 pandemic, package travel organisers from their obligation to provide the travellers concerned with a full refund of any payments made for a package does not satisfy the conditions governing reliance on force majeure by the Member States.

Thus, first, while the COVID-19 pandemic falls within circumstances beyond the control of the Member State concerned and those circumstances are abnormal and unforeseeable, national legislation which releases, in a generalised manner, all travel organisers from their reimbursement obligation cannot, by its very nature, be justified by force majeure. A general temporary suspension of that reimbursement obligation does not take into account the specific and individual financial situation of the travel organisers concerned. Secondly, it has not been proven that the financial consequences which that legislation is intended to address could not have been avoided other than by infringing the Package Travel Directive, and in particular by adopting certain State aid measures. Thirdly, that national legislation, which provides for the release of package travel organisers from their reimbursement obligation for a period of up to 21 months from notification of the ‘rescission’ of the relevant package travel contract, is clearly not framed in such a way as to limit its effects to the period necessary to remedy the difficulties caused by the event capable of constituting force majeure.

In the third and final place, the Court recalls that where a national court is hearing an action, brought in accordance with its national law, for the annulment of national legislation which it considers to be contrary to EU law, that court is required to annul that legislation. In the present case, the Court states, first, that the threat to the economic interests of operators active in the package travel sector, occasioned by the COVID-19 pandemic, is not comparable to overriding considerations relating to the protection of the environment or the electricity supply in the Member State concerned, which are exceptional circumstances in respect of which the Court has, moreover, recognised that national courts have the power to adjust the temporal effects of their decisions to annul national legislation that is held to be incompatible with EU law. Secondly, the Court states that it is not apparent that the annulment of national legislation allowing Member States to release, in the context of the COVID-19 pandemic, package travel organisers from their reimbursement obligation would have adverse consequences for the package travel sector to such an extent that maintaining its effects would be necessary in order to protect the financial interests of the operators in that sector. Therefore, the principle of sincere cooperation<sup>77</sup> does not allow a national court, which is hearing an action for the annulment of national legislation that is contrary to the Package Travel Directive, to adjust the temporal effects of its decision annulling that national legislation.

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<sup>77</sup> Laid down in Article 4(3) TEU.

Nota bene:

The résumés 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 General Court (Fourth Chamber, Extended Composition), 7 June 2023, TC v Parliament, T-309/21, EU:T:2023:315
- Judgment of the General Court (Fourth Chamber, Extended Composition), 21 June 2023, Guangdong Haomei New Materials and Guangdong King Metal Light Alloy Technology v Commission, T-326/21, EU:T:2023:347
- Judgment of the General Court (Fourth Chamber), 21 June 2023, Hangzhou Dingsheng Industrial Group and Others v Commission, T-748/21, EU:T:2023:346
- Judgment of the General Court (Seventh Chamber), 28 June 2023, IMG v Commission, T-752/20, EU:T:2023:366
- Judgment of the General Court (Sixth Chamber), 28 June 2023, CEDC International v EUIPO – Underberg (Shape of a blade of grass in a bottle), T-145/22, EU:T:2023:365