COURT OF JUSTICE
OF THE EUROPEAN UNION

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

Judgment of the Court (Grand Chamber) of 13 July 2023, YP and Others (Lifting of a judge's immunity and his or her suspension from duties), C-615/20 and C-671/20

Link to the full text of the judgment

References for a preliminary ruling – Second subparagraph of Article 19(1) TEU – Rule of law – Effective legal protection in the fields al by Union law – Independence of judges – Primacy of EU law – Article 4(3) TEU – Duty of sincere cooperation – Lifting of a judge's immunity from prosecution and his or her suspension from duties ordered by the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) – Lack of independence and impartiality on the part of that chamber – Alteration of the composition of the court formation called on to adjudicate on a case which up to that time had been entrusted to that judge – Prohibitions on national courts calling into question the legitimacy of a court, on undermining its functioning or on assessing the legality or effectiveness of the appointment of judges or of their judicial powers, subject to disciplinary penalties – Obligation on the courts concerned and the bodies which have power to designate and modify the composition of court formations to disapply the measures lifting immunity and suspending the judge concerned – Obligation on the same courts and bodies to disapply the national provisions providing for those prohibitions)

Case C-615/20

On the basis of an indictment from the Prokuratura Okręgowa w Warszawie (Warsaw Regional Public Prosecutor's Office, Poland), YP and other defendants were prosecuted before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) on the grounds of a series of criminal offences. That case was assigned to a single-Judge formation of that court, composed of Judge I.T.

When that case was at a very advanced stage of the proceedings, the Prokuratura Krajowa Wydział Spraw Wewnętrznych (National Public Prosecutor's Office, Internal Affairs Division, Poland), on 14 February 2020, applied to the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court, Poland) [1] for leave to prosecute Judge I.T. for having, in December 2017, allowed media representatives to record footage and sounds during a hearing and during the delivery of the decision in the case concerned and the oral statement of reasons for it and, in so doing, allegedly disclosed information deriving from the investigation procedure of the Warsaw Regional Public Prosecutor's Office in the case at issue.

By a resolution of 18 November 2020 ('the resolution at issue'), the Disciplinary Chamber authorised the initiation of criminal proceedings against Judge I.T., suspended him from his duties and reduced the amount of his remuneration by 25% for the duration of that suspension.

The referring court, which is the formation of the Warsaw Regional Court hearing the criminal proceedings initiated, inter alia, against YP and on which Judge I.T. sits as a single Judge, notes that the resolution at issue is such as to prevent it from being able to continue those proceedings. In that context, it decided to stay the proceedings to ask the Court of Justice, in essence, about the compatibility with EU law of national provisions which confer on a body, whose independence and

[1] The Law on the Supreme Court, of 8 December 2017, established within the Sąd Najwyższy (Supreme Court, Poland), a new disciplinary chamber known as the Izba Dyscyplinarna ('the Disciplinary Chamber'). By a law of 20 December 2019 amending the Law on the Supreme Court, which entered into force in 2020, new powers were conferred on that chamber, in particular to authorise the initiation of criminal proceedings against judges or to place them in provisional detention (Article 27(1)(1a)).

impartiality are not guaranteed, jurisdiction to authorise the initiation of criminal proceedings against judges of the ordinary courts and, where such authorisation is issued, to suspend the judges concerned from their duties and to reduce their remuneration during that suspension. Its questions seek, in essence, to determine whether, having regard to the provisions and principles of EU law, [2] the single Judge who makes up that court is still justified in continuing the examination of the case in the main proceedings notwithstanding the resolution at issue, which suspended him from his duties.

Case C-671/20

Another set of criminal proceedings between the Warsaw Regional Public Prosecutor's Office and M.M., who is also charged with various criminal offences, concerns a decision by that public prosecutor's office to order the creation of a compulsory mortgage over a building belonging to M.M. The latter brought an action against that decision before the Warsaw Regional Court, within which court the case linked to that action was initially assigned to Judge I.T.

Following the adoption of the resolution at issue, which, inter alia, suspended Judge I.T. from his duties, the President of the Warsaw Regional Court instructed the President of the Chamber in which Judge I.T. sat to change the composition of the court formation in the cases which had been assigned to that judge, with the exception of the case in which Judge I.T. had submitted to the Court the request for a preliminary ruling forming the subject of Case C-615/20. Consequently, that Chamber President adopted an order reassigning the cases initially assigned to Judge I.T., including the case relating to M.M.

According to the referring court, namely another single-Judge formation of the Warsaw Regional Court to which that case was reassigned, those events show that the President of that court has conceded that the resolution at issue is binding by taking the view that the suspension of Judge I.T. from his duties prevented that case from being examined by that judge or that there was a lasting obstacle to such an examination.

That court raises the issue of whether an act such as the resolution at issue is binding and whether the other court formations designated as a result of the execution of that resolution are legitimate. It states, moreover, that recent national provisions prohibit it, subject to disciplinary measures, from examining the binding nature of that resolution. Its questions to the Court seek, in essence, to determine whether, having regard to the provisions and principles of EU law, [3] it may, without any risk of disciplinary liability to the single Judge sitting on it, regard the resolution at issue as non-binding, so that it is not justified in adjudicating on the case in the main proceedings which was re-assigned to it following that resolution, and to determine whether that case must therefore be assigned back to the judge initially hearing it.

In its judgment delivered in these Joined Cases, the Court, sitting as the Grand Chamber, refers to the guidance contained in its case-law, [4] in particular in the judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)*. [5] It holds, in essence, that the second subparagraph of Article 19(1) TEU precludes national provisions which allow a body such as the Disciplinary Chamber, whose independence and impartiality are not guaranteed, to lift a judge's immunity, to suspend him

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2 Namely Article 47 of the Charter of Fundamental Rights of the European Union, Article 2 TEU and the second subparagraph of Article 19(1) TEU laying down the principle of the rule of law and the requirements of effective legal protection, and the principles of primacy, sincere cooperation and legal certainty.

3 Namely Article 2 and the second subparagraph of Article 19(1) TEU and the principles of primacy, sincere cooperation and legal certainty.

4 Relating to the lack of independence and impartiality of the Disciplinary Chamber established by the 2017 Law on the Supreme Court, as amended, in the context of the 2019 reform of the Polish judicial system.

5 Judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442).

or her from his or her duties and to reduce his or her remuneration. It also makes clear, in the light of the principle of the primacy of EU law and of the principle of sincere cooperation laid down in Article 4(3) TEU, the consequences of such a conclusion for the national court with respect to an act such as the resolution at issue entailing, in breach of the second subparagraph of Article 19(1) TEU, the suspension of a judge sitting as a single Judge from his or her duties, and for the judicial bodies with power to designate and modify the compositions of the formations of that national court.

Findings of the Court

In the first place, the Court rules that the second subparagraph of Article 19(1) TEU precludes national provisions which confer on a body, whose independence and impartiality are not guaranteed, jurisdiction to authorise the initiation of criminal proceedings against judges of the ordinary courts and, where such authorisation is issued, to suspend the judges concerned from their duties and to reduce their remuneration during that suspension.

The Court observes in that regard that, since those two references for a preliminary ruling were made, it has delivered the judgment in *Commission* v *Poland (Independence and private life of judges)* in which it held, inter alia, that by conferring on the Disciplinary Chamber, whose independence and impartiality are not guaranteed, [6] jurisdiction to hear and determine cases having a direct impact on the status of judges and the performance of their office, such as applications for authorisation to initiate criminal proceedings against judges, Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. [7]

In the aforementioned judgment, the Court pointed out that the mere prospect, for judges, of running the risk that authorisation to prosecute them might be sought and obtained from a body whose independence is not guaranteed is liable to affect their own independence and that the same is true of risks that such a body may decide whether to suspend them from their duties and reduce their remuneration. [8]

In the present case, the resolution at issue was adopted with regard to Judge I.T., [9] on the basis of national provisions which the Court, in the aforementioned judgment, held to be contrary to the second subparagraph of Article 19(1) TEU inasmuch as they confer on such a body jurisdiction to adopt acts such as that resolution.

If the authorities of the Member State concerned are under a duty to amend national provisions which have been the subject of a judgment establishing a failure to fulfil obligations to make them conform with the requirements of EU law, the courts of that Member State, for their part, have an obligation to ensure, when performing their duties, that the Court's judgment is complied with, which means, in particular, that those national courts must take account, if need be, of the elements of law contained in that judgment in order to determine the scope of the provisions of EU law which they have the task of applying. Consequently, the referring court in Case C-615/20 is required, in the case in the main proceedings, to draw all the appropriate conclusions from the guidance in the judgment in *Commission* v *Poland (Independence and private life of judges).*

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6 In paragraph 102 of the judgment in *Commission* v *Poland (Independence and private life of judges)*, the Court, on the basis of its earlier case-law (paragraph 112 of the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596)), reiterated its finding that the Disciplinary Chamber does not meet the requirement of independence and impartiality.

7 Judgment in *Commission* v *Poland (Independence and private life of judges)*, operative part 1.

8 Judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 101.

9 That is to say, an ordinary court which may be called on to rule, under the second subparagraph of Article 19(1) TEU on questions linked to the application or interpretation of EU law.

In the second place, the Court interprets the second subparagraph of Article 19(1) TEU, the principle of the primacy of EU law and the principle of sincere cooperation as meaning:

- first, that a formation of a national court, seised of a case and composed of a single Judge – against whom a body, whose independence and impartiality are not guaranteed, has adopted a resolution authorising the initiation of criminal proceedings and ordering that that judge be suspended from his or her duties and that his or her remuneration be reduced – is justified in disapplying such a resolution which precludes the exercise of its jurisdiction in that case and,
- secondly, that the judicial bodies which have power to designate and modify the composition of the formations of that national court must also disapply that resolution which precludes the exercise of that jurisdiction by that court formation.

It observes in that connection that, pursuant to settled case-law, [10] the principle of the primacy of EU law imposes a duty, inter alia, on any national court called upon within the exercise of its jurisdiction to apply provisions of EU law to give full effect to the requirements of EU law in the dispute brought before it by disapplying, as required, of its own motion, any national rule or practice that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means. Compliance with that obligation constitutes an expression of the principle of sincere cooperation.

The second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter of Fundamental Rights, [11] has direct effect which means that any national provision, case-law or practice contrary to those provisions of EU law, as interpreted by the Court, [12] must be disapplied.

Even in the absence of national legislative measures having brought to an end a failure to fulfil obligations established by the Court, the national courts must take all measures to facilitate the full application of EU law in accordance with the *dicta* in the judgment establishing that failure to fulfil obligations. They must, moreover, under the principle of sincere cooperation, nullify the unlawful consequences of an infringement of EU law.

To satisfy those obligations, a national court must disapply an act such as the resolution at issue which, in breach of the second subparagraph of Article 19(1) TEU, ordered the suspension of a judge from his or her duties where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law. [13]

Lastly, the Court points out that, where an act such as the resolution at issue was adopted by a body which does not constitute an independent and impartial tribunal within the meaning of EU law, no consideration relating to the principle of legal certainty or the alleged finality of that resolution can be successfully relied on in order to prevent the referring court and the judicial bodies with power to designate and modify the composition of the formations of the national court from disapplying such a resolution. [14]

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[10] See, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 53 and the case-law cited, and paragraph 55 and the case-law cited).

[11] 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 conditions, 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 must be previously established by law.

[12] Judgment in *Commission* v *Poland (Independence and private life of judges),* paragraph 78 and the case-law cited.

[13] See, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraphs 159 and 161).

[14] See, to that effect, judgment in *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, paragraph 160.

The Court observes in that regard, that the main proceedings in Case C-615/20 have been stayed by the referring court, pending the present judgment. In that context, the continuation of those proceedings by the judge comprising the single-Judge formation of the referring court, especially at the advanced stage which those particularly complex proceedings have reached, does not appear to be capable of undermining legal certainty. On the contrary, it seems to be such as to allow the handling of the case in the main proceedings to result in a decision which complies, first, with the requirements arising from the second subparagraph of Article 19(1) TEU and, secondly, with the right of the individuals concerned to a fair trial within a reasonable period.

In those circumstances, the referring court in Case C-615/20 is justified in disapplying the resolution at issue in order to be able to continue the examination of the case in the main proceedings in its present composition without the judicial bodies with power to designate and modify the composition of the formations of the national court being able to prevent that continued examination.

In the third place, the Court interprets the second subparagraph of Article 19(1) TEU and the principles of the primacy of EU law and of sincere cooperation in connection with the situation of a formation of a national court, such as the referring court in Case C-671/20, to which a case which hitherto had been assigned to another formation of that national court was reassigned as a result of an act of the Disciplinary Chamber such as the resolution at issue, in order to determine, in particular, whether that referring court must, in instant case, disapply that resolution and refrain from continuing to examine that case.

It points out in that regard that the obligation for the national courts to disapply a resolution resulting, in breach of the second subparagraph of Article 19(1) TEU, in the suspension of a judge from his or her duties, where that is essential in view of the procedural situation at issue in order to ensure the primacy of EU law, falls, in particular, on the court formation to which the case would have been reassigned on account of such a resolution. That court formation must, as a result, refrain from hearing and determining that case. That obligation also binds the bodies which have power to designate and modify the composition of the formations of that national court and those bodies must, accordingly, assign that case back to the formation which was initially seised of it.

In the present case, no consideration relating to the principle of legal certainty or linked to an alleged finality of that resolution can successfully be relied upon.

The Court observes in this connection that, in Case C-671/20 and unlike in other cases assigned to Judge I.T. – which would also have been re-assigned to other court formations in the meantime, but the examination of which would have been continued and even, in some cases, concluded by the adoption of a decision by those new formations – the main proceedings were stayed pending delivery of the present judgment. In those circumstances, the resumption of those proceedings by Judge I.T. would appear to be such as to enable those proceedings, notwithstanding the delay caused by the resolution at issue, to result in a decision that complies both with the requirements stemming from the second subparagraph of Article 19(1) TEU and from those stemming from the right of the individual concerned to a fair trial.

Consequently, the Court interprets the second subparagraph of Article 19(1) TEU and the principles of the primacy of EU law and of sincere cooperation as meaning that:

– first, a formation of a national court, to which a case which hitherto had been assigned to another formation of that court has been re-assigned – as a result of a resolution adopted by a body whose independence and impartiality are not guaranteed and which authorised the initiation of criminal proceedings against the single Judge comprising the latter formation and ordered his or her suspension from duties and a reduction in his or her remuneration – and which has decided to suspend the handling of that case pending a decision by the Court on a preliminary ruling, must disapply that resolution and refrain from continuing to examine that case and,

– secondly, the judicial bodies which have power to designate and modify the composition of the formations of that national court are required, in such a situation, to assign that case back to the formation initially hearing it.

So far as concerns, in the fourth place, the national provisions and the case-law of a constitutional court as mentioned by the referring court in Case C-671/20, [15] which would preclude the latter court from being able to rule on the lack of binding force of an act such as the resolution at issue and, if necessary, from disapplying it, even though it is required to do so having regard to the answers given by the Court to its other questions, the Court observes that the fact that a national court performs the tasks entrusted to it by the Treaties and complies with its obligations thereunder, by giving effect to provisions such as the second subparagraph of Article 19(1) TEU, cannot be prohibited or regarded as a disciplinary offence on the part of judges sitting in such a court. [16]

Likewise, in the light of the direct effect of the second subparagraph of Article 19(1) TEU, the principle of the primacy of EU law requires national courts to disapply any national case-law contrary to that provision of EU law as interpreted by the Court. Thus, in the event that, following judgments delivered by the Court, a national court finds that the case-law of a constitutional court is contrary to EU law, the fact that such a national court disapplies that constitutional case-law, in accordance with the principle of the primacy of EU law, cannot give rise to its disciplinary liability. [17]

Consequently, the second subparagraph of Article 19(1) TEU and the principles of the primacy of EU law and of sincere cooperation must be interpreted as precluding:

– first, national provisions which prohibit a national court, subject to disciplinary sanctions being imposed on the judges who make up that court, from examining whether an act adopted by a body whose independence and impartiality are not guaranteed and which has authorised the initiation of criminal proceedings against a judge and ordered his or her suspension from duties and a reduction in his or her remuneration is binding and, if necessary, from disapplying that act and,
– secondly, case-law of a constitutional court under which the acts appointing judges cannot be the subject of judicial review, inasmuch as that case-law is liable to preclude that examination.

II. INSTITUTIONAL PROVISIONS: PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION

Judgment of the General Court (Sixth Chamber, Extended Composition) of 5 July 2023, Puigdemont i Casamajó and Others v Parliament, T-272/21

Link to the full text of the judgment

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15 Article 42a(1) and (2) of the Law on the ordinary courts of 27 July 2001, as amended by the Law of 20 December 2019, imposes on those courts prohibitions on calling into question the lawfulness of courts or on assessing the legality of the appointment of a judge or his or her authority to perform judicial tasks. Point 3 of Article 107(1) of that law makes a disciplinary offence, inter alia, any act of judges of the ordinary courts which calls into question the effectiveness of the appointment of a judge.

16 See, to that effect, judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 132.

17 See, to that effect, judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 132.

Institutional law – Member of the Parliament – Privileges and immunities – Decision to waive parliamentary immunity – Article 9 of Protocol No 7 on the Privileges and Immunities of the European Union – Competence of the authority that issued the request for waiver of immunity – Legal certainty – Manifest error of assessment – Scope of the Parliament's review – Procedure for examining the request for the waiver of immunity – Rights of the defence – Impartiality

The three applicants applied to stand as candidates in the elections to the European Parliament held in Spain on 26 May 2019, following which, on 13 June 2019, the first and second applicants were declared elected. On 20 June 2019, the Junta Electoral Central (Central Electoral Commission, Spain) notified the Parliament of a decision in which it found that the first and second applicants had not taken the oath or promised to respect the Spanish Constitution required by the Spanish Electoral Law [18] and, consequently, declared their seats in the Parliament vacant. On 27 June 2019, the then President of the Parliament informed the first and second applicants that he was not in a position to treat them as future Members of the Parliament.

On 14 October and 4 November 2019, the investigating judge of the Criminal Chamber of the Tribunal Supremo (Supreme Court, Spain) issued a national arrest warrant, a European arrest warrant and an international arrest warrant against each applicant, so that they might be tried in the criminal proceedings brought against them for offences including, depending on the persons concerned, insurgency, sedition and misuse of public funds.

At the plenary session of 13 January 2020, the Parliament took note, following the judgment in *Junqueras Vies*, [19] of the election to the Parliament of the first and second applicants with effect from 2 July 2019. On 16 January 2020, the Vice-President of the Parliament announced in Parliament the requests sent by the President of the Supreme Court on 13 January 2020, seeking the waiver of the immunity of the first and second applicants, and referred them to the Parliament's Committee on Legal Affairs.

On 10 February 2020, following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union on 31 January 2020, the Parliament took note of the election of the third applicant as a Member with effect from 1 February 2020. On 13 February 2020, the Vice-President of the Parliament announced in Parliament the request sent by the President of the Supreme Court on 10 February 2020, seeking the waiver of the immunity of the third applicant, and referred that request to the Parliament's Committee on Legal Affairs.

By three decisions of 9 March 2021, [20] the Parliament waived the immunity provided for in point (b) of the first paragraph of Article 9 of Protocol No 7 [21] of the three applicants, who then brought an action before the General Court for annulment of those three decisions.

Ruling in extended composition, the Court dismisses the applicants' action, which leads it, in particular, to rule on the applicability of the principle of impartiality to a decision on a request for waiver of the immunity of a Member of the European Parliament, on the scope of that principle and on the examination to be carried out by the Parliament when such a request is submitted to it.

Findings of the Court

In the first place, as regards the requirement of impartiality, enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union, which applies to the institutions in carrying out their

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18 Article 224(2) of Ley orgánica 5/1985, de régimen electoral general (Organic Law 5/1985 on the General Electoral System) of 19 June 1985 (BOE No 147 of 20 June 1985, p. 19110).

19 Judgment of 19 December 2019, *Junqueras Vies* (C-502/19, EU:C:2019:1115).

20 Decisions P9_TA(2021)0059, P9_TA(2021)0060 and P9_TA(2021)0061 of the European Parliament of 9 March 2021.

21 That article of Protocol (No 7) on the Privileges and Immunities of the European Union (OJ 2010 C 83, p. 266) provides that, during the sessions of the European Parliament, its Members are to enjoy, in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

missions, the Court recalls that that requirement is intended to guarantee equal treatment, which is at the heart of the European Union. It is intended, inter alia, to avoid a situation where there could be a conflict of interest on the part of officials or agents acting on behalf of those institutions. It also applies to Members of the Parliament when they are involved in the adoption of decisions falling within the administrative functions of the Parliament. The Court holds that it is equally binding on Members of the Parliament who, as members of the Committee on Legal Affairs, participate in the investigation phase of a request for waiver of immunity, despite the political nature of the decision on such a request. It states that that requirement must, however, necessarily take account of the fact that those members are not, by definition, politically neutral, which distinguishes them from officials and other servants acting on behalf of the institutions, bodies, offices and agencies of the European Union.

The Court also notes that the Committee on Legal Affairs is a political body whose composition is intended to reflect the plurality that exists within the Parliament. That committee appoints, from among its members, the rapporteur in accordance with a system of equal rotation between the political groups. It follows that, if the rapporteur's task is entrusted to a Member of a given political group, that Member acts in the context of a committee whose composition reflects the balance of political groups within the Parliament.

The Court considers that, in that context, the impartiality of a Member during that investigation phase, such as the rapporteur, cannot, in principle, be assessed in the light of his or her political ideology or in the light of a comparison between his or her political ideology and that of the Member to whom the request for waiver of immunity relates. In particular, the fact that the rapporteur belongs to a national political party or to a political group constituted within the Parliament, whatever their values and ideas, and even if they could reveal sensitivities which are a priori unfavourable to the situation of the Member concerned by the request for waiver of immunity, has, in principle, no bearing on the assessment of the rapporteur's impartiality.

The Court concludes from this that, in the present case, the fact that the rapporteur belongs to the European Conservatives and Reformists political group, which also includes the Members belonging to the VOX political party, which is behind the criminal proceedings brought against the applicants, is, in principle, irrelevant to the assessment of his impartiality. In that regard, the Court considers that the special situation of Members who belong to that party cannot extend, as a matter of principle, to all the members of the European Conservatives and Reformists political group on the sole ground that, since they belong to the same group, they share political affinities. In that context, the fact that the Member, the future rapporteur in the cases to waive the applicants' immunity, expressed his support for the ideas of the VOX political party concerning, in particular, the political situation in Catalonia and his opposition to the political ideas advocated by the applicants, cannot suffice to constitute a breach of the principle of impartiality.

After noting that the applicants did not rely on a personal interest on the part of the rapporteur in the cases in question or on his personal prejudice, separable from his political ideology, the Court rejected the complaint alleging a lack of impartiality on the part of the rapporteur.

In the second place, as regards the examination to be carried out by the Parliament when it receives a request for waiver of immunity, the Court points out that the Parliament must, first, ascertain whether the facts giving rise to that request can be covered by Article 8 of Protocol No 7 as a special provision. If it does, the Parliament must find that immunity cannot be waived. It is only if that institution concludes in the negative that it must verify, second, whether the Member concerned benefits from the immunity provided for in Article 9 of that protocol in respect of the facts at issue and, if that is so, to decide whether or not to waive that immunity on the basis of the third paragraph of Article 9 of that protocol.

In that regard, the Court notes that, in the contested decisions, the Parliament stated that the facts giving rise to the requests for waiver of immunity did not fall within the scope of Article 8 of Protocol No 7.

Next, as regards the question whether the applicants enjoyed the immunity provided for in Article 9 in respect of the facts at issue, the Court considers that, since, in the context of its powers relating to immunities, the Parliament must ensure its effectiveness, it implicitly but necessarily considered that, in the circumstances of the present case, only the immunity provided for in point (b) of the first

paragraph of Article 9 of Protocol No 7 constituted an obstacle to the applicants' arrest and surrender to the Spanish authorities pursuant to the European arrest warrants at issue.

In that regard, the Court states that, in the contested decisions, the Parliament took note of the fact that Spanish law, as interpreted by the national courts, did not confer immunity on the applicants in respect of the facts at issue. The Court considers that, since the extent and scope of the immunity provided for in point (a) of the first paragraph of Article 9 of Protocol No 7 are determined by national law, the Parliament was fully entitled to refer to national law as interpreted by the national courts. The Court also takes the view that the applicants have not established that that finding was incorrect.

The Court also held that the fact that the contested decisions are silent as to the immunity provided for in the second paragraph of Article 9 of Protocol No 7, which concerns the immunity of Members of the Parliament while they are travelling to or from the place of meeting of the Parliament, is not such as to render them ambiguous, since the immunity provided for in that provision did not confer on the applicants protection separate from that which they enjoyed under the first paragraph of Article 9.

Lastly, the Court stated that it is not for the Parliament, when examining whether it is appropriate to waive the immunity of one of its Members, to assess the legality of the acts adopted by the judicial authorities during the national proceedings at issue, such as, in the present case, the national and European arrest warrants. That question falls within the exclusive competence of the national authorities.

III. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR ANNULMENT

Judgment of the General Court (Sixth Chamber, Extended Composition) of 5 July 2023, Puigdemont i Casamajó and Comín i Oliveres v Parliament, T-115/20

Link to the full text of the judgment

Action for annulment – Institutional law – Member of the European Parliament – Refusal of the President of the Parliament to accede to a request for privileges and immunities to be defended – Act not open to challenge – Inadmissibility

The applicants applied to stand as candidates in the elections to the European Parliament held in Spain on 26 May 2019, following which they were declared elected. [22] On 15 June 2019, the investigating judge of the Tribunal Supremo (Supreme Court, Spain) refused to withdraw the national arrest warrants issued against them by the Spanish criminal courts in the criminal proceedings to which they were subject for offences relating, inter alia, to insurgency, sedition and misuse of public funds.

On 17 June 2019, the Junta Electoral Central (Central Electoral Commission, Spain) notified the Parliament of the list of candidates elected in Spain, which did not include the applicants' names. On 20 June 2019, it notified the Parliament of a decision in which it found that the applicants had not taken the oath or promised to respect the Spanish Constitution, as required by the Spanish Electoral

[22] Decision of 13 June 2019 of the Central Electoral Commission on the 'Declaration of the Members elected to the European Parliament in the elections held on 26 May 2019' (BOE No 142 of 14 June 2019, p. 62477).

Law, [23] and consequently declared that their seats in the Parliament were vacant and that all the prerogatives to which they might be entitled by virtue of their duties were suspended until such time as they took that oath or made that promise. The first session of the newly elected Parliament following the elections of 26 May 2019 was opened on 2 July 2019, without the applicants being present.

By email of 10 October 2019, a Member of the European Parliament, acting on behalf of the applicants, sent to the newly elected President of the Parliament a request from 38 Members of the European Parliament, including herself, seeking the Parliament's defence of the parliamentary immunity of the applicants, referred to in Protocol No 7 on the Privileges and Immunities of the European Union. [24] On 10 December 2019, the President of the Parliament rejected that request stating inter alia that the Parliament could not regard the applicants as Members of the Parliament in the absence of official notification by the Spanish authorities of their election, within the meaning of the Electoral Act. [25]

The applicants brought an action before the General Court for annulment of that decision.

The Parliament, supported by the Kingdom of Spain, raised a plea of inadmissibility on the basis that there is no act open to challenge for the purposes of Article 263 TFEU.

Ruling in extended composition, the Court upholds that plea and, accordingly, dismisses the action as inadmissible in so far as it is not directed against an act which may be challenged by means of an action for annulment under Article 263 TFEU.

Findings of the Court

As a preliminary point, the Court recalls the settled case-law under which any acts adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of an applicant, by bringing about a distinct change in his or her legal position, are regarded as actionable measures for the purposes of Article 263 TFEU.

The Court also states that the reply of an EU institution to a request submitted to it does not necessarily constitute a decision for the purposes of the fourth paragraph of Article 263 TFEU and thereby enable the addressee of that reply to bring an action for annulment. Moreover, when a decision of an EU institution amounts to a rejection, that decision has to be appraised in the light of the nature of the request to which it constitutes a reply. Thus, the rejection by an institution of a request addressed to it does not constitute an act against which an action for annulment may be brought where that request does not seek the adoption, by that institution, of a measure having binding legal effects.

In the present case, in order to determine whether the refusal by the President of the Parliament, following the request for defence of the applicants' immunity, is an act open to challenge for the purposes of Article 263 TFEU, the Court examines whether the defence decision requested was capable of producing legal effects.

In that regard, in the first place, the Court rejects the applicants' argument that the exclusive competence of the Parliament to waive the immunity of one of its Members [26] confers on it exclusive competence to decide with binding effect whether or not that Member enjoys immunity in a given case.

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[23] Article 224(2) of Ley orgánica 5/1985 de régimen electoral general (Organic Law 5/1985 on the General Electoral System) of 19 June 1985 (BOE No 147 of 20 June 1985, p. 19110).

[24] The immunity provided for in the first and second paragraphs of Article 9 of Protocol (No 7) on the Privileges and Immunities of the European Union (OJ 2010 C 83, p. 266).

[25] Act concerning the election of the Members of the Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ 1976 L 278, p. 1), as amended by Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002 (OJ 2002 L 283, p. 1).

[26] Pursuant to the third paragraph of Article 9 of Protocol No 7.

In the second place, the Court stated that, under Protocol No 7, [27] in the territory of their own State, Members of the Parliament enjoy the immunities accorded, under national law, to members of parliament in their country. Thus, the extent and scope of the immunity enjoyed by Members of the European Parliament in their national territory, or, in other words, the substantive content of that immunity, are to be determined by the various national laws. The Court infers from this that, where the law of a Member State provides for a procedure for the defence of the immunity of members of the national parliament, enabling that parliament to intervene with the judicial or police authorities, in particular by requiring the suspension of the prosecution of one of its members, the same powers are conferred on the Parliament in relation to Members of the European Parliament elected for that State.

In the third place, the Court finds that the provisions of national law, [28] as interpreted by the national courts, [29] do not confer on the Spanish Parliament the power to defend the immunity of one of its members where the national court does not recognise that immunity, in particular by requiring the suspension of legal proceedings brought against that Member. Thus, the Parliament does not have, on the basis of the national law to which Protocol No 7 refers, any such power in relation to Members elected for the Kingdom of Spain.

It follows that the Parliament does not have competence arising from a legislative act to adopt a decision to defend the applicants' immunity that would produce binding legal effects vis-à-vis the Spanish judicial authorities. Accordingly, the Parliament could not adopt, in response to the request for defence of the applicants' parliamentary immunity, a decision producing binding legal effects.

Consequently, the refusal of the President of the Parliament to accede to that request is not an act open to challenge under Article 263 TFEU.

IV. PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 4 July 2023, Meta Platforms and Others (General terms of use of a social network), C-252/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Online social networks – Abuse of a dominant position by the operator of such a network – Abuse which entails the processing of the personal data of the users of that network as provided for in its general terms of use – Powers of a competition authority of a Member State to find that processing not consistent with that regulation – Reconciliation with the powers of the national data protection supervisory authorities – Article 4(3) TEU – Principle of sincere cooperation – Points (a) to (f) of the first subparagraph of Article 6(1) of Regulation 2016/679 – Whether the processing is lawful – Article 9(1) and (2) – Processing of special categories of personal data – Article 4(11) – Concept of 'consent'

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27 Pursuant to point (a) of the first paragraph of Article 9 of Protocol No 7.

28 Article 71 of the Spanish Constitution, Article 751(2) and Article 753 of the Ley de Enjuiciamiento Criminal (Code of Criminal Procedure) and Article 12 of the Reglamento del Congreso de los Diputados (Rules of Procedure of the Congress of Deputies).

29 In particular, by the Tribunal Constitucional (Constitutional Court, Spain) in its judgment 70/2021 of 18 March 2021, which was followed in subsequent judgments.

Meta Platforms owns the online social network Facebook, which is free of charge for private users. The business model of that social network is based on financing through online advertising, which is tailored to its individual users. That advertising is made possible in technical terms by the automated production of detailed profiles in respect of the network users and the users of the online services offered at the level of the Meta group. In order to be able to use that social network, when they register, users must accept the general terms drawn up by Meta Platforms, which refer to the data and cookies policies set by that company. Under those policies, in addition to the data which those users provide directly when they register, Meta Platforms also collects data about user activities on and off the social network and links the data with the Facebook accounts of the users concerned. The latter data, also known as 'off-Facebook data', are data concerning visits to third-party webpages and apps as well as data concerning the use of other online services belonging to the Meta group (including Instagram and WhatsApp). The aggregate view of the data thus collected allows detailed conclusions to be drawn about those users' preferences and interests.

By decision of 6 February 2019, the Bundeskartellamt (Federal Cartel Office, Germany), prohibited Meta Platforms, first, from making, in the general terms in force at the time, [30] the use of the social network Facebook by private users resident in Germany subject to the processing of their off-Facebook data and, second, from processing those data without their consent. In addition, the Federal Cartel Office required Meta Platforms to adapt those general terms in such a way that it is made clear that those data will neither be collected nor linked with Facebook user accounts nor used without the consent of the users concerned. Last, the office clarified that such a consent was not valid if it was a condition for using the social network. It based its decision on the fact that the processing of the data at issue, which it found to be inconsistent with the GDPR, [31] constitutes an abuse of Meta Platforms's dominant position on the market for online social networks.

Meta Platforms brought an action against that decision before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). Having doubts as to (i) whether national competition authorities may review whether the processing of personal data complies with the requirements set out in the GDPR and (ii) the interpretation and application of certain provisions of that regulation, the Higher Regional Court, Düsseldorf, referred the matter to the Court of Justice for a preliminary ruling.

By its judgment, the Court, sitting as the Grand Chamber, rules on the powers of a national competition authority to find that the processing of personal data is not consistent with the GDPR as well as on how to reconcile this with the powers of the national data protection supervisory authorities. [32] Moreover, it provides clarification on whether users' 'sensitive' personal data may be processed by the operator of a social network, on the conditions for lawful data processing by such an operator and on whether consent given for the purposes of such processing by those users to an undertaking holding a dominant position on the national market for online social networks is valid.

Findings of the Court

In the first place, with regard to the powers of a competition authority to find that the processing of personal data is not consistent with the GDPR, the Court holds that, subject to compliance with its duty of sincere cooperation [33] with the data protection supervisory authorities, such an authority can find, in the context of the examination of an abuse of a dominant position by an undertaking, [34] that that undertaking's general terms of use relating to the processing of personal data and the

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30 On 31 July 2019, Meta Platforms introduced new general terms expressly stating that the user agrees to be shown advertisements instead of paying to use Facebook products.

31 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, and corrigendum OJ 2018 L 127, p. 2) ('the GDPR').

32 For the purposes of Articles 51 to 59 of the GDPR.

33 Enshrined in Article 4(3) TEU.

34 Within the meaning of Article 102 TFEU.

implementation thereof are not consistent with that regulation, where that finding is necessary to establish the existence of such an abuse. Nevertheless, where a competition authority identifies an infringement of the GDPR in the context of the finding of an abuse of a dominant position, it does not replace the supervisory authorities.

Thus, in the light of the principle of sincere cooperation, when competition authorities are called upon, in the exercise of their powers, to examine whether an undertaking's conduct is consistent with the provisions of the GDPR, they are required to consult and cooperate sincerely with the national supervisory authorities concerned or with the lead supervisory authority. All of these authorities are then bound to observe their respective powers and competences, in such a way as to ensure that the obligations arising from the GDPR and the objectives of that regulation are complied with while their effectiveness is safeguarded. It follows that, where, in the context of the examination seeking to establish whether there is an abuse of a dominant position by an undertaking, a competition authority takes the view that it is necessary to examine whether that undertaking's conduct is consistent with the provisions of the GDPR, that authority must ascertain whether that conduct or similar conduct has already been the subject of a decision by the competent national supervisory authority or the lead supervisory authority or the Court. If that is the case, the competition authority cannot depart from it, although it remains free to draw its own conclusions from the point of view of the application of competition law.

Where it has doubts as to the scope of the assessment carried out by the competent national supervisory authority or the lead supervisory authority, where the conduct in question or similar conduct is, simultaneously, under examination by those authorities, or where, in the absence of investigation by those authorities, it takes the view that an undertaking's conduct is not consistent with the provisions of the GDPR, the competition authority must consult these authorities and seek their cooperation in order to dispel its doubts or to determine whether it must wait for the supervisory authority concerned to take a decision before starting its own assessment. In the absence of any objection from them or of a reply within a reasonable time, the competition authority may continue its own investigation.

In the second place, with regard to the processing of special categories of personal data, [35] the Court finds that, where the user of an online social network visits websites or apps to which one or more of those categories relate and, as the case may be, enters information into them when registering or when placing online orders, the processing of personal data by the operator of that online social network [36] must be regarded as 'processing of special categories of personal data' within the meaning of Article 9(1) of the GDPR, where it allows information falling within one of those special categories to be revealed, irrespective of whether that information concerns a user of that network or any other natural person. Such data processing is in principle prohibited, subject to certain derogations. [37]

In the latter regard, the Court states that, where the user of an online social network visits websites or apps to which one or more of those special categories relate, the user does not manifestly make

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35 Referred to in Article 9(1) of the GDPR. Under this provision, 'processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited'.

36 That processing entails the collection – by means of integrated interfaces, cookies or similar storage technologies – of data from visits to those sites and apps and of the information entered by the user, the linking of all those data with the user's social network account and the use of those data by that operator.

37 Provided for in Article 9(2) of the GDPR. That article provides that 'paragraph 1 shall not apply if one of the following applies:

(a)the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

...

(e)processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

...'.

public [38] the data relating to those visits collected by the operator of that online social network via cookies or similar storage technologies. Moreover, where he or she enters information into such websites or apps or where he or she clicks or taps on buttons integrated into those sites and apps, such as the 'Like' or 'Share' buttons or buttons enabling the user to identify himself or herself on those sites or apps using login credentials linked to his or her social network user account, his or her telephone number or email address, that user manifestly makes public the data thus entered or resulting from the clicking or tapping on those buttons only in the circumstance where he or she has explicitly made the choice beforehand, as the case may be on the basis of individual settings selected with full knowledge of the facts, to make the data relating to him or her publicly accessible to an unlimited number of persons.

In the third place, as regards more generally the conditions for the lawful processing of personal data, the Court recalls that, under the GDPR, data processing is lawful if and to the extent that the data subject has given consent for one or more specific purposes. [39] In the absence of such a consent, or where that consent was not freely given, specific, informed and unambiguous, such processing is nevertheless justified if it meets one of the requirements of necessity, [40] which must be interpreted strictly. The processing of the personal data of its users by the operator of an online social network can be regarded as necessary for the performance of a contract to which those users are party only on condition that the processing is objectively indispensable for a purpose that is integral to the contractual obligation intended for those users, such that the main subject matter of the contract cannot be achieved if that processing does not occur.

In addition, according to the Court, the data processing at issue can be regarded as necessary for the purposes of the legitimate interests pursued by the controller or by a third party only on condition that the operator has informed the users from whom the data have been collected of a legitimate interest that is pursued by the data processing, that such processing is carried out only in so far as is strictly necessary for the purposes of that legitimate interest and that it is apparent from a balancing of the opposing interests, having regard to all the relevant circumstances, that the interests or fundamental freedoms and rights of those users do not override that legitimate interest of the controller or of a third party. The Court finds, inter alia, that in the absence of consent on their part, the interests and fundamental rights of those users override the interest of the operator of an online social network in personalised advertising through which it finances its activity.

Last, the Court specifies that the processing of personal data at issue is justified where it is actually necessary for compliance with a legal obligation to which the controller is subject, pursuant to a provision of EU law or the law of the Member State concerned, where that legal basis meets an objective of public interest and is proportionate to the legitimate aim pursued and where that processing is carried out only in so far as is strictly necessary.

In the fourth and last place, as regards the validity of the consent of the users concerned to the processing of their data under the GDPR, the Court holds that the fact that the operator of an online social network holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent to the processing of their personal data by that operator. However, since that position is liable to affect the freedom of choice of those users and to create a clear imbalance between them and the controller, it is an important

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38 Within the meaning of Article 9(2)(e) of the GDPR.

39 Within the meaning of point (a) of the first subparagraph of Article 6(1) of the GDPR.

40 Referred to in points (b) to (f) of the first subparagraph of Article 6(1) of the GDPR. Under those provisions, processing is lawful only if and to the extent that it is, inter alia, necessary for the performance of a contract to which the data subject is party (point (b) of the first subparagraph of Article 6(1) of the GDPR), for compliance with a legal obligation to which the controller is subject (point (c) of the first subparagraph of Article 6(1) of the GDPR) or for the purposes of the legitimate interests pursued by the controller or by a third party (point (f) of the first subparagraph of Article 6(1) of the GDPR).

factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove. [41]

In particular, the users of the social network in question must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using that online social network, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations. Moreover, it must be possible to give separate consent for the processing of off-Facebook data.

V. AGRICULTURE AND FISHERIES

Judgment of the General Court (Second Chamber, Extended Composition) of 12 July 2023, Cunsorziu di i Salamaghji Corsi – Consortium des Charcutiers Corses and Others v Commission, T-34/22

Link to the judgment as published in extract form

Protected geographical indication – Protected designation of origin – Applications for protection of the geographical indications 'Jambon sec de l'Île de Beauté', 'Lonzo de l'Île de Beauté' and 'Coppa de l'Île de Beauté' – Earlier protected designations of origin 'Jambon sec de Corse – Prisuttu', 'Lonzo de Corse – Lonzu' and 'Coppa de Corse – Coppa di Corsica' – Eligibility of names – Evocation – Article 7(1)(a) and Article 13(1)(b) of Regulation (EU) No 1151/2012 – Scope of the Commission's control of the applications for registration – Article 50(1) and Article 52(1) of Regulation No 1151/2012 – Error of assessment

In 2014, the names 'Jambon sec de Corse'/'Jambon sec de Corse – Prisuttu', 'Lonzo de Corse'/'Lonzo de Corse – Lonzu' and 'Coppa de Corse'/'Coppa de Corse – Coppa di Corsica' were registered as protected designations of origin (PDOs). [42]

In 2015, the Cunsorziu di i Salamaghji Corsi – Consortium des Charcutiers Corses (the 'Consortium') applied with the French national authorities, pursuant to Regulation No 1151/2012, [43] to register the names 'Jambon sec de l'Île de Beauté', 'Lonzo de l'Île de Beauté' and 'Coppa de l'Île de Beauté' as protected geographical indications (PGIs).

In 2018, those authorities issued decrees approving the corresponding specifications with a view to forwarding them to the European Commission for approval.

The union holding the specifications of the PDOs 'Jambon sec de Corse – Prisuttu', 'Coppa de Corse – Coppa di Corsica' and 'Lonzo de Corse – Lonzu' applied for the annulment of those decrees before the

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41 Pursuant to Article 7(1) of the RGPD.

42 Respectively, by Commission Implementing Regulation (EU) No 581/2014 of 28 May 2014 entering a name in the register of protected designations of origin and protected geographical indications (Jambon sec de Corse/Jambon sec de Corse – Prisuttu (PDO)) (OJ 2014 L 160, p. 23), Commission Implementing Regulation (EU) No 580/2014 of 28 May 2014 entering a name in the register of protected designations of origin and protected geographical indications (Lonzo de Corse/Lonzo de Corse – Lonzu (PDO)) (OJ 2014 L 160, p. 21) and Commission Implementing Regulation (EU) No 582/2014 of 28 May 2014 entering a name in the register of protected designations of origin and protected geographical indications (Coppa de Corse/Coppa de Corse – Coppa di Corsica (PDO)) (OJ 2014 L 160, p. 25).

43 Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

Conseil d'État (Council of State, France). It argued that the term 'Île de Beauté' imitated or evoked the term 'Corsica' and therefore caused confusion with the names already registered as PDOs. The Conseil d'État (Council of State) rejected that application on the ground, inter alia, that the use of different terms and the difference in the protections conferred by a PDO, on the one hand, and by a PGI, on the other, were such as to dispel that likelihood of confusion.

By Implementing Decision 2021/1879, [44] the Commission nevertheless refused to register the names 'Jambon sec de l'Île de Beauté', 'Lonzo de l'Île de Beauté' and 'Coppa de l'Île de Beauté' as PGIs. The Commission considered inter alia that it was well known that the name 'Île de Beauté' was a customary periphrasis which, in the eyes of the French consumer, unequivocally refers to Corsica. Therefore, the names applied for constituted a breach of the protection granted to the PDOs concerned by Article 13(1)(b) of Regulation No 1151/2012. [45] Consequently, they did not comply with the conditions for eligibility for registration, namely Article 7(1)(a) of Regulation No 1151/2012. [46]

The action brought by the Consortium and some of its members against that decision is dismissed by the General Court.

Although both the Court of Justice and the General Court have already had occasion to rule on the extent of the Commission's review of applications for registration, this case leads the General Court to rule for the first time on the eligibility of a name to be registered, a fortiori after national authorities and courts have found that consumers who are reasonably well informed and reasonably observant and circumspect would not, when faced with the PGIs applied for, directly have in mind, as a reference image, the products benefiting from PDOs already registered. In addition, this is also the first time that the Court has ruled on whether the Commission may refuse to register a name on the basis of a combined reading of Article 7(1)(a) and Article 13(1)(b) of Regulation No 1151/2012.

Findings of the Court

The General Court rejects the plea that the Commission exceeded its powers and infringed the principle of *res judicata*.

As regards the Commission's powers, the Court finds, first, that Article 7(1)(a) of Regulation No 1151/2012, read in conjunction with Article 13(1)(b) of that regulation, may constitute a valid legal basis for refusing to register a name. Admittedly, Article 7(1)(a) relates specifically to the 'product specification' of the name which is the subject of an application for protection. However, the issue of evocation referred to in Article 13 is related to eligibility for registration under that provision. The Commission must assess, under Article 50(1) of Regulation No 1151/2012, read in the light of recital 58 thereof, following a detailed examination, whether the specification which accompanies the application for registration contains the information required by that regulation and whether that information does not appear to be vitiated by manifest errors.

That specification, the preparation of which constitutes a necessary step in the registration procedure, must include, in particular, the name for which protection is sought as it 'is used in trade or in common language'. It follows that the Commission must check that that use does not infringe the protection against evocation provided for in Article 13(1)(b) of Regulation No 1151/2012. To allow the registration of a PGI when it would be evocative of a PDO already registered would render ineffective the protection provided for in Article 13(1)(b), since once that name is registered as a PGI,

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[44] Commission Implementing Decision (EU) 2021/1879 of 26 October 2021 rejecting three applications for protection of a geographical indication in accordance with Article 52(1) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council 'Jambon sec de l'Île de Beauté' (PGI), 'Lonzo de l'Île de Beauté' (PGI), 'Coppa de l'Île de Beauté') (PGI) (OJ 2021 L 383, p. 1).

[45] Article 13 of Regulation No 1151/2012, relating to 'protection', provides, in its paragraph 1(b), that 'registered names shall be protected against … (b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation" or similar, including when those products are used as an ingredient'.

[46] Under Article 7(1)(a) of Regulation No 1151/2012, entitled 'Product specification', '1. A protected designation of origin or a protected geographical indication shall comply with a specification which shall include at least: (a) the name to be protected as a designation of origin or geographical indication, as it is used, whether in trade or in common language'.

the name previously registered as a PDO will no longer enjoy the protection provided for in that provision in respect of that PDO.

Accordingly, the Commission cannot be required to allow the registration of a name if it considers its use in trade to be unlawful.

Secondly, the Court clarifies the extent of the Commission's examination of the compliance of the names with the conditions set out in Regulation No 1151/2012.

In that regard, the Commission must [47] scrutinise, by appropriate means, the applications to ensure that there are no manifest errors and that Union law and the interests of stakeholders outside the Member State of application have been taken into account.

Thirdly, the Commission has a different margin of discretion depending on whether it is the first stage of the procedure for registering a name, namely the stage during which the documents constituting the file relating to the application for registration which the national authorities may forward to the Commission are collected, or the second stage of that procedure, namely its own examination of the applications for registration.

While it is apparent from the case-law [48] that, as regards the first of those two stages, the Commission has only 'limited, if any', discretion, it has a margin of independent discretion as regards its decision to register a name as a PDO or PGI in the light of the conditions of eligibility for registration laid down in Article 7(1)(a) of Regulation No 1151/2012, read in conjunction with Article 13(1)(b) of that regulation.

As to an alleged infringement of the principle of *res judicata*, the General Court further states that the decision of a national court which has become *res judicata*, establishing that there was no risk, for reasonably well-informed and reasonably observant and circumspect consumers, of evocation between the registered PDOs and the PGIs applied for, cannot be relied on in order to call into question the Commission's independent assessment of those conditions of eligibility.

VI. FREEDOM OF MOVEMENT: FREEDOM OF ESTABLISHMENT

Judgment of the Court (Second Chamber) of 13 July 2023, Xella Magyarország, C-106/22

Link to the full text of the judgment

Reference for a preliminary ruling – Free movement of capital – Freedom of establishment – Regulation (EU) 2019/452 – Legislation of a Member State establishing a mechanism for filtering foreign investment in resident companies considered to be 'strategic' – Decision adopted on the basis of that legislation, prohibiting the acquisition by a resident company of all the shares of another resident company – Acquired company considered to be 'strategic' on the ground that its primary activity concerns the extraction of certain raw materials such as gravel, sand and clay – Acquiring company considered to be a 'foreign investor' on the ground that it forms part of a group of companies whose ultimate parent company is established in a third country – Harm or risk of harm to a national interest, public security or

[47] Under recital 58 and Article 50(1) of Regulation No 1151/2012.

[48] Judgments of 29 January 2020, *GAEC Jeanningros* (C-785/18, EU:C:2020:46), and of 23 April 2018, *CRM* v *Commission*, T-43/15, not published, EU:T:2018:208.

public order of the Member State – Objective intended to ensure the security of supply of raw materials to the construction sector, in particular at the local level

Janes és Társa is a Hungarian company whose main activity is the extraction of gravel, sand and clay from its quarry situated in Lázi (Győr-Moson-Sopron County, Pannonhalma District, Hungary).

Because of that activity, Janes és Társa is regarded as a 'strategic company', within the meaning of a law establishing a foreign investment screening mechanism. Its market share on the Hungarian market for the production of the raw materials concerned is 0.52%.

Xella Magyarország is another Hungarian company which forms part of a group of companies whose ultimate parent company is established in Bermuda and which belongs, ultimately, to an Irish national. It operates on the Hungarian construction materials market and is primarily engaged in the manufacture of concrete construction products. It purchases about 90% of the annual production of Janes és Társa with a view to the processing of those raw materials into sand-lime bricks in its factory near the quarry.

In October 2020, Xella Magyarország concluded a sale agreement for the purpose of acquiring 100% of the shares in Janes és Társa and requested the competent Minister to take note of the transaction concerned or to confirm that that formality was not necessary in view of its ownership structure. By a decision adopted in July 2021, that Minister prohibited the execution of the notified legal transaction, classifying Xella Magyarország as a 'foreign investor' because it is indirectly owned by LSF10 XL Investments, a company registered in Bermuda.

In addition, that Minister maintained that the security and foreseeability of the extraction and supply of raw materials were of strategic importance, particularly in the light of the serious disruptions to the functioning of global supply chains caused by the COVID-19 pandemic. The Minister highlighted that the production of aggregates, such as sand, gravel and crushed stone, for the construction sector was already dominated by foreign-owned Hungarian producers. Accordingly, if Janes és Társa were to be indirectly owned by a company registered in Bermuda, this would pose a longer-term risk to the security of supply of raw materials, such as those at issue in this case, which could harm the 'national interest', in the broad sense.

By its judgment, the Court of Justice concludes that the provisions of the TFEU on the freedom of establishment preclude the foreign investment screening mechanism in question. By means of that mechanism, a resident company which is a member of a group of companies established in several Member States, over which an undertaking of a third country has decisive influence, may be prohibited from acquiring ownership of another resident company regarded as strategic. The Court thus rejects the Hungarian Government's argument that such an acquisition harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials.

Findings of the Court

First, the Court finds that national legislation allowing the authorities of a Member State to prohibit an EU company, on grounds of security and public policy, from acquiring a shareholding in a 'strategic' resident company allowing it to exert a definite influence on the management and control of that company clearly constitutes a restriction on the freedom of establishment of that EU company, in this case a particularly serious restriction.

Secondly, the Court examines whether that restriction may be justified by an overriding reason relating to the public interest. In that respect, the Court notes that, in accordance with its case-law, such a justification presupposes that the restriction is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what is necessary to achieve it.

In this case, the specific interest at issue, namely in ensuring the security and the continuity of supply to the construction sector as regards certain basic raw materials, is capable of falling within the scope of Article 52(1) TFEU. That provision provides that a restriction on the freedom of establishment may be justified on grounds of public policy, public security or public health.

However, according to the case-law, while Member States are still free to determine the requirements of public policy and public security in the light of their national needs, those grounds may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.

As regards specifically an objective linked to the security of supply to the construction sector, in particular at the local level, as regards certain basic raw materials, the Court finds that it cannot constitute a public security reason and, therefore, possibly justify an obstacle to a fundamental freedom at issue in the main proceedings, in this case a particularly serious obstacle. It cannot be considered that that objective concerns a 'fundamental interest of society', within the meaning of the Court's case-law.

Moreover, it does not appear that the acquisition prohibited by the decision at issue in the main proceedings is actually capable of giving rise to a 'genuine and sufficiently serious threat', within the meaning of the Court's case-law. First, prior to that acquisition, the acquiring company already purchased approximately 90% of the production of the basic raw materials concerned from the quarry of the acquired company; the remaining 10% of that production being purchased by local undertakings in the construction sector. Secondly, it is well known that those basic raw materials have, by their very nature, a relatively low market value compared, above all, with their transport cost. Accordingly, the risk that a significant part of those extracted raw materials would be exported appears unlikely or even non-existent in practice.

VII. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court (First Chamber) of 6 July 2023, Bundesamt für Fremdenwesen und Asyl (Refugee who has committed a serious crime), C-663/21

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test – Directive 2008/115/EU – Return of illegally staying third-country nationals – Postponement of removal

Judgment of the Court (First Chamber) of 6 July 2023, Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime), C-8/22

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test

Judgment of the Court (First Chamber) of 6 July 2023, Staatssecretaris van Justitie en Veiligheid (Particularly serious crime), C-402/22

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test

In *Bundesamt für Fremdenwesen und Asyl (Refugee who has committed a serious crime)* (C-663/21), AA was granted, in December 2015, refugee status in Austria. Between March 2018 and October 2020, he received custodial sentences on a number of occasions and a fine for various offences including, inter alia, dangerous threatening behaviour, destroying or damaging the property of others, the unauthorised handling of drugs, drug trafficking, wounding, and aggressive behaviour towards a member of a public supervisory body.

By a decision adopted in September 2019, the competent Austrian authority withdrew AA's refugee status, issued a return decision accompanied by a prohibition on residence against him and set a period for voluntary departure, while stating that his removal was not permitted.

Following an appeal brought by AA, the Bundesverwaltungsgericht (Federal Administrative Court, Austria), by judgment delivered in May 2021, annulled that decision of September 2019. That court found that AA had been convicted by a final judgment of committing a particularly serious crime and that he constituted a danger to the community. Nevertheless, it considered that it was necessary to weigh up the interests of the host Member State against those of the individual concerned as a beneficiary of international protection, taking into account the measures to which that person would be exposed in the event of revocation of that protection. Given that AA would be exposed, if returned to his country of origin, to a risk of torture or death, that court held that his interests outweighed those of Austria. The competent Austrian authority brought an appeal on a point of law against that judgment before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

In *Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime)* (C-8/22), XXX was granted, in February 2007, refugee status in Belgium. By a judgment delivered in December 2010, he was sentenced to 25 years' imprisonment for, inter alia, aggravated theft of multiple moveable objects and intentional homicide with a view to facilitating that theft or ensuring impunity.

By a decision adopted in May 2016, the competent Belgian authority withdrew his refugee status. XXX brought an appeal against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), which, by a judgment delivered in August 2019, dismissed that appeal. That court held that the danger which XXX represents to the community stems from his conviction for a particularly serious crime, with the result that it was not for that authority to demonstrate that he constitutes a genuine, present and sufficiently serious danger to the community. On the contrary, it was for XXX to establish that, despite that conviction, he no longer constitutes such a danger. XXX brought an appeal on a point of law against that judgment before the Conseil d'État (Council of State, Belgium).

In *Staatssecretaris van Justitie en Veiligheid (Particularly serious crime)* (C-402/22), M.A. lodged, in July 2018, an application for international protection in the Netherlands. The competent Netherlands authority rejected that application in June 2020 on the ground that the applicant had been convicted, in 2018, to a term of imprisonment of 24 months for three sexual assaults, an attempted sexual assault and the theft of a mobile telephone, all committed on the same evening.

Following an appeal brought by M.A., the decision of June 2020 was annulled by a first instance court on the ground that an inadequate statement of reasons had been provided. The competent Netherlands authority brought an appeal against that judgment before the Raad van State (Council of State, Netherlands). It submits, first, that the acts of which M.A. was convicted should be regarded as

a single offence constituting a particularly serious crime and, second, that the conviction for a particularly serious crime demonstrates in principle that M.A. represents a danger to the community.

In those three cases, the referring courts ask the Court, in essence, about the conditions governing the revocation of refugee status pursuant to Article 14(4)(b) of Directive 2011/95, [49] and the weighing up, in that context, of the interests of the host Member State and those of the individual concerned as a beneficiary of international protection.

By those three judgments delivered on the same day, the Court answers those questions by clarifying, first, the concepts of 'particularly serious crime' and 'danger to the community' and, second, the scope of the proportionality test to be carried out in that context. It also explains the relationship between the revocation of refugee status and the adoption of the return decision.

Findings of the Court

The Court finds, first of all, that the application of Article 14(4)(b) of Directive 2011/95 is subject to two separate conditions being satisfied, namely, first, that the third-country national concerned has been convicted by a final judgment of a particularly serious crime and, second, that it has been established that that third-country national constitutes a danger to the community of the Member State in which he or she is present. Therefore, it cannot be held that the fact that the first of those two conditions has been satisfied is sufficient to establish that the second has also been satisfied. Such an interpretation of that provision follows from its wording and from a comparison of that provision with Article 12(2)(b) [50] and Article 17(1) of Directive 2011/95. [51]

As regards the first of those conditions, in the absence of an express reference to the law of the Member States for the purpose of determining its meaning and scope, the concept of 'particularly serious crime' must normally be given an independent and uniform interpretation throughout the European Union. First, in accordance with its usual meaning, the term 'crime' characterises, in that context, an act or omission which constitutes a serious breach of the legal order of the community concerned and which is, therefore, criminally punishable as such within that community. Second, the expression 'particularly serious', in so far as it adds two qualifiers to that concept of 'crime', refers to a crime of exceptional seriousness.

As regards the context in which the term 'particularly serious crime' is used, first, account must be taken of the Court's case-law relating to Article 12(2)(b) of Directive 2011/95, which refers to a 'serious non-political crime', and Article 17(1)(b) of that directive, which refers to a 'serious crime', given that those articles are also intended to deprive of international protection a third-country national who has committed a crime of a certain degree of seriousness. Second, it is apparent from a comparison of Articles 12, 14, 17 and 21 of Directive 2011/95 that the EU legislature imposed different requirements as regards the degree of seriousness of the crimes which may be relied on in order to justify the application of a ground for exclusion or revocation of international protection or the refoulement of a refugee. Thus, Article 17(3) of Directive 2011/95 refers to the commission of 'one or more crimes' and Article 12(2)(b) and Article 17(1)(b) of that directive refer to the commission of a 'serious crime'. It follows that the use, in Article 14(4)(b) of Directive 2011/95, of the expression 'particularly serious crime' highlights the choice of the EU legislature to make the application of that

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[49] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). Article 14(4)(b) of that directive provides: 'Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when … he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.'

[50] Article 12(2)(b) of Directive 2011/95 expressly provides that a third-country national is to be excluded from being a refugee where he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, without any requirement that that person represents a danger to the community of the Member State in which he or she is present.

[51] Article 17(1) of Directive 2011/95, concerning the granting of subsidiary protection, which can offer more limited protection than refugee status, refers, in (b), to the commission of a serious crime and, in (d), to the existence of a danger to the community, and those criteria are expressly presented as alternative conditions each of which, taken in isolation, entails the exclusion from eligibility for subsidiary protection.

provision subject to the satisfaction, inter alia, of a particularly strict condition relating to the existence of a final conviction for a crime of exceptional seriousness, more serious than the crimes which may justify the application of those provisions of that directive.

So far as concerns the assessment of the seriousness of a crime in the light of Article 14(4)(b) of Directive 2011/95, it is true that that assessment is to be carried out on the basis of a common standard and common criteria. However, in so far as the criminal law of the Member States is not the subject of general harmonisation measures, the assessment is to be carried out taking into account the choices made, within the framework of the criminal system of the Member State concerned, as regards the identification of the crimes which, in the light of their specific features, are exceptionally serious, in so far as they most seriously undermine the legal order of the community.

Still, given that that provision refers to a final conviction for a 'particularly serious crime' in the singular, the degree of seriousness of a crime cannot be attained by a combination of separate offences, none of which constitutes per se a particularly serious crime.

Lastly, in order to assess the degree of seriousness of such a crime, all the specific circumstances of the case concerned are to be examined. In that regard, of significant relevance are, inter alia, the grounds of the conviction, the nature and quantum of the penalty provided for and the penalty imposed, the nature of the crime committed, all of the circumstances surrounding the commission of that crime, whether or not that crime was intentional, and the nature and extent of the harm caused by that crime.

As regards the second condition, namely that it has been established that a third-country national constitutes a danger to the community of the host Member State, the Court finds, in the first place, that a measure referred to in Article 14(4)(b) of Directive 2011/95 may be adopted only where the third-country national concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of that Member State. In that regard, the Court states, inter alia, that it is apparent from the very wording of that provision that it applies only where that national 'constitutes' a danger to the community, which suggests that that danger must be genuine and present. Accordingly, the later a decision under that provision is taken after the final conviction for a particularly serious crime, the more it is incumbent on the competent authority to take into consideration, inter alia, developments subsequent to the commission of such a crime in order to determine whether a genuine and sufficiently serious threat exists on the day on which it is to decide on the potential revocation of refugee status. In that regard, the Court also relies on the fact that it is clear from a comparison of various provisions of Directive 2011/95 with Article 14(4)(b) of that directive that the application of the latter provision is subject to strict conditions.

In the second place, as regards the respective roles of the competent authority and the third-country national concerned in the assessment of whether a danger exists, it is for the competent authority, when applying Article 14(4)(b) of Directive 2011/95, to undertake, for each individual case, an assessment of all the specific circumstances of the case. In that context, that authority must have available to it all the relevant information and carry out its own assessment of the facts with a view to determining the tenor of its decision and providing a full statement of reasons for that decision.

Lastly, the Member State's option of adopting the measure provided for in Article 14(4)(b) of Directive 2011/95 is to be exercised in observance of, inter alia, the principle of proportionality, which entails that the threat that the third-country national concerned represents to the society of the Member State in which he or she is present, on the one hand, must be weighed against the rights which must be guaranteed to persons satisfying the substantive conditions of Article 2(d) of that directive, on the other. In that assessment, the competent authority must also take into account the fundamental rights guaranteed by EU law and, in particular, determine whether it is possible to adopt other measures less prejudicial to the rights guaranteed to refugees and to fundamental rights which would have been equally effective to ensure the protection of society in the host Member State.

However, when it adopts such a measure, that authority is not required to verify, in addition, that the public interest in the return of the third-country national to his or her country of origin outweighs that third-country national's interest in the continuation of international protection, in the light of the extent and nature of the measures to which that third-country national would be exposed if he or she were to return to his or her country of origin. The consequences, for the third-country national concerned or for the community of the Member State in which that third-country national is present,

of that national's potential return to his or her country of origin are to be taken into account not when the decision to revoke refugee status is adopted but, as the case may be, where the competent authority considers adopting a return decision against that third-country national.

In that regard, the Court states that Article 14(4)(b) of Directive 2011/95 corresponds in part to the grounds for exclusion contained in Article 33 of the Geneva Convention. [52] In those circumstances, in so far as the first of those provisions provides, in the scenarios referred to therein, for the possibility for Member States to revoke refugee status, while the second permits the refoulement of a refugee covered by one of those scenarios to a country where his or her life or freedom would be threatened, EU law provides more extensive international protection for the refugees concerned than that guaranteed by the Geneva Convention. Consequently, in accordance with EU law, the competent authority may be entitled to revoke, pursuant to Article 14(4)(b) of Directive 2011/95, the refugee status granted to a third-country national, without, however, necessarily being authorised to remove him or her to his or her country of origin. In addition, at a procedural level, such removal would involve the adoption of a return decision, in compliance with the substantive and procedural safeguards provided for in Directive 2008/115, [53] which provides, inter alia, in Article 5 thereof, that the Member States are required, when implementing that directive, to respect the principle of non-refoulement. Therefore, the revocation of refugee status, pursuant to Article 14(4) of Directive 2011/95, cannot be regarded as implying the adoption of a position on the separate question of whether that person can be deported to his or her country of origin. In that context, the Court further clarifies that Article 5 of Directive 2008/115 precludes the adoption of a return decision in respect of a third-country national where it is established that his or her removal to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.

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[52] Article 33 of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954 and was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967 ('the Geneva Convention') provides: '1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

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

VIII. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN ARREST WARRANT

Judgment of the Court (Second Chamber) of 6 July 2023, Minister for Justice and Equality (Request for consent – Effects of the original European arrest warrant), C-142/22

Link to the full text of the judgment

Reference for a preliminary ruling – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 27 – Prosecution for an offence committed prior to the person's surrender other than that for which he or she was surrendered – Request for consent sent to the executing judicial authority – European arrest warrant issued by the public prosecutor of a Member State which is not an issuing judicial authority – Consequences for the request for consent

By an order of the High Court (Ireland) executing three European arrest warrants issued in 2016 by Netherlands prosecutors, OE was surrendered to the Netherlands in 2017. He was then sentenced to a term of imprisonment.

In 2019, an investigating judge in Amsterdam (Netherlands) asked the High Court, in accordance with the rule set out in Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584, [54] to grant consent to the prosecution of OE for offences committed prior to his surrender other than those which provided the justification for the initial European arrest warrants. OE opposed that request before the High Court, claiming that the initial arrest warrants, which had been issued by public prosecutors, had been issued by authorities which could not be regarded as 'issuing judicial authorities' within the meaning of Article 6(1) of Framework Decision 2002/584. According to OE, that fact precluded the request for consent from being granted. However, by order of 27 July 2020, the High Court granted the consent sought.

In May 2021, the Court of Appeal (Ireland) dismissed OE's appeal, holding that it was necessary to apply the national procedural rule of estoppel, which precluded a challenge to the 2017 surrender order, which had the force of *res judicata*.

In the context of an appeal brought by OE against that decision before the Supreme Court (Ireland), which is the referring court in the present case, that court is uncertain as to how to classify legally the relationship between the surrender procedure and the consent procedure.

The Court holds that Article 27(3)(g) and (4) of Framework Decision 2002/584 must be interpreted as meaning that the fact that a European arrest warrant on the basis of which a person has been the subject of a surrender decision has been issued by an authority which did not constitute an 'issuing judicial authority' within the meaning of Article 6(1) of that framework decision, does not preclude the executing judicial authority, to which a request to that effect has been made by an issuing judicial authority within the meaning of Article 6(1), from subsequently giving its consent to that person being prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

Findings of the Court

First of all, the Court notes that European arrest warrants which have been issued by the public prosecutor of a Member State which may, in exercising its decision-making power, receive an

[54] 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).

instruction in a specific case from the executive are not issued in accordance with the requirements arising from Framework Decision 2002/584.

The Court then notes that the consent decision has a subject matter that is specific to it. For that reason, it must be taken by the executing judicial authority following an examination separate from and independent of the examination prompted by the European arrest warrant. That examination must be carried out in accordance with Article 27(4) of Framework Decision 2002/584. The executing judicial authority must first verify whether the request for consent submitted to it is accompanied by the information required under the framework decision and a translation. [55] Second, that authority must also ascertain whether the offence for which consent is requested is itself subject to the surrender obligation under the same framework decision. Third, it must assess, in the light of the grounds for mandatory or optional non-execution laid down by that framework decision, [56] whether the extension of the prosecution to offences other than those for which the person concerned was surrendered may be authorised. However, it is not clear from the wording of the provisions concerned that a defect affecting an initial European arrest warrant would be such as to prevent the executing judicial authority from giving the consent sought.

Furthermore, the Court takes the view that to accept that the conditions under which the surrender was carried out may be the subject of a review in the context of a request for consent made under Article 27(3)(g) and (4) of Framework Decision 2002/584 would result in a delay to the consent decision, on grounds unrelated to those provided for in paragraph 4, which would run counter to the need for speed which underlies that framework decision.

Lastly, the Court notes that, in the present case, the 2017 surrender order has become definitive despite the fact that it was adopted following European arrest warrants that were all issued by authorities that cannot be classified as 'competent judicial authorities' within the meaning of Article 6 of Framework Decision 2002/584. Therefore, it would be paradoxical to call into question, on the basis of that fact, the consent at the origin of the case in the main proceedings, which, for its part, follows a request issued by such a competent judicial authority.

IX. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

Judgment of the Court (Fourth Chamber) of 13 July 2023, TT (Wrongful removal of a child), C-87/22

Link to the full text of the judgment

Reference for a preliminary ruling – Jurisdiction in matters of parental responsibility – Regulation (EC) No 2201/2003 – Articles 10 and 15 – Transfer to a court of another Member State better placed to hear

[55] See Article 8(1) and (2) of Framework Decision 2002/584.

[56] See Articles 3 and 4 of Framework Decision 2002/584.

the case – Conditions – Court of the Member State to which the child has been wrongfully removed – The 1980 Hague Convention – Best interests of the child

The Slovak nationals TT and AK are the parents of V and M, born in Slovakia in 2012. In 2014, the family moved to Austria. TT and AK separated in 2020 and AK brought the children to live with her in Slovakia, without TT's consent. TT then lodged a request for the return of the children with a Slovak court pursuant to the 1980 Hague Convention. [57] In parallel, he lodged an application with an Austrian court for the purpose of being granted sole custody of the two children. AK seised that same court, requesting that it ask a Slovak court to assume jurisdiction on the matter of custody of the children, in accordance with Regulation No 2201/2003, [58] [59] arguing that the Slovak courts would be better placed to rule on the matter of parental responsibility for the two children.

The referring court wonders whether jurisdiction as regards custody of a child can be transferred, pursuant to Regulation No 2201/2003, [60] to a court of the Member State in which the child has settled his or her habitual residence following a wrongful removal and whether the conditions laid down for such a transfer are exhaustive.

Seised by that court, the Court of Justice provides clarifications concerning the conditions under which the court of a Member State, which has jurisdiction to rule on the substance of a case on the matter of parental responsibility under Article 10 of Regulation No 2201/2003, may exceptionally request the transfer of that case, provided for by Article 15(1)(b) of that regulation, to a court of the Member State to which the child has been wrongfully removed by one of his or her parents.

Findings of the Cour

The rules on jurisdiction in matters of parental responsibility contained in Regulation No 2201/2003 were drawn up with the objective of meeting the best interests of the child and, to that end, they favour the criterion of proximity. Thus, a general rule of jurisdiction is established [61] in favour of the courts of the Member State in which the child is habitually resident at the time the court is seised. That rule applies, however, [62] subject to, inter alia, Article 10 of that regulation, which attributes jurisdiction to the courts of the Member State in which that child was habitually resident immediately before the wrongful removal or retention. That provision, which gives effect to the aim of deterring the wrongful removal or retention of children between Member States, serves to defeat what would otherwise be the effect of the application of the general rule of jurisdiction in a case of the wrongful removal of the child concerned, namely the transfer of jurisdiction to the Member State where the child may have acquired a new habitual residence, following his or her wrongful removal or retention.

In addition, Article 15 of Regulation No 2201/2003 provides for a means of cooperation by which a court of a Member State which has jurisdiction to hear the case may, by way of exception, transfer that case to a court of another Member State, provided that that court accepts jurisdiction within six weeks. A court whose jurisdiction is based on Article 10 of Regulation No 2201/2003 also has the power to request a transfer, and it cannot be ruled out that the transfer may be made to a court of the Member State to which the child concerned has been wrongfully removed by one of his or her

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57 Convention on the Civil Aspects of International Child Abduction, concluded in The Hague on 25 October 1980.

58 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1). Article 15 of Regulation No 2201/2003 provides that, by way of exception, the courts of a Member State having jurisdiction as to the substance of a case in matters of parental responsibility may request the transfer of that case, or a specific part thereof, to a court of another Member State with which the child has a particular connection, if that court is better placed to hear the case, and where the transfer is in the best interests of the child.

59 In particular with Article 15(1)(b), (2)(a) and (5) of that regulation.

60 Under Article 15(1)(b) of that regulation.

61 In accordance with Article 8(1) of that regulation.

62 In accordance with Article 8(2) of that regulation.

parents. The best interests of the child, which is one of the objectives pursued by Regulation No 2201/2003, is a fundamental consideration and the transfer at issue must be in those best interests. It is therefore not contrary to the objectives pursued by Regulation No 2201/2003 for a court having jurisdiction in matters of parental responsibility on the basis of Article 10 of that regulation to be able to request the transfer of the case of which it is seised to a court in the Member State to which the child concerned has been wrongfully removed by one of his or her parents.

The transfer at issue may, however, be requested only if three cumulative and exhaustive conditions are satisfied, [63] namely that there is a 'particular connection' between the child and another Member State, that the court having jurisdiction as to the substance of the case considers that a court of that other Member State is 'better placed' to hear the case and that the transfer is in the best interests of the child, in so far as it is not liable to be detrimental to the situation of the child concerned. The existence of a return application based on the 1980 Hague Convention, in respect of which a final decision has not yet been delivered in the Member State to which the child concerned has been wrongfully removed by one of his or her parents, does not preclude the transfer at issue, but that fact must be taken into account in the analysis of whether the conditions laid down for that transfer have been satisfied.

In that regard, in the first place, the fact that a Member State is the place of the child's nationality is one of the criteria permitting a finding that that child has a 'particular connection' with that Member State.

In the second place, as regards the condition that the court to which it is envisaged that the transfer will be made must be 'better placed' to hear the case, the court having jurisdiction should take several factors into account. First of all, the transfer should provide genuine and specific added value to the adoption of a decision relating to the child, compared with if the case were to continue before the court having jurisdiction. That is the case, inter alia, where the court to which it is envisaged that the transfer will be made has, at the request of the parties to the main proceedings and in accordance with the applicable rules of procedure, adopted a series of urgent provisional measures based on, inter alia, Article 20 of Regulation No 2201/2003. Next, that transfer cannot give rise to a clear risk that the parent applying for the return of the child will be deprived of the opportunity to present his or her arguments effectively before the court to which it is envisaged that the transfer will be made. Lastly, where a return application based on the 1980 Hague Convention has been lodged with the competent authorities of the Member State to which the child concerned has been wrongfully removed, no court of that Member State may be held to be 'better placed' to hear the case before the period of six weeks laid down for delivering a judgment on the application for the return of the child [64] has expired. Furthermore, a substantial delay by the courts of that Member State in ruling on that application is capable of constituting a factor weighing against a finding that those courts are better placed to rule on the substance of rights of custody. After having been informed of the wrongful removal of a child, the courts of the contracting State to which the child has been removed cannot rule on the substance of rights of custody until it has been established that, inter alia, the conditions for the return of the child are not satisfied. [65]

In the third and last place, as regards the condition relating to the best interests of the child, the assessment of that condition cannot disregard the temporary impossibility for the courts of the Member State to which the child has been wrongfully removed by one of his or her parents to adopt a decision on the substance of rights of custody, consistent with those best interests, before the court of that Member State hearing the application for the return of that child has, at the very least, ruled on that application.

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63 Listed exhaustively in Article 15(1) of Regulation No 2201/2003.

64 Laid down in Article 11 of the 1980 Hague Convention and Article 11 of Regulation No 2201/2003.

65 Article 16 of the 1980 Hague Convention.

X. COMPETITION: CONCENTRATIONS

Judgment of the Court (Grand Chamber) of 13 July 2023, Commission v CK Telecoms UK Investments, C-376/20 P

Link to the full text of the judgment

Appeal – Competition – Regulation (EC) No 139/2004 – Control of concentrations of undertakings – Mobile telecommunications services – Decision declaring a concentration incompatible with the internal market – Oligopolistic market – Significant impediment to effective competition – Non-coordinated effects – Standard of proof – European Commission's margin of discretion with regard to economic matters – Limits of judicial review – Guidelines on horizontal mergers – Factors relevant to demonstrating a significant impediment to effective competition – Concepts of 'important competitive force' and 'close competitors' – Closeness of competition between the parties to the concentration – Quantitative analysis of the effects of the proposed concentration on prices – Efficiencies – Distortion – Complaint raised by the General Court of the European Union of its own motion – Annulment

A proposed concentration involving two of the four mobile telephone operators active on the retail market for mobile telecommunications services in the United Kingdom was notified to the European Commission on 11 September 2015. That proposed transaction was to enable CK Hutchison Holdings Ltd, through the intermediary of its indirect subsidiary Hutchison 3G UK Investments Ltd, which became CK Telecoms UK Investments Ltd ('CK Telecoms'), to obtain sole control over Telefónica Europe plc ('O2'). Following the proposed concentration, Hutchison 3G UK Ltd ('Three'), an indirect subsidiary of CK Hutchison Holdings, and O2 would become the main player on that market, ahead of the two remaining operators, namely EE Ltd, a subsidiary of BT Group plc and former legacy operator ('BT/EE'), and Vodafone.

By decision of 11 May 2016, [66] the Commission, pursuant to the Merger Regulation [67] and its guidelines on the assessment of horizontal mergers, [68] declared the concentration incompatible with the internal market. The Commission put forward three 'theories of harm'. The Commission took the view that the concentration would create significant impediments to effective competition due to non-coordinated effects resulting from, first, the elimination of important competitive constraints on the retail market (first 'theory of harm'), which would probably have led to an increase in prices for mobile telecommunications services and a restriction of choice for consumers. Second, since a characteristic of the market in question was that BT/EE and Three, on the one hand, and Vodafone and O2, on the other, had concluded network-sharing agreements, the concentration would have a negative influence on the quality of services for consumers, hindering the development of mobile network infrastructure in the United Kingdom (second 'theory of harm'). Third, there was a risk that the concentration would have significant non-coordinated effects on the wholesale market (third 'theory of harm').

The General Court, before which CK Telecoms brought an action seeking to have the decision at issue set aside, was also called upon to give a ruling, for the first time, on the condition in which the Merger

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66 Commission Decision C(2016) 2796 final of 11 May 2016 declaring a concentration incompatible with the internal market (Case M.7612 – Hutchison 3G UK/Telefónica UK), non-confidential version available in English at the following address: <https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf>, and published in summary format in the Official Journal of the European Union (OJ 2016 C 357, p. 15, 'the decision at issue').

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

68 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5, 'the guidelines').

Regulation applies to a concentration on an oligopolistic market entailing neither the creation nor the strengthening of an individual or collective dominant position, but which could give rise to non-coordinated effects.

By judgment of 28 May 2020, [69] the General Court set aside the decision at issue, holding, in essence, that the Commission had not been able to demonstrate that the notified concentration would give rise to non-coordinated effects which were likely to constitute significant impediments to effective competition, either on the retail market, as regards the first and second theories of harm, or on the wholesale market, as regards the third theory.

The Commission appealed against the judgment under appeal.

By its judgment, the Court of Justice, sitting in Grand Chamber formation, holds that most of the complaints made by the Commission under the six grounds of appeal relied on in support of its appeal are well founded, and it therefore sets aside the judgment under appeal in its entirety. In so doing, the Court provides clarification, in particular, in relation to: (i) the standard of proof required of the Commission in order to make a finding that there may be a significant impediment to effective competition, (ii) the interpretation of Article 2(3) of the Merger Regulation, (iii) the extent of judicial review, (iv) the interpretation of the concepts 'important competitive force' and 'close competitors', (v) the efficiencies which the Commission may take into account and (vi) the overall assessment of the relevant factors which may influence whether or not significant non-coordinated effects are likely to result from a merger on an oligopolistic market.

Findings of the Court

First, the Court of Justice examines the ground of appeal seeking to challenge, in principle, the General Court's determination of the standard of proof required of the Commission when carrying out the prospective analysis of the effects of the concentration in question, in order to demonstrate that there may be significant impediments to effective competition such as to justify a decision of incompatibility.

As regards the determination of the standard of proof required, the Court of Justice observes, at the outset, that the provisions of the Merger Regulation setting out the scope of the Commission's power as regards merger control are symmetrical as regards the standards of proof imposed on the Commission in order to demonstrate that a notified concentration would or would not significantly impede effective competition and must therefore be declared incompatible or compatible with the internal market. In that context, the Court recalls that in relation to the analysis thereby required, there can be no general presumption of compatibility or incompatibility with the internal market. Furthermore, the standard of proof required is not dependent on the type of concentration examined by the Commission or the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration. In those circumstances, in the light of the prospective nature of the required economic analysis, the Court considers that, in order to be able to give a ruling on a concentration, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it. Therefore, by taking the view, in the judgment under appeal, that the Commission is required to demonstrate with a 'strong probability the existence of significant impediments' to effective competition following the concentration and that 'the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is "more likely than not"', the General Court applied a standard of proof which does not follow from the Merger Regulation, as interpreted by the Court of Justice, and in so doing made an error in law.

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[69] Judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217, 'the judgment under appeal').

Second, the Court of Justice finds that the General Court's interpretation of Article 2(3) of the Merger Regulation, read in the light of recital 25 thereof is incorrect as regards the conditions required in order to establish whether there is a significant impediment to effective competition resulting from a concentration which has non-coordinated effects on an oligopolistic market. The General Court took the view that that recital sets out two cumulative conditions for such effects to be able, in certain circumstances, to result in a significant impediment to effective competition, namely, first, the elimination of important competitive constraints that the merging parties had exerted upon each other and, second, the reduction of competitive pressure on the remaining competitors. Accordingly, the General Court required the Commission to demonstrate that those two conditions were fulfilled in the present case. In so far as such an interpretation, that those conditions are cumulative, would mean that the elimination of important competitive constraints that the merging parties had exerted upon each other and the unilateral price increase which might result therefrom would never, in themselves, be sufficient to demonstrate a significant impediment to effective competition, that interpretation is incompatible with the objective of the Merger Regulation, which is to establish effective control of all concentrations which are capable of resulting in such an impediment, including those giving rise to non-coordinated effects.

Acting on the implications of the foregoing statements of principle, the Court of Justice examines, third, the ground of appeal by which the Commission complained, in essence, that the General Court had, first of all, exceeded the limits of judicial review incumbent on it in interpreting the concepts of 'important competitive force' and 'close competitors', next, distorted both the decision at issue and the Commission's defence and, last, misinterpreted the concepts of 'important competitive force' and 'close competitors' contained in the guidelines.

In that regard, the Court of Justice states first of all that the General Court cannot be criticised for having exceed the limits of judicial review incumbent on it in interpreting those concepts. While it is true that those concepts require an economic analysis when they are implemented, the EU Courts nevertheless continue to have jurisdiction to interpret them when conducting their review of Commission merger control decisions.

However, the Court of Justice's examination of the grounds under criticism finds that the inadequacies of the General Court in relation to the implementation of those concepts, constituted both a distortion of the decision at issue and a misinterpretation of the concepts of 'important competitive force' and 'close competitors'.

First, it is not apparent from the decision at issue that the Commission was of the view that the elimination of an 'important competitive force' or the closeness of competition would be sufficient in the present case, in themselves, to prove a significant impediment to effective competition. In making a finding to the contrary, the General Court therefore distorted the meaning of the decision at issue. Second, the Court of Justice observes that the General Court made an error of law in finding that, in order to be able to classify an undertaking as an 'important competitive force', it was for the Commission to demonstrate, in particular, that the undertaking concerned competed particularly aggressively in terms of prices and that it forced the other players on the market to align with its prices, whereas it is sufficient for the Commission to establish that the undertaking in question had more of an influence on the competitive process than its market share or similar measures would suggest, as borne out by paragraph 37 of the guidelines. The General Court therefore erred in finding, in the present case, that the Commission had not demonstrated to the requisite legal standard that Three fell within that concept. Similarly, the Court of Justice finds that, for the purposes of implementing the concept of 'close competitors', the General Court was also not justified in requiring the Commission to establish 'particular' closeness between the parties to the concentration in order to be able to classify them as 'close competitors'.

Fourth, as regards the quantitative analysis of the effects of the proposed concentration on prices, which the General Court had also found to be insufficiently supported, it is apparent from the examination of the relevant paragraphs of the judgment under appeal that none of the factors relied on by the General Court is such as to provide the basis for the finding criticised.

Indeed, on the one hand, in observing – having compared the estimate, which was presented as not subject to dispute, of the predicted price increase in the present case with the higher increases found in other cases – that the Commission did not for that reason regard those higher increases as

'significant', the General Court (i) distorted the Commission's written pleadings at first instance, which reveals the parties' lack of agreement as regards the estimate to be used, and (ii) erred in comparing the present case to those other concentration cases examined by the Commission.

On the other hand, the General Court also erred in taking the view that it was for the Commission to include in its quantitative analysis the so-called 'standard' efficiencies which, according to the General Court, are specific to all concentrations. The Court of Justice considers that it is for the parties to the concentration alone to demonstrate such pro-competitive effects and there can be no presumption thereof.

Fifth, the Court of Justice examines the ground of appeal by which the Commission criticises the General Court for not having analysed whether all the relevant factors supported the conclusion that the Commission had been able, in the present case, to establish that the concentration would result in a significant impediment to effective competition and to have therefore erroneously limited its examination to certain factors supporting the first theory of harm and whether, taken separately, those factors were sufficient to establish such an impediment. The Court of Justice upholds that ground of appeal and observes that by failing to carry out, following its examination of the substance of the factors and findings contested by CK Telecoms at first instance and in the light of the result of that examination, an overall assessment of the relevant factors and findings, in order to ascertain whether the Commission had demonstrated the existence of a significant impediment to effective competition, the General Court erred in law.

Sixth, the Court of Justice examines the grounds referred to in the appeal on which the General Court relied in order to reject the Commission's analysis in relation to the second theory of harm. In that regard, the Court of Justice rules, first, that the General Court's finding that the Commission had failed to assess possible degradation of the quality of the network resulting from the concentration is attributable to a distortion of the decision at issue. Second, the Court of Justice observes that CK Telecoms did not criticise the Commission, before the General Court, for having failed to specify or analyse the appropriate time frame within which that institution intended to establish the existence of non-coordinated effects and of a significant impediment to effective competition. However, the General Court carried out an analysis of its own motion of that issue. Accordingly, the General Court erred in raising of its own motion a complaint which cannot be classified as a plea involving a matter of public policy.

Having regard to the breadth, nature and scope of the errors made by the General Court, which affect that court's reasoning as a whole in the judgment under appeal, the Court of Justice holds that the judgment under appeal must be set aside. Given that the General Court made its ruling without having examined all of the grounds raised and given that the nature and scope of the errors identified by the Court of Justice require, essentially, a new analysis, the Court of Justice takes the view that the state of the proceedings does not permit a final judgment to be given in the matter and, therefore, the Court of Justice orders the case to be referred back to the General Court.

XI. TAX PROVISIONS: LIMITATION PERIOD FOR ACTION BY THE TAX AUTHORITIES

Judgment of the Court (Fifth Chamber) of 13 July 2023, Napfény-Toll, C-615/21

Link to the full text of the judgment

Reference for a preliminary ruling – Value added tax (VAT) – National legislation providing for the possibility of suspending, without any temporal limit, the limitation period for action by the tax authorities in the event of court proceedings – Repeated tax procedures – Regulation No 2988/95 – Scope – Principles of legal certainty and effectiveness of EU law.

Napfény-Toll Kft., a company incorporated under Hungarian law, deducted from the amount of value added tax (VAT) which it was liable to pay the amount of VAT due in respect of various acquisitions of goods made in 2010 and 2011.

Following a tax inspection initiated in December 2011 by the first-level administrative tax authority, part of the deduction was rejected because some of the invoices relied on for that purpose did not correspond to any real economic transaction and some others were part of a tax fraud.

By a decision of 8 October 2015 ('the initial administrative decision'), that administrative authority ordered the company to pay tax arrears totalling 144 785 000 Hungarian forint (HUF) (approximately EUR 464 581) and imposed a fine on it of HUF 108 588 000 (approximately EUR 348 433), as well as a late-payment penalty of HUF 46 080 000 (approximately EUR 147 860).

Dealing with complaints from Napfény-Toll, the second-level administrative tax authority overturned the initial administrative decision as regards the late-payment penalty and dismissed the complaint as to the remainder. Napfény-Toll brought an action against that first administrative decision at the second level before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) which set aside that decision and ordered a new procedure to be initiated.

The second-level administrative tax authority adopted a second decision, in essence upholding the initial administrative decision. By judgment of 5 July 2018, the Budapest Administrative and Labour Court, before which the company had brought an action against that second decision, set it aside and ordered a new procedure to be initiated.

As a third decision by the second-level administrative tax authority upheld the initial administrative decision, Napfény-Toll brought an appeal against that decision before the Szegedi Törvényszék (Szeged High Court, Hungary), the referring court.

That court states that, according to the legislation and the national administrative practice, the limitation period in respect of the right of the tax authorities to assess VAT is to be suspended for the whole duration of the judicial review of a decision by that administration, regardless of the number of repeat administrative tax procedures following those reviews and with no ceiling on the cumulative duration of the suspensions of that period.

Accordingly, there is no limit on how long the suspension of the limitation period in cases of judicial review can last, with the result that the tax authority's right to assess VAT amounts to be repaid could be extended by a number of years or even by decades, as is similar in the present case.

The referring court put questions to the Court of Justice concerning the compatibility of those rules and of the practice resulting from them with the principles of legal certainty and effectiveness of EU law.

By its judgment, the Court rules, in essence that those principles do not preclude national legislation or national administrative practice which provide that the limitation period in respect of the right of the tax authorities to assess VAT is suspended for the whole duration of judicial review, regardless of the number of times the administrative tax procedure has had to be repeated following those reviews and with no ceiling on the cumulative duration of the suspensions of that period.

Findings of the Court

The Court notes, as a preliminary point, the EU law does not lay down a period within which the right of the tax authorities to assess VAT is time-barred, and it also does not, a fortiori, specify the circumstances in which such a period ought to be suspended. It is true that Regulation No 2988/95 [70] lays down certain requirements for calculating and suspending the limitation periods for proceedings in respect of the irregularities referred to in that regulation. However, prejudice to revenue from VAT

[70] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

does not fall within the scope of that regulation, since that tax is not collected directly on behalf of the European Union as provided for in that regulation.

Therefore, it is for Member States to establish and apply rules on limitation periods in relation to the right of tax authorities to assess VAT due, including the procedures for suspension and/or interruption of that limitation period. Such a competence must however be exercised in a manner consistent with EU law, which requires reasonable time limits to be laid down which protect both the taxable person and the authority concerned.

In that regard, the Court observes that, even if its case-law already provides certain information concerning the limitation period in respect of the right of the tax authority to assess the VAT due, that case-law does not address the question of whether such a limitation period can be suspended for the whole duration of judicial review without infringing EU law, and in particular, the EU law principles of legal certainty and effectiveness.

In order to respond to that question, the Court recalls, first of all, that the principle of legal certainty, which must be observed by the Member States in the exercise of their competences, is aimed at ensuring foreseeability of situations and requires that the tax position of a taxable person having regard to his or her rights and obligations vis-à-vis the tax authorities should not be open to challenge indefinitely. Therefore, the taxable person must be able to rely on a specific legal situation.

Since before the expiry of the limitation period laid down for that purpose, the tax authority has notified the taxable person concerned of its intention to re-examine that taxable person's tax position and, therefore, implicitly, to withdraw its decision to accept that taxable person's declaration, that taxable person can no longer rely on the situation which arose on the basis of that declaration.

Moreover, the requirements arising from the principle of legal certainty are not absolute. Member States must therefore weigh them against the other requirements inherent in their membership of the European Union, in particular those of the fulfilment of the obligations arising from the Treaties or from acts adopted by the institutions under those Treaties. The national rules relating to the suspension of the limitation period in respect of the right of the tax authority to assess the VAT due must find a balance between the requirements arising from the principle of legal certainty and those enabling Directive 2006/112 [71] to be implemented effectively and efficiently.

In that regard, while the legislation and the practice described in the present case are capable of causing the duration of that limitation period to be extended, they are, however, not capable, in principle, of causing the situation of the taxable persons concerned to be under challenge indefinitely. The suspension which they lay down makes it possible to ensure the effective and efficient implementation of Directive 2006/112 cannot be jeopardised by dilatory actions being brought and therefore that such implementation is not undermined by reason of a systemic risk that acts constituting infringements of that directive may go unpunished.

Next, the Court examines whether that legislation and that practice infringe the principle of effectiveness which circumscribe the procedural autonomy which the Member States enjoy in defining the detailed rules for the implementation of rights which the EU legal order confers on individuals, where EU law does not contain any specific legislation in that regard.

The national rules concerning the time limits on the rights and obligations laid down by Directive 2006/112 and the conditions for suspending those time limits, constitute rules for the implementation of the provisions of that directive which are therefore, on that basis, required to comply with the principles of effectiveness and of equivalence. Those procedural rules must not be framed so as to make it, in practice, impossible or excessively difficult to exercise the rights conferred by the EU legal order.

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[71] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

However, the limitation rules at issue in the present case are not such as to make it, in practice, impossible or, at the very least, excessively difficult to exercise the rights conferred by the EU legal order. Indeed, in no way do they prevent that taxable person from relying on the rights conferred by the EU legal order and, in particular, by Directive 2006/112, but by contrast are intended to enable that taxable person effectively to assert the rights which he derives from EU law, while at the same time preserving the rights of the tax authorities.

Notwithstanding the fact that neither the principle of legal certainty nor the principle of effectiveness precludes the legislation or the administrative practice at issue, the taxpayer is entitled to have his or her situation dealt with within a reasonable period of time, in accordance with the right to sound administration, then, in the event of legal proceedings, the right to have his or her case heard within a reasonable period of time, in accordance with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union .

Therefore, once the procedure for examining the situation of a taxable person in the light of the rules of the common system of VAT has been reopened, the duration of such a review and, where appropriate, subsequent judicial reviews must not be unreasonable in the light of the particular circumstances of each case.

That could be the case where that administrative procedure has had to be repeated on account of the manifest infringement, by that authority, of a decisive ground of a court decision concerning that administrative procedure.

However, the excessive length of proceedings, whether administrative or judicial, is capable of justifying the annulment of the decision taken at the end of that procedure only where that length has had an effect on the ability of the person concerned to defend him or herself.

Given it is for taxable persons to ensure that they keep all the relevant supporting documents relating to their tax return until the tax decisions become final and having regard to the predominant role of the tax return and the documentary evidence in the common VAT system for the purposes of establishing the accuracy of taxable persons' returns, it is therefore only in exceptional circumstances that it could be established that the excessive length of an administrative or judicial procedure is capable of having had an impact on the ability of the person concerned to defend him or herself.

XII. COMMON COMMERCIAL POLICY

1. ANTI-DUMPING

Judgment of the General Court (Fifth Chamber, Extended Composition) of 5 July 2023, Nevinnomysskiy Azot and NAK 'Azot' v Commission, T-126/21

Link to the full text of the judgment

Dumping – Imports of ammonium nitrate originating in Russia – Definitive anti-dumping duties – Request for an expiry review – Article 11(2) of Regulation (EU) 2016/1036 – Article 5(3) and (9) of Regulation 2016/1036 – Legal time limit – Sufficiency of the evidence – Deficiency procedure – Information submitted outside the legal time limit

In 2018, following an interim review of the dumping measures applied to imports of ammonium nitrate originating in Russia ('the product concerned'), the European Commission adopted Implementing Regulation 2018/1722 maintaining a definitive anti-dumping duty on those imports. [72]

On 21 June 2019, the Commission received a request for the initiation of an expiry review of those anti-dumping measures, on the basis of Article 11(2) of Regulation (EU) 2016/1036 [73] ('the original request'), lodged by Fertilizers Europe, an association of European fertiliser manufacturers. On 20 August 2019, at the request of the Commission, Fertilizers Europe provided additional information that was incorporated into a consolidated version of the original request.

The Commission took the view that there was sufficient evidence to initiate an expiry review and to carry out an investigation. Following that investigation, it decided to extend the measures at issue for a period of five years by adopting Implementing Regulation (EU) 2020/2100 imposing a definitive anti-dumping duty on imports of the product concerned originating in Russia [74] ('the contested regulation').

AO Nevinnomysskiy Azot and AO Novomoskovskaya Aktsionernaya Kompania NAK 'Azot', two companies established in Russia that produce and export the product concerned, brought an action for annulment of the contested regulation.

By its judgment, delivered in a chamber sitting in extended composition, the General Court upholds that action and annuls the contested regulation. On this occasion, it clarifies the content of a request for an expiry review of anti-dumping measures made by or on behalf of Union producers on the basis of Article 11(2) of the basic regulation, as well as the nature of the additional information that may be submitted by a complainant during the three months preceding the date on which the anti-dumping measures concerned are to expire.

Findings of the Court

In support of their action, the applicants claim, inter alia, that the Commission erred in initiating the expiry review procedure in spite of the lack of sufficient evidence to do so, thereby disregarding the requirements of Article 11(2) of the basic regulation.

In that regard, it follows from that provision that a request for a review must be made by or on behalf of Union producers no later than three months before the date on which the anti-dumping measures are to expire ('the legal time limit'). Moreover, such a request must contain, no later than that date, sufficient evidence that the expiry of the measures would likely result in a continuation or recurrence of dumping and injury in order to justify the initiation of the review.

According to the Court, the requirements thus defined in respect of the legal time limit serve a dual purpose. That system contributes, first, to ensuring legal certainty, by enabling market operators to know, in good time, whether the anti-dumping measures are likely to be maintained. Second, it enables the Commission to assess the evidence contained in the request for a review, as made within the legal time limit, and to ascertain whether the evidence is sufficient and relevant, before deciding whether or not to initiate the review. To that end, the Commission is allowed to receive or request additional information after the legal time limit and during the three months preceding the date on which the anti-dumping measures in question are to expire, resulting in a consolidated version of the request. That being so, such additional information can only supplement or corroborate the sufficient

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72 Implementing Regulation (EU) 2018/1722 of 14 November 2018 amending Implementing Regulation (EU) No 999/2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an interim review pursuant to Article 11(3) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ 2018 L 287, p. 3).

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

74 Commission Implementing Regulation (EU) 2020/2100 of 15 December 2020 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) of the Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ 2020 L 425, p. 21).

evidence submitted within the legal time limit; it cannot therefore constitute new evidence or remedy the insufficiency of the evidence submitted within that time limit.

Consequently, the Court holds that the Commission erred in considering that the three months preceding the date on which the anti-dumping measures were to expire were included in the legal time limit and that the condition relating to the sufficiency of the evidence had to be satisfied only at the time the decision to initiate the expiry review was taken.

Lastly, the Court considers that the interpretation thus given to Article 11(2) of the basic regulation cannot be called into question by the other provisions of the basic regulation with regard to the procedures and conduct of investigations that apply in the context of the original investigation, such as Article 5(3) and (9) of that regulation.

Article 5(9) of the basic regulation, under which the Commission is to initiate proceedings 'where it is apparent that there is sufficient evidence to justify' such initiation, concerns the time limits for the initiation of original anti-dumping investigations; it cannot therefore apply to expiry review procedures, in accordance with Article 11(5) of that regulation.

Article 5(3) of the basic regulation, for its part, refers only to the examination, by the Commission, of the accuracy and adequacy of the evidence contained in a complaint in order to determine whether there is sufficient evidence to justify the initiation of an original investigation. Nothing in that provision indicates that the evidentiary standards laid down therein apply to proceedings other than the initiation of original anti-dumping investigations, or that those standards may be applicable to expiry review investigations following a request for a review made by or on behalf of Union producers.

In the light of the foregoing considerations, it follows, in the present case, that the original request, lodged by Fertilizers Europe within the legal time limit, had to satisfy the condition relating to the sufficiency of the evidence contained in a request for a review and that the additional information submitted after the legal time limit, but during the three months preceding the date on which the anti-dumping measures were to expire, could only supplement or corroborate that evidence.

In this case, the Court finds that there are substantial differences between the evidence set out in the original request for the calculation of the dumping margin and the evidence set out in the additional information. Although the evidence set out in the original request was based on a constructed normal value, the evidence contained in the additional information related to a normal value determined on the basis of actual domestic prices on the Russian market.

It follows that the evidence contained in the additional information, which is, moreover, based on a different calculation method and different data, as well as having a separate legal basis and relating to different circumstances, cannot therefore be regarded as a mere clarification of the evidence contained in the original request. Rather, it is new evidence which substantially altered the determination of the dumping margins as established in the original request and altered the substance of the original request. Since that evidence was filed after the expiry of the legal time limit, the Commission could not rely on it in deciding to initiate the expiry review.

It follows explicitly from the Court's considerations regarding the contested regulation, the notice of initiation and the Commission's observations that the contested regulation cannot be read as establishing that the original request contained sufficient evidence that the expiry of the measures would likely result in a continuation of dumping. By contrast, it is apparent from the contested regulation that, without the clarifications contained in the additional information, incorporated into the consolidated version of the original request, the Commission would not necessarily have initiated the expiry review. In those circumstances, the Court considers that the request made by the Commission to the intervener for the purposes of obtaining a normal value determined on the basis of the actual prices on the Russian domestic market cannot be understood as being intended to supplement the evidence set out in the original request, since that evidence was based solely on a constructed normal value, but was intended to remedy a lack of information. In addition, it is not for the Court to substitute its own assessment of whether the evidence contained in the original request is sufficient for the Commission's assessment as set out in the notice of initiation and the contested regulation. The conditions for initiating that review were therefore not satisfied and, consequently, the contested regulation must be annulled for infringement of Article 11(2) of the basic regulation.

2. RESTRICTIVE MEASURES TAKEN BY A THIRD COUNTRY

Judgment of the General Court (Sixth Chamber, Extended Composition) of 12 July 2023, IFIC Holding v Commission, T-8/21

Commercial policy – Protection against the effects of the extraterritorial application of legislation adopted by a third country – Restrictive measures taken by the United States against Iran – Secondary sanctions preventing natural or legal persons of the European Union from having commercial relationships with undertakings targeted by those measures – Prohibition on complying with such legislation – Second paragraph of Article 5 of Regulation (EC) No 2271/96 – Commission decision authorising a legal person of the European Union to comply with that legislation – Obligation to state reasons – Retroactive effect of authorisation – Account taken of the interests of the undertaking targeted by the restrictive measures of the third country – Right to be heard.

In 2018, the United States of America withdrew from the Iran nuclear deal, signed in 2015, the aim of which was to control the Iranian nuclear programme and lift economic sanctions against Iran. As a result of that withdrawal, on the basis of the Iran Freedom and Counter-Proliferation Act of 2012, the United States again imposed sanctions on Iran and a list of named persons. [75] From that date, it is once again prohibited for any person to trade, outside the territory of the United States, with any person or entity included in the SDN list.

Following that decision, in order to protect its interests, the European Union adopted Delegated Regulation 2018/1100 [76] amending the annex to Regulation No 2271/96 [77] in order to refer in that annex to the abovementioned 2012 US law on freedom and counter proliferation in Iran. That regulation, which aims to provide protection against the extraterritorial application of the laws annexed thereto, in particular prohibits the persons concerned [78] from complying with the laws in question or actions resulting therefrom (Article 5, first paragraph), unless authorised by the European Commission where non-compliance with those foreign laws would seriously damage the interests of the persons covered by the regulation or those of the European Union (Article 5, second paragraph). It also adopted Implementing Regulation 2018/1101, laying down the criteria for the application of the second paragraph of Article 5 of Regulation No 2271/96. [79]

IFIC Holding AG ('IFIC') is a German company whose shares are held indirectly by the Iranian State and which itself has shareholdings in various German undertakings, by virtue of which it has a right to dividends. Clearstream Banking AG is the only securities depository bank authorised in Germany. After the listing of IFIC, in November 2018, on the SDN list by the United States, Clearstream Banking interrupted payment to IFIC of its dividends and blocked those dividends on a separate account. On 28 April 2020, following an authorisation request, within the meaning of the second paragraph of

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75 Specially Designated Nationals and Blocked Persons List ('the SDN list').

76 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199I, p. 1).

77 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996 L 309, p. 1), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1) and by Delegated Regulation 2018/1100 ('the regulation').

78 The persons referred to in Article 11 of Regulation No 2271/96 are, inter alia, first, natural persons residing in the European Union who are nationals of a Member State and, secondly, legal persons incorporated within the European Union (Article 11(1) and (2)).

79 Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199I, p. 7).

Article 5 of Regulation No 2271/96, from Clearstream Banking, the Commission adopted Implementing Decision C(2020) 2813 final, by which it authorised that bank to comply with certain US laws concerning the applicant's securities or funds, for a period of 12 months ('the contested authorisation'). That authorisation was then renewed in 2021 and 2022 by Implementing Decisions C(2021) 3021 final and C(2022) 2775 final [80] ('the contested decisions'). In that context, on the basis of Article 263 TFEU, IFIC requested the Court to annul the decisions adopted by the Commission at the request of Clearstream Banking, that bank having intervened in the proceedings.

The General Court dismisses IFIC's action and at the same time rules on novel questions of law concerning Regulation No 2271/96. It considers in particular that the contested decisions do not have retroactive effect and that the Commission did not err in its assessment by not taking into account the applicant's interests or by failing to examine whether less onerous alternatives existed. It also holds that the limitation of the applicant's right to be heard by the Commission in the context of the adoption of those decisions was, in the light of the objectives pursued by Regulation No 2271/96, necessary and proportionate.

Findings of the Court

The Court finds, first, that the contested decisions do not have retroactive effect as those decisions state clearly that they take effect from the date of their notification for a period of 12 months. [81] As a result, the contested authorisation has no retroactive effect and does not cover conduct that took place before the date on which the contested decisions took effect, but only conduct which took place after that date.

Secondly, concerning the applicant's plea in law based on an error of assessment, according to which the Commission did not, in the first place, take into account the applicant's interests, but only those of Clearstream Banking, the Court held that the Commission was not required to take those interests into account. It observes that Regulation No 2271/96 [82] provides that the grant of authorisation to comply with the laws annexed thereto is subject to the condition that non-compliance with those laws would seriously damage the interests of the person seeking the authorisation or those of the European Union, but that that provision does not refer to the interests of third parties covered by the restrictive measures of the third country. The Court made the same finding concerning the non-cumulative criteria, set out in Implementing Regulation 2018/1101, [83] which the Commission must take into account when assessing an authorisation request. In addition, none of the criteria in question refer to a balancing of the interests of third parties with those of the applicant or those of the European Union. Moreover, even if the third party referred to in the restrictive measures is covered by Regulation No 2271/96 [84] and therefore falls within the scope of certain provisions of that regulation, that could not lead, in the context of the application of the exception provided for in the second paragraph of Article 5 of that regulation, to taking into account interests other than those provided for by that regulation. As regards, in the second place, the applicant's argument that the Commission took into account the possibility of having recourse to less onerous alternatives or the possibility for the applicant to claim compensation, the Court notes that Implementing Regulation 2018/1101 [85] does not impose such obligations on the Commission. The Commission's assessment consists in ascertaining whether the evidence submitted by the applicant allows the conclusion, in the light of the criteria laid down by Implementing Regulation 2018/1101, [86] that, in the event of non-

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80 Commission Implementing Decision C(2021) 3021 final of 27 April 2021 and Commission Implementing Decision C(2022) 2775 final of 26 April 2022.

81 See Article 3 of each of the contested decisions.

82 See Article 5, second paragraph, of Regulation No 2271/96.

83 See Article 4 of Implementing Regulation 2018/1101.

84 See Article 11 of Regulation No 2271/96.

85 See Article 3 of Implementing Regulation 2018/1101.

86 See Article 4 of Implementing Regulation 2018/1101.

compliance with the laws annexed thereto, the interests of the applicant or of the European Union would be seriously damaged, within the meaning of the second paragraph of Article 5 of Regulation No 2271/96. The Commission, where it concludes that there is sufficient evidence that serious damage to those interests has occurred, is not therefore required to examine whether there are alternatives to authorisation.

Thirdly, as regards the plea in law relating to infringement of the right to be heard, the Court finds that the EU legislature chose to establish a system in which the interests of third parties referred to in the restrictive measures are not to be taken into account and those third parties are not to be involved in the procedure under the second paragraph of Article 5 of Regulation No 2271/96. The adoption of a decision under that article meets the general interest objectives of protecting the interests of the European Union or of persons exercising rights under the FEU Treaty system against the serious damage which can result from non-compliance with the laws annexed to the regulation.

In that context, not only is the exercise of a right to be heard by the third parties concerned in the procedure in question not in accordance with the general interest objectives pursued by that legislation, but it also risks jeopardising, through the uncontrolled dissemination of information which could be brought to the attention of the authorities of the third country which enacted the laws annexed to the regulation, the attainment of those objectives. Consequently, those authorities could be aware of the fact that a person sought authorisation and that that person may as a consequence not comply with the extraterritorial legislation of the third country in question, which would entail risks in terms of investigations and sanctions against that person and, therefore, harm to the interests of that person and, as the case may be, to the European Union.

Moreover, no factor inherent in the personal circumstances of such third parties is directly included among the factors which must be included in an application for authorisation [87] or among the criteria taken into account by the Commission when assessing such an application. [88] Thus, in the system established by Regulation No 2271/96, the third parties targeted by the restrictive measures do not appear to be able to rely, before the Commission, on errors or factors relating to their personal circumstances. Therefore, a limitation of the right to be heard of third parties targeted by restrictive measures in the context of such a procedure does not appear, having regard to the relevant legal framework and the objectives pursued by that framework, to be disproportionate and to fail to respect the essential content of that right. It follows that, in the specific circumstances of the present case, that limitation of the right to be heard is justified, within the meaning of the case-law, and is necessary and proportionate having regard to the objectives pursued by Regulation No 2271/96 and, in particular, the second paragraph of Article 5 thereof. Therefore, the Commission was not required to hear the applicant in the context of the procedure leading to the adoption of the contested decisions.

Furthermore, the applicant claimed that, in order to comply with its right to be heard, the Commission should have published, at the very least, the operative part of the contested decisions. There is, however, no basis on which it can be found that the Commission has such an obligation to publish. First, that alleged obligation has no legal basis in any relevant provision; secondly, the publication of the contested decisions after their adoption is not capable of affecting the exercise of any right of the applicant to be heard in the administrative procedure. Finally, the Court dismisses, for the same reasons, the applicant's argument that, in the alternative, the Commission should have communicated the contested decisions to it after their adoption. In the light of the foregoing, it

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87 Within the meaning of Article 3(2) of Implementing Regulation 2018/1101: 'applications shall include the name and contact details of the applicants, shall indicate the precise provisions of the listed extra-territorial legislation or the subsequent action at stake, and shall describe the scope of the authorisation that is being requested and the damage that would be caused by non-compliance'.

88 Within the meaning of the criteria provided for in Article 4 of Implementing Regulation 2018/1101, the objective of which is to assess whether a serious damage to the protected interests as referred to in the second paragraph of Article 5 of Regulation No 2271/96 would arise.

cannot, therefore, be held that, by failing to publish or communicate the contested decisions to the applicant, the Commission infringed the applicant's right to be heard.

XIII. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS: EXPENSES AND ALLOWANCES OF THE MEMBERS OF THE EUROPEAN PARLIAMENT

Judgment of the General Court (Fourth Chamber, Extended Composition) of 7 June 2023, TC v Parliament, T-309/21

Link to the full text of the judgment

Law governing the institutions – Rules governing expenses and allowances for Members of Parliament – Parliamentary assistance allowance – Recovery of sums unduly paid – Reasonable time – Burden of proof – Right to be heard – Protection of personal data – Article 9 of Regulation (EU) 2018/1725 – Article 26 of the Staff Regulations

By a judgment of 7 March 2019, *L* v *Parliament*, [89] the General Court had annulled the decision of the European Parliament terminating L's contract as the accredited parliamentary assistant ('the APA') – accredited for the purposes of assisting TC, the applicant, a Member of the European Parliament – due to the breakdown in the relationship of trust on the ground that the APA had failed to comply with the rules relating to authorisations to engage in external activities. The Court had found that it was apparent from the material in the file that not only was the applicant aware of the APA's external activities, but that, moreover, they were on his direct initiative.

Following that judgment, the Secretariat-General of the Parliament informed the applicant of the commencement of a procedure for the recovery of sums unduly paid, [90] in respect of the parliamentary assistance provided to the applicant by the APA. At the same time the applicant was invited to submit, within two months, observations and evidence to rebut the Parliament's preliminary findings on the external activities which the APA had carried out and to prove that the APA had actually performed the duties of an accredited parliamentary assistant. In response, the applicant sent observations and additional evidence to the Parliament, while requesting a number of documents and information relating to the APA's personal file at the Parliament, the copies of the correspondence exchanged by the APA with the Parliament's representatives concerning his work and the complete file in the case which gave rise to the judgment of 7 March 2019. The Parliament partially granted the applicant's request for the documents and the information.

By decision of 16 March 2021 ('the contested decision'), the Secretary-General of the Parliament considered that a sum of money had been unduly borne by that institution in connection with the use

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89 Judgment of 7 March 2019, *L* v *Parliament* (T-59/17, EU:T:2019:140).

90 Pursuant to Article 68 of the Decision of the Bureau of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament (OJ 2009 C 159, p. 1; 'the IMS').

of the APA and that it should be recovered from the applicant. [91] Consequently, the Director-General for Finance of the Parliament issued, on 31 March 2021, a debit note ordering the recovery of that sum.

Hearing an action for annulment of the contested decision, which it upholds, the General Court rules in the present case on a debtor's right to plead infringement of the reasonable time principle when the institution sends it a debit note within the five-year period laid down by the Financial Regulation, reaffirms the importance of observing the principle of the right to be heard in proceedings for recovery of parliamentary assistance expenses commenced by the Parliament against its Members and, lastly, decides on the novel question of the right to rely, as a guarantee of the right to be heard, on grounds of public interest in order to obtain the transmission of personal data.

Findings of the Court

In the first place, the Court rejects the plea alleging infringement of the reasonable time principle on the ground that the Parliament based the contested decision on data from the case *L* v *Parliament*, in respect of which the application had been lodged in April 2017.

In that regard, the Court notes that Article 41(1) of the Charter of Fundamental Rights of the European Union lays down the reasonable time principle, which forms an integral part of the right to good administration, and that there is an obligation to act within a reasonable time in all cases where, in the absence of any statutory rule, the principles of legal certainty or the protection of legitimate expectations preclude the EU institutions and natural or legal persons from acting without any time limits. On the other hand, where the administration acts within the period specifically prescribed by a provision, it cannot be validly claimed that the requirements arising from the right for a person to have his or her affairs dealt with within a reasonable time are disregarded.

Contrary to the previous rules, [92] those applicable in the present case [93] now provide for the authorising officer to send the debit note immediately after establishing the amount receivable and at the latest within a period of five years from the time when the EU institution is in a position to claim its debt.

There is therefore no need, in the present case, to have recourse to the reasonable time principle in order to assess the period within which the debit note was sent. In addition, the Court notes that, first, the debit note was sent to the applicant immediately after the establishment of the amount receivable, in the contested decision, and that, second, the moment at which the Parliament was able to claim its debt coincides with the lodging of the application in the case *L* v *Parliament* or with the delivery of the judgment in that case, with the result that the five-year period laid down by the Financial Regulation in force was complied with by the Parliament.

In the second place, the Court upholds the plea alleging infringement of the right to be heard. As a preliminary point, it notes that the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, is guaranteed, in particular, by the IMS, [94] under

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91 Pursuant to Article 68(1) of the IMS.

92 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), and Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 (OJ 2012 L 362, p. 1).

93 Second subparagraph of Article 98(2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

94 Article 68(2) of the IMS.

which the Member concerned is to be heard prior to the adoption of any decision on the matter. That right guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely.

In the present case, the Court finds that several requests by the applicant to the Parliament for documents and information were refused, except the documents concerning the end of the APA's contract.

It should be borne in mind that, where there is doubt as to the propriety of the use of parliamentary assistance expenses paid to an APA, it is for the Member of Parliament to establish that that APA worked for him or her, in connection with his or her parliamentary mandate, throughout the period during which those expenses were paid. Furthermore, when requested to provide such proof, the Member of Parliament must disclose to the Parliament, within the prescribed time limit, the information in his or her possession. If other information appears to be relevant, he or she may request disclosure thereof from the institutions, bodies, offices and agencies of the European Union which have that information, on the basis of the right to be heard, provided that they concern the data necessary to enable him or her to make his or her observations effectively on the proposed recovery measure. The Parliament which receives such a request cannot refuse to provide the data requested without infringing the right to be heard, unless it relies, in support of that refusal, on grounds which may be regarded as justified having regard, first, to the circumstances of the case and, second, to the applicable rules.

The Court therefore examines whether the grounds relied on by the Parliament for not disclosing the data requested by the applicant are justified.

First, the Court rejects the grounds relied on by the Parliament for refusing the applicant's request concerning the disclosure of 'all emails from 2015, 2016 and 2019' and the correspondence exchanged by the applicant with the relevant services of the Parliament concerning the APA's work. It points out that each institution organises its work in compliance with the rules applicable to it and which it can lay down, and considers that, in the present case, the Parliament was entitled to limit the retention period for Members' emails by allowing them to be safeguarded in private folders. However, the Court determines whether, in the present case, that policy was implemented in such a way as to ensure observance of the right to be heard.

The Court notes that, from the beginning of 2016, the Parliament became aware of a situation of conflict between the applicant and the APA as regards whether or not the latter was carrying out his activities for the applicant in compliance with the rules governing parliamentary assistance. Consequently, from that time, it was necessary for the Parliament to ensure the retention of emails which could establish the exact nature of the activities of the APA during the dismissal procedure and, if that procedure gave rise to other judicial or administrative proceedings, such as a recovery procedure, for as long as those other proceedings remained open.

Furthermore, the possibility of personal archiving cannot have the effect of relieving the Parliament of the obligation to ensure the retention of all emails relevant to establishing that, in accordance with the rules which the institution has laid down for itself, an APA has effectively and exclusively carried out his or her activities for the Member to whom he or she was assigned, in direct connection with the latter's mandate. It adds that that possibility cannot relieve the Parliament of the obligation to disclose the emails thus retained, where, in accordance with the right to be heard, which is fundamental in the legal order of the European Union, a request to that effect is made by the Member concerned who, as in the present case, is the subject of a recovery procedure for improper use of parliamentary assistance expenses.

Second, the Court rejects the grounds relied on by the Parliament for refusing the request concerning the APA's 'personal file' (all the documents relating to his recruitment and work), including information

on the number of times protection of Parliament had been requested in respect of that APA, and the data relating to his presence which could be extracted from his Parliamentary access card.

As regards the ground that the transmission of those data was contrary to the regulation on the protection of personal data with regard to the processing of personal data by the institutions, bodies, offices and agencies of the European Union and on the free movement of such data, [95] admittedly, the Court notes that, since they had to be used for his defence in the recovery procedure, the data requested by the applicant could not be regarded as being 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient'. [96] For the same reason, it cannot be considered that the transmission of those data to the applicant served a 'specific purpose in the public interest'. [97]

However, the Court notes that the request for observations sent by the Parliament to the applicant in order to enable him to exercise his right to be heard is based, in the present case, on information held by that institution without being known, as the case may be, to the applicant, or on information of which the applicant was aware when he was the APA's hierarchical superior, but which is no longer available to him.

Therefore, with regard to the importance accorded to the right to be heard, the fact that such information may be found in the APA's 'personal file' cannot, as such, preclude the information from being disclosed to the applicant in order to enable him to make his observations effectively in the exercise of that right.

The right to the protection of personal data is not absolute, but should be considered in relation to its function in society and weighed on that basis against other fundamental rights, in an approach which gives each of the rights involved its proper place in the EU legal order, in the light of the facts of the case, in accordance with the principle of proportionality. The need to strike such a balance between the right to the protection of personal data and the other fundamental rights recognised in that legal order is emphasised by the EU legislature in the regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, [98] of which the regulation on the protection of personal data by the EU institutions, bodies, offices and agencies is the equivalent.

The Court concludes that it cannot be accepted that the Parliament may invite the applicant to state his views effectively on the information contained, as the case may be, in the APA's file, without, as in the present case, giving him access to that information, after weighing up, on the one hand, that APA's interest in the data concerning him not being transmitted to third parties and, on the other hand, the applicant's interest in presenting his observations effectively in the context of the recovery procedure commenced against him.

As regards the ground that the transmission of those data was contrary to the provisions of the Staff Regulations of Officials of the European Union on personal files of officials and other servants, [99]

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

96 Within the meaning of Article 9(1)(a) of Regulation 2018/1725.

97 Within the meaning of Article 9(1)(b) of Regulation 2018/1725.

98 Recital 4 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).

99 Article 26 of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, as amended.

applicable to parliamentary assistants, the Court finds that the confidentiality of the documents in question cannot be relied on against the applicant, who is, moreover, the author of some of the documents concerned as the APA's hierarchical superior, to the extent necessary for the applicant to exercise his right to be heard.

Lastly, third, the Court rejects the grounds relied on by the Parliament for refusing the applicant's request concerning the file relating to the case which gave rise to the judgment of 7 March 2019. As regards the granting of anonymity to the APA by the Court in the proceedings which gave rise to that judgment, the Court notes that anonymity is intended to omit the name of a party to the dispute or that of other persons mentioned in connection with the proceedings concerned, or of other information in the documents relating to the case to which the public has access. By contrast, the anonymity granted by the Court does not concern the confidentiality of the material placed on the file of those proceedings outside those proceedings, in the context of the relations between the parties and third parties. Consequently, the Court's decision on anonymity did not preclude the Parliament from disclosing to the applicant the documents exchanged in the judgment of 7 March 2019, which were likely to be relevant for the purposes of the applicant's exercise of his right to be heard.

2. APPROXIMATION OF LAWS: EUROPEAN UNION TRADEMARK

Judgment of the General Court (Sixth Chamber) of 28 June 2023, CEDC International v EUIPO – Underberg (Shape of a blade of grass in a bottle), T-145/22

Link to the full text of the judgment

EU trade mark – Opposition proceedings – Application for a three-dimensional EU trade mark – Shape of a blade of grass in a bottle – Earlier national trade marks – Relative ground for refusal – Article 8(3) of Regulation (EC) No 40/94 (now Article 8(3) of Regulation (EU) 2017/1001) – Concept of 'agent' or 'representative' – Requirement for a direct contractual agreement

In 1996, Underberg AG ('the intervener') filed an application for registration of a three-dimensional trade mark consisting of the shape of a blade of grass in a bottle, in respect of spirits and liqueurs, with the European Union Intellectual Property Office (EUIPO). In 2003, the predecessor in law to the applicant company CEDC International sp. z o.o. filed a notice of opposition to that application for registration on the basis of a number of earlier signs claimed in, inter alia, various Member States of the European Union. The Opposition Division and, subsequently, the Fourth Board of Appeal of EUIPO rejected the opposition and dismissed the appeal respectively.

By judgment of 11 December 2014, the General Court annulled the decision of the Fourth Board of Appeal and remitted the case to the Fourth Board of Appeal which, taking the view that the evidence submitted was not sufficient to prove the nature of use of the earlier marks relied on, dismissed the appeal. That decision was partially annulled by the judgment of the General Court of 23 September 2020 on the basis of a failure to state reasons. Following a reallocation, the Fifth Board of Appeal also dismissed the appeal on the ground that, first, the intervener could not be considered to be acting as an agent or representative of the applicant and, secondly, the use of the non-registered mark claimed had not been proved.

The General Court, before which an action was brought, examined the application of Article 8(3) of Regulation No 40/94, relating to the refusal of registration of a trade mark where an agent or representative of the proprietor of the trade mark applies for that registration in his or her own name without the proprietor's consent, and clarified its case-law regarding the origin of the earlier mark, the concept of an agent or representative and the requirement for a direct contractual agreement.

Findings of the Court

First, the Court examined the condition that the opponent must be the proprietor of the earlier mark in order for an opposition to succeed on the basis of Article 8(3) of Regulation No 40/94. In that regard, it pointed out, first of all, that that provision refers to the 'proprietor of the trade mark', without specifying the kind of trade mark referred to. The concept of a 'trade mark' within the meaning of that provision covers, in addition to registered trade marks, those which are not registered, to the extent that the law of the country of origin acknowledges rights of that type. It is irrelevant, in that regard, whether or not the rights relating to the earlier mark apply in the European Union, since that provision does not contain any reference to the 'territory' concerned. Next, the Court stated that the principle that Article 8(3) of Regulation No 40/94 did not limit its scope to trade marks registered in a Member State or having effect in that State had already been upheld in the judgment *Adamowski* v *OHIM – Fagumit (FAGUMIT)*, [100] relating to two applications for a declaration of invalidity. Lastly, the Court observed that the term 'proprietor' had to be interpreted by taking into account Article 6 *septies* of the Paris Convention, [101] relating to trade mark registrations made by an agent or representative of the proprietor without his or her authorisation, with the result that the proprietor of a trade mark which had been registered in one of the States party to that convention could also invoke the protection of Article 8(3) of Regulation No 40/94, if his or her agent or representative applied for registration of the mark in the European Union without his or her consent.

Secondly, the Court ruled on the condition relating to the existence of a contractual agency or representation agreement. In that regard, it pointed out that the attainment of the objective of preventing the misuse of the earlier mark by the agent or representative of the proprietor of that mark requires a broad interpretation of the concepts of 'agent' and 'representative', so that all forms of relationships based on a contractual agreement under which one of the parties represents the interests of the other, regardless of how the relationship is legally categorised, are covered. It is therefore sufficient that there is some agreement of commercial cooperation between the parties of a kind that gives rise to a 'fiduciary' relationship, by imposing on the trade mark applicant, whether expressly or implicitly, a general duty of trust and loyalty as regards the interests of the proprietor of the earlier mark.

The Court stated that, nevertheless, some kind of contractual agreement, whether written or not, entered into directly by the parties, and not through third parties, must exist. Consequently, the fact that an 'implicit' relationship may suffice means only that the decisive criterion for the application of Article 8(3) of Regulation No 40/94 is to be found in the existence and nature of a contractual agreement of commercial cooperation established in substance, and not in its formal classification. Furthermore, the existence of the contractual relationship cannot be proved by means of probabilities or presumptions, but must be demonstrated by solid and objective evidence. Moreover, it is not necessary for the agreement between the parties still to be in force at the time when the trade mark application is filed, provided, however, that sufficient time has elapsed for there to be good reason to assume that the obligation of trust and confidentiality still existed at the time of that filing.

In the present case, given that the burden of proof regarding the existence of a contractual agency or representation relationship lay with the opponent, namely the proprietor of the earlier mark, it was for the applicant to prove that such a contractual agreement of commercial cooperation existed directly between the intervener and itself at the time when the mark applied for was filed. In the light of the foregoing considerations, the Court stated, first of all, that there was no formally concluded contractual agreement between the applicant (or its predecessor) and the intervener (or its predecessor). Next, it pointed out that the existence of commercial relations between the intervener and a third-party company was not capable of showing that the intervener had been the agent or

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[100] Judgment of 29 November 2012, *Adamowski* v *OHIM – Fagumit (FAGUMIT)* (T-537/10 and T-538/10, EU:T:2012:634, paragraph 19).

[101] Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised and amended.

representative of the applicant. Lastly, it took the view that the existence of an 'implicit' or 'de facto' commercial relationship between the applicant (or its predecessor) and the intervener (or its predecessor) was not supported by the evidence submitted by the applicant. Accordingly, no direct, even implicit or de facto, contractual agreement of commercial cooperation between the parties had been proved, with the result that no obligation of trust and loyalty on the part of the intervener (or its predecessor) towards the applicant (or its predecessor) had been established.

Consequently, the Court endorsed the Board of Appeal's assessments that the applicant had not succeeded in proving the existence of a fiduciary contractual relationship between itself and the intervener, that it had not discharged the burden of proof which rested on it for the purposes of establishing the existence of a direct contractual agency or representation agreement and that it had therefore not proved that one of the cumulative conditions set out in Article 8(3) of Regulation No 40/94 was satisfied. Since the condition relating to the existence of a contractual agency or representation agreement had not been satisfied, the Court held that the Board of Appeal had not infringed Article 8(3) of Regulation No 40/94.

3. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (Fourth Chamber) of 21 June 2023, Hangzhou Dingsheng Industrial Group and Others v Commission, T-748/21

Link to the judgment as published in extract form

Dumping – Extension of the definitive anti-dumping duty imposed on imports of certain aluminium foil originating in China to imports of certain aluminium foil consigned from Thailand – Anti-circumvention investigation – Circumvention – Article 13 of Regulation (EU) 2016/1036 – Sufficient evidence – Manifest error of assessment – Obligation to state reasons

In the context of the European Union's trade protection policy, in 2009 the Council adopted Regulation (EC) No 925/2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China. [102]

Those anti-dumping measures were extended by as regards the People's Republic of China by Commission Implementing Regulation 2015/2384. [103] Those measures were extended to other categories of aluminium foil by Commission Implementing Regulation 2017/271. [104]

In 2020, following a complaint lodged by an anonymous user, the Commission initiated an investigation concerning the possible circumvention of those anti-dumping measures, following which

[102] Regulation (EC) No 925/2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China (OJ 2009 L 262, p. 1).

[103] Commission Implementing Regulation (EU) 2015/2384 of 17 December 2015 imposing a definitive anti-dumping duty on imports of certain aluminium foils originating in the People's Republic of China and terminating the proceeding for imports of certain aluminium foils originating in Brazil following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 (OJ 2015 L 332, p. 63).

[104] Commission Implementing Regulation (EU) 2017/271 of 16 February 2017 extending the definitive anti-dumping duty imposed by Council Regulation No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China to imports of slightly modified certain aluminium foil (OJ 2017 L 40, p. 51).

it adopted Implementing Regulation 2021/1474 [105] extending those measures to imports of certain aluminium foil ('the product concerned' [106]) consigned from Thailand, whether declared as originating in Thailand or not.

Hangzhou Dingsheng Industrial Group Co., Ltd, Dingheng New Materials Co., Ltd and Thai Ding Li New Materials Co., Ltd belong to the Dingsheng Group, a Chinese multinational active in the aluminium products manufacturing sector also active in Thailand. They brought an action for annulment of Implementing Regulation 2021/1474, complaining that the Commission, inter alia, confined itself to the allegations set out in the complaint in order to initiate its investigation, without ensuring that it had sufficient information, in the light of the requirements of Regulation 2016/1036. [107]

The Court dismisses the action, while taking the opportunity to clarify the value of the factors capable of justifying the initiation of an anti-circumvention investigation.

Findings of the Court

As a preliminary point, the Court recalls that, in accordance with Article 13(1) of the basic regulation, four conditions are required in order to determine the existence of circumvention. First, there must be a change in the pattern of trade between a third country and the European Union or between individual companies in the country subject to measures and the European Union. Second, that change must stem from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty. Third, there must be evidence of harm to EU industry or that the remedial effects of the anti-dumping duty are being undermined in terms of the prices or quantities of the like product. Fourth, there must be evidence of dumping in relation to the normal values previously established for the like product.

Moreover, it is apparent from Article 5(3) of the basic regulation, which also applies to an anti-circumvention investigation, [108] that the Commission must, as far as possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation.

In that regard, the Court notes that the quantity and quality of the evidence necessary to meet the criteria of the sufficiency of the evidence for the purpose of initiating an investigation is different from that which is necessary for the purpose of a final determination of whether there is circumvention. It is therefore not a requirement that the complaint contain an analysis of any information provided or that that information constitute irrefutable proof of the existence of the facts alleged. Moreover, the sufficiency of the information depends on the circumstances of each case and must, consequently, be assessed on a case-by-case basis.

In the light of those considerations, the Court rejects, first of all, the complaint alleging a lack of sufficient evidence in the complaint to demonstrate the change in the pattern of trade.

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[105] Commission Implementing Regulation (EU) 2021/1474 of 14 September 2021 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) 2015/2384 and Implementing Regulation (EU) 2017/271 on imports of certain aluminium foil originating in the People's Republic of China to imports of certain aluminium foil consigned from Thailand, whether declared as originating in Thailand or not (OJ 2021 L 325, p. 6).

[106] The products concerned by that regulation were those referred to in Regulation No 925/2009 and Implementing Regulation 2017/271/

[107] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, 'the basic regulation').

[108] Article 13 of the basic regulation, entitled 'Circumvention', provides, in the third subparagraph of Article 13(3) that 'the relevant procedural provisions of this Regulation concerning the initiation and the conduct of investigations shall apply pursuant to this Article'.

On that point, the Court notes that the first condition is worded in very general terms which, consequently, leave a broad discretion to the EU institutions to determine its nature and characteristics.

In the present case, in the first place, it is apparent from the complaint that, between 2017 and 2019, imports of aluminium foil to the European Union from Thailand increased significantly. Although those imports were not limited to the products concerned, it was likely that the proportion of those imports in that increase was just as substantial. Thus, since the imposition of an anti-dumping duty may be based on a risk of circumvention where that risk is genuine and not merely hypothetical, the Commission could find that such a risk existed at the time of the initiation of the investigation. In the second place, the complaint contained statistics relating, for the period from 2015 to 2019, to imports into Thailand of the raw material necessary for the production of the products concerned from China. Those data reveal an increase in the volumes imported throughout that period, with the result that the Commission did not make a manifest error of assessment in considering, in the light of that evidence, that those imports were capable of supporting the production of the products concerned in Thailand so that they could be exported subsequently to the European Union, in circumvention of the anti-dumping duty imposed on exports of those products from China.

In the third place, the applicants' submission that it has not been demonstrated that exports from China to the European Union had been replaced by exports from Thailand cannot be upheld. The Court observes that the substitution of imports originating in the country subject to the anti-dumping duty by those from the country of circumvention was not among the conditions to be met in order to establish the existence of circumvention within the meaning of Article 13(1) of the basic regulation.

In the fourth and last place, although the Commission has not shown that it obtained more detailed data for the period 2019-2020, the Court considers that it was not required to do so, since the complaint contained sufficient evidence to support the conclusion that there was circumvention and significant assembly operations of the product concerned in Thailand.

Next, the Court rejects the complaint that there was insufficient evidence in the complaint relating to the third condition, namely the undermining of the remedial effects of the original duties, in so far as the complaint did not contain sufficient information concerning the calculation of the non-injurious price.

In that regard, the Court notes that it follows from Article 13(1) of the basic regulation that the undermining of remedial effects may be established either on the basis of the price of the like products or on the basis of the quantity of such products, the two parameters being alternative. It follows that, in the present case, the Commission could refer solely to the parameter relating to imported quantities of similar products, without being required also to refer to the prices of such products.

Lastly, the Court rejects the complaint alleging a lack of sufficient evidence in relation to the fourth condition, namely the existence of dumping in relation to the normal value previously established for the like products.

As regards the determination of the normal value, it is apparent from the complaint that the demonstration of dumping was based on the data used in Implementing Regulation 2015/2384 in connection with an expiry review. It follows that the complaint took into account the normal value established previously for the only product referred to in that regulation.

First, it should be noted that, according to the case-law, where the product concerned contains several product types, as is the case here, the basic regulation does not require that the complaint provide information on all those product types. Rather, it follows from Article 13(1) and (3) of that regulation that the Commission may validly consider that it has sufficient evidence to justify the initiation of the investigation where the evidence available to it is capable of establishing the existence of dumping of the product as a whole, and not only of an insignificant subcategory of that product.

Since the applicants have not claimed that the product referred to in Implementing Regulation 2015/2384 constitutes an insignificant subcategory of the products concerned, the Commission could conclude that the evidence relating to the dumping of that product was sufficient to justify the initiation of the investigation.

Second, the products concerned must be regarded as being like the product referred to in Implementing Regulation 2015/2384. It follows that the taking into account, in the complaint, of the normal value previously established for the only product referred to in Implementing Regulation 2015/2384 is consistent with Article 13 of the basic regulation.

As regards the determination of the export price, although it was determined by reference to a wide variety of products which are not limited to the products concerned, the Court concludes that, in any event, it is apparent from the analysis of the foregoing that the Commission could, without making a manifest error of assessment, conclude that the complaint contained sufficient evidence, assessed as a whole, and rely on a body of consistent evidence in order to decide to initiate the anti-dumping investigation.

In the light, inter alia, of those considerations, the Court dismisses the applicants' action in its entirety.

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 Court (Grand Chamber) of 24 July 2023, Lin, C-107/23 PPU, EU:C:2023:606
- Judgment of the General Court (Fourth Chamber, Extended Composition) of 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 (Seventh Chamber) of 28 June 2023, IMG v Commission, T-752/20, EU:T:2023:366
- Judgment of the General Court (Ninth Chamber) of 12 July 2023, Eurecna v Commission, T-377/21, EU:T:2023:398
- Judgment of the General Court (Seventh Chamber, Extended Composition) of 26 July 2023, Stockdale v Council and Others, T-776/20, EU:T:2023:422
- Judgment of the General Court (Second Chamber) of 26 July 2023, Arctic Paper Grycksbo v Commission, T-269/21, EU:T:2023:429
- Judgment of the General Court (Seventh Chamber) of 26 July 2023, Engineering – Ingegneria Informatica v Commission and REA, T-222/22, EU:T:2023:437