COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
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I. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Fifth Chamber) of 16 November 2021, Ligue des droits humains (Verification by the supervisory authority of data processing), C-333/22

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Directive (EU) 2016/680 – Article 17 – Exercise of the rights of the data subject through the supervisory authority – Verification of the lawfulness of the data processing – Article 17(3) – Obligation to provide the data subject with a minimum of information – Scope – Validity – Article 53 – Right to seek an effective judicial remedy against the supervisory authority – Concept of a 'legally binding decision' – Charter of Fundamental Rights of the European Union – Article 8(3) – Control by an independent authority – Article 47 – Right to effective judicial protection

In 2016, BA sought security clearance from the Autorité nationale de sécurité (National Security Authority, Belgium). He was refused that clearance, inter alia for reasons of State security and preservation of the constitutional democratic order, on account of his participation in demonstrations over the last decade. Specifically, that refusal was based on his personal data, processed by the Belgian police service.

Subsequently, BA requested the Organe de contrôle de l'information policière (OCIP) (Supervisory Body for Police Information (OCIP), Belgium), in its capacity as the supervisory authority, to identify the controllers responsible for processing his personal data and to order them to grant him access to all the information concerning him, in order to enable him to exercise his rights. The OCIP carried out a verification of the lawfulness of the processing of BA's personal data in the police data banks in accordance with Belgian law. [1] Relying on that law, which does not allow the data subject direct access to his or her data, the OCIP merely informed BA that it had carried out the necessary verifications.

In that context, the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) was seised by the Ligue des droits humains ASBL and BA following an order from the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium) declaring itself to have 'no jurisdiction' to hear and determine the application for interim measures lodged by those parties. The cour d'appel de Bruxelles (Court of Appeal, Brussels) referred a question to the Court of Justice on the interpretation and validity of Article 17 of Directive 2016/680 [2] in the light of the provisions of the Charter of Fundamental Rights of the European Union ('the Charter').

In its judgment, the Court rules, first, on the right of the data subject to seek an effective judicial remedy against the supervisory authority's decision where that data subject's rights have been exercised through that authority. Secondly, it holds Article 17 of Directive 2016/680 to be valid inasmuch as that provision lays down only a minimum obligation on the supervisory authority to

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1 Article 42 of the loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel (Law on the protection of natural persons with regard to the processing of personal data) of 30 July 2018 (*Moniteur belge* of 5 September 2018, p. 68616).

2 Article 17 of Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89) provides: '1. In the cases referred to in Article 13(3), Article 15(3) and Article 16(4) Member States shall adopt measures providing that the rights of the data subject may also be exercised through the competent supervisory authority. ... 3. Where the right referred to in paragraph 1 is exercised, the supervisory authority shall inform the data subject at least that all necessary verifications or a review by the supervisory authority have taken place. The supervisory authority shall also inform the data subject of his or her right to seek a judicial remedy.'

inform the data subject that all necessary verifications or a review by the supervisory authority have taken place and of that data subject's right to seek a judicial remedy.

Findings of the Court

The Court begins by recalling that Directive 2016/680 requires Member States to provide for the right of a natural or legal person to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them. [3] It is thus necessary to determine whether that authority adopts such a decision where the data subject's rights are exercised through that authority.

In that regard, the Court observes first that, in the cases provided for by Directive 2016/680 which seek to protect public interest purposes, [4] the Member States must provide for the possibility for the data subject's rights to be exercised indirectly through the supervisory authority. That possibility offers that data subject an additional guarantee as to the lawful processing of his or her data where national law restricts the direct exercise of his or her rights before the controller, [5] as allowed under Directive 2016/680. [6]

Next, the Court states that, to that end, each supervisory authority must, under Article 17 of Directive 2016/680, be entrusted with the task of checking the lawfulness of processing and have not only effective investigative powers, but also corrective powers. [7] In that context, its task falls entirely within the definition of its role by the Charter. [8] Furthermore, under that provision also, the supervisory authority is obliged to inform the person concerned that all the necessary verifications have been carried out.

The Court infers from this that, where the supervisory authority provides that information, it brings to the data subject's knowledge the decision adopted in his or her regard to close the verification process, which necessarily affects his or her legal position. That decision therefore constitutes a legally binding decision for that data subject, irrespective of whether and to what extent that authority has found the processing of his or her data to be lawful or adopted corrective measures.

Lastly, the Court concludes that the data subject must be able to obtain judicial review of the merits of such a decision and, in particular, of the manner in which the supervisory authority performed its obligation to carry out all necessary verifications and, as the case may be, exercised its corrective powers. That conclusion is also consistent with Article 47 of the Charter concerning the right to an effective judicial remedy which, under settled case-law, must be accorded to any person relying on rights or freedoms guaranteed by EU law against a decision adversely affecting him or her which is such as to undermine those rights or freedoms.

As regards the validity of Article 17(3) of Directive 2016/680, the Court observes that, inasmuch as that provision does not preclude, in certain situations, in accordance with the rules adopted by the national legislature to implement it, the supervisory authority from being able, or even obliged, to communicate to the data subject the minimum information provided for by that provision, in particular where those rules seek to avoid compromising the public interest purposes provided for by that directive, it is liable to give rise to a limitation on the right to an effective judicial remedy, guaranteed in Article 47 of the Charter.

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3 Article 53(1) of Directive 2016/680.

4 Those purposes, set out in Article 13(3), Article 15(1) and Article 16(4) of Directive 2016/680, seek to: 'avoid obstructing official or legal inquiries, investigations or procedures', 'avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties', 'protect public security', 'protect national security', or 'protect the rights and freedoms of others'.

5 Specifically, these rights are: the right to receive further information, the right of access to his or her data or the right to obtain their rectification, erasure or a restriction of processing, set out in Article 13(2), Article 14 and Article 16(1) to (3) of Directive 2016/680 respectively.

6 Article 13(3), Article 15(1) and Article 16(4) of Directive 2016/680.

7 Article 46(1)(g) and Article 47(1) and (2) of Directive 2016/680.

8 Article 8 of the Charter.

However, that limitation is expressly provided for by law and is not absolute. In addition, so far as concerns the other criteria which are capable of justifying such a limitation, [9] the Court points out that it is for the Member States to ensure that the national provisions implementing Article 17(3) of that directive, first, respect the essence of the right to effective judicial protection and, secondly, are based on a weighing up of the public interest purposes warranting limitation of that information and of the fundamental rights and legitimate interests of the data subject, in accordance with the principles of necessity and proportionality. Thus, it is for those Member States to provide that, under certain conditions, the information disclosed to the data subject may go beyond the minimum information, that the competent authority has a degree of discretion to determine whether it may communicate to the data subject, at least in brief, the result of its verifications and that, if not, the court with jurisdiction, seised of an action against the supervisory authority, may, nevertheless, ensure sufficient compliance with the procedural rights of the person concerned, such as the right to be heard and the adversarial principle, and exercise its power of review effectively.

Having regard to all those considerations, the Court holds that there is nothing calling into question the validity of Article 17(3) of Directive 2016/680.

II. COMPETITION: STATE AID

Judgment of the General Court (Ninth Chamber) of 15 November 2021, Gaming and Betting Association v Commission, T-167/21

Link to the full text of the judgment

State aid – State measure extending gambling licences granted by the Netherlands – Decision finding no State aid – Failure to initiate the formal investigation procedure – Serious difficulties – Procedural rights of interested parties

The Netherlands legislation on gambling is based on a system of exclusive authorisations, or licences, under which the organisation or promotion of gambling is prohibited unless an administrative authorisation has been issued to that effect.

Pursuant to a general policy rule adopted by the Netherlands State Secretary for Security and Justice, the Netherlands Gambling Authority renewed six expiring licences relating to, inter alia, the organisation of lotteries and sports and horse betting (together, 'the contested measure').

Considering that that general policy rule and the renewal of the six exclusive licences constituted State aid in favour of the legacy licence holders, an association comprising European online gaming and betting operators, European Gaming and Betting Association ('the applicant') lodged a complaint with the European Commission.

The Commission rejected that complaint without initiating the formal investigation procedure provided for in Article 108(2) TFEU. [10]

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9 Provided for by Article 52(1) of the Charter.

10 Commission Decision C(2020) 8965 final of 18 December 2020 in Case SA.44830 (2016/FC) – Netherlands – Prolongation of gambling licences in the Netherlands ('the contested decision'), referred to in the Official Journal of the European Union of 15 January 2021 (OJ 2021 C 17, p. 1).

In its decision, the Commission considered that, as no advantage was conferred on the licence holders, the contested measure did not constitute State aid within the meaning of Article 107(1) TFEU. In that regard, the Commission pointed out that the Netherlands legislation required the licence holders to pay the proceeds of their gambling activities to bodies that serve the common interest specified in the licences, after deducting their expenditure and reasonable costs.

The General Court, before which the applicant had brought an action for annulment, annuls that Commission decision, on the ground that the Commission did not examine whether the contested measure conferred an indirect advantage on the bodies to which the licence holders had to remit part of their proceeds and, so doing, it excluded that that issue could give rise to serious difficulties in the classification of that measure as State aid which only the formal investigation procedure laid down in Article 108(2) TFEU could have resolved. In that context, the Court clarifies the scope of the examination that must be carried out by the Commission when it is called upon to ascertain whether a particular measure constitutes State aid within the meaning of Article 107(1) TFEU.

Findings of the General Court

In support of its action, the applicant relied on, inter alia, infringement of its procedural rights by the Commission's refusal to initiate the formal investigation procedure under Article 108(2) TFEU, while the preliminary examination for the purposes of Article 108(3) TFEU did not eliminate all doubts as to the existence of aid. In that regard, the applicant submitted, in essence, that the Commission was wrong to conclude in the contested decision that no doubts persisted with regard to whether the contested measure conferred an advantage on its beneficiaries.

According to settled case-law, the lawfulness of a decision by the Commission not to raise objections, based on Article 4(3) of Regulation 2015/1589, [11] depends on whether the assessment of the information and evidence which the Commission had or could have had available to it during the preliminary examination procedure should objectively have raised doubts as to the compatibility of an aid measure with the internal market, given that any such doubts must lead to the initiation of a formal investigation procedure.

In that context, the applicant argued, inter alia, that the Commission had information and evidence available to it which made it possible to suspect that there was an indirect advantage benefitting the bodies to which the licence holders had to remit part of their proceeds generated by gambling activities. However, by failing to examine this, the applicant claimed that the Commission was not able to resolve all doubts regarding the existence of State aid.

In that connection, the Court finds that it is clear from the Netherlands legislation on gambling submitted to the Commission for assessment that the licence holders had to remit part of their proceeds to the bodies that serve the common interest designated in the licences.

The Court goes on to highlight that the Commission based its analysis that there was no advantage for the licence holders specifically on their obligation to remit part of their proceeds to bodies that serve the common interest.

It follows that, when the contested decision was adopted, the Commission had information available to it which should have led it to examine whether the Netherlands legislation on gambling was designed in such a way as to channel the proceeds generated by the activity of the licence holders in question towards, primarily, bodies that serve the common interest designated by those licences, which could constitute an indirect advantage and, therefore, State aid for those bodies.

Moreover, paragraph 115 of the Commission Notice on the notion of State aid [12] specifies that an indirect advantage can be conferred on undertakings other than those to which State resources have

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11 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

12 Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1).

been directly transferred. In addition, paragraph 116 of that notice states that the notion of 'indirect advantage' covers the situation in which the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings.

The Commission should therefore have sought to ascertain whether the contested measure conferred an indirect advantage on bodies that serve the common interest and, therefore, whether it constituted aid for those bodies.

Due to the complete absence of appropriate investigation by the Commission of that question at the preliminary examination stage, while the remittance of part of the proceeds generated by the activity of the licence holders to bodies that serve the common interest designated by those licences constituted one of the main features of the legislation at issue, the Court finds that the fact that this issue was not examined in the contested decision does not make it possible to rule out the existence of serious difficulties in that connection.

As a result, the Court upholds the claim that the applicant's procedural rights were infringed due to the Commission's failure to assess whether the licences at issue conferred an indirect advantage on the bodies to which the holders of those licences had to remit part of their proceeds generated by gambling activities.

III. APPROXIMATION OF LAWS

1. COPYRIGHT

Judgment of the Court of Justice (First Chamber) of 23 November 2021, Seven.One Entertainment Group, C-260/22

Link to the full text of the judgment

Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2(e) – Broadcasting organisations – Reproduction right of fixations of broadcasts – Article 5(2)(b) – Private copying exception – Fair compensation – Harm to broadcasting organisations – Equal treatment – National legislation excluding broadcasting organisations from the right to fair compensation

Corint Media is a collective management company which manages copyright and related rights of private television channels and radio stations on the German market in particular. It distributes the revenues from the blank media levy to broadcasting organisations and entered into an exclusive copyright management contract with Seven.One, a broadcasting organisation which produces and broadcasts, on German territory, a private, advertising-financed television channel.

Seven.One thus requested Corint Media to pay it compensation in respect of that levy. Corint Media could not, however, accede to that request, because national legislation [13] excludes broadcasting organisations from the right to fair compensation.

[13] Paragraph 87(4) of the Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273).

Seven.One referred the matter to the Landgericht Erfurt (Regional Court, Erfurt, Germany), which asked the Court of Justice whether broadcasting organisations, whose fixations of broadcasts are reproduced by natural persons for private use and for non-commercial ends, may be excluded from the right to fair compensation provided for in Article 5(2)(b) of Directive 2001/29. [14]

The referring court observed that a restriction of fair compensation to the detriment of certain rightholders is not provided for under that provision. Consequently, that court has doubts as to whether the aforementioned national legislation is compatible with Directive 2001/29 and the principle of equal treatment, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter').

By the present judgment, the Court of Justice examines the question whether a Member State which has implemented the exception for private use to the exclusive reproduction right referred to in Article 5(2)(b) of Directive 2001/29 is justified in excluding in its entirety the category of broadcasting organisations from the right to fair compensation provided for in that article.

Findings of the Court

In the first place, the Court considers, first, that under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right, in the event of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the holders of that exclusive right receive fair compensation. Secondly, it is expressly apparent from Article 2(e) of that directive that broadcasting organisations, in the same way as the other rightholders referred to in that article, enjoy the exclusive right 'to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Consequently, broadcasting organisations [15] must, in principle, in the Member States which have implemented the private copying exception, be granted the right to fair compensation, in the same way as the other rightholders.

That interpretation follows not only from a combined reading of Articles 2(e) and 5(2)(b) of Directive 2001/29, but also from the context of those provisions, from the objectives they pursue and from the origins of that directive.

In the second place, the Court finds, first, that the circumstance that some of those broadcasting organisations which also have the capacity of film producers already receive fair compensation in that respect, is irrelevant. The subject matter of the exclusive right of reproduction of those various rightholders is not identical. More specifically, the producers of the first fixations of films [16] have the exclusive right to authorise reproduction in respect of the original and copies of their films, and have their organisational and economic performance protected. On the other hand, broadcasting organisations have the exclusive reproduction right in respect of fixations of their broadcasts which they transmit, and are entitled to the protection of their technical performance embodied in the broadcast. It follows that the harm to those rightholders in respect of private copying is not the same either. Moreover, the capacity as film producers of broadcasting organisations is likely to be present to varying degrees, depending on whether those broadcasting organisations produce their broadcasts themselves, with their own material and human resources, transmit broadcasts produced on commission by contractual partners or transmit under licence broadcasts produced by third parties.

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14 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

15 Broadcasting organisations are referred to in Article 2(e) of Directive 2001/29.

16 Article 2(d) of Directive 2001/29.

The Court notes, secondly, that the system on which fair compensation is based and the level of that compensation must be linked to the harm caused to the rightholders on account of private copying and be consistent with the principle of equal treatment, as enshrined in Article 20 of the Charter. In that respect, the Court states that the absence, or 'minimal' level, of harm suffered by the broadcasting organisations, on account of the private copying of fixations of their broadcasts, constitutes an objective and reasonable criterion which does not go beyond what is necessary to safeguard a fair balance of rights between the rightholders and the users of protected subject matter. However, it is for the national court, first, to satisfy itself, in the light of objective criteria, that broadcasting organisations, unlike the other categories of rightholders, suffer only harm which may be classified as 'minimal' in respect of non-authorised reproduction of fixations of their broadcasts. Secondly, it is for the national court to ascertain, also in the light of objective criteria, whether, in the category of broadcasting organisations, all of those organisations are in comparable situations, in particular with regard to the harm they suffer, justifying that all of those organisations be excluded from the right to fair compensation.

2. EU TRADE MARK

Judgment of the General Court (Third Chamber) of 22 November 2021, Shaman Spirits v EUIPO – Global Drinks Finland (LAPLANDIA Land of purity and others), T-679/22

Link to the full text of the judgment

EU trade mark – Proceedings for the revocation of decisions or for the cancellation of entries – Cancellation of an entry in the register which contains an obvious error attributable to EUIPO – Registration of licences for the figurative marks LAPLANDIA Land of purity and others – Conditions for the registration of a licence – Evidence that a licence was granted by a registered proprietor – Concept of 'obvious error attributable to EUIPO' – Second sentence of Article 27(1) of Regulation (EU) 2017/1001 – First sentence of Article 103(1) of Regulation 2017/1001

Between 2008 and 2016, Brandavid Oy obtained the registration of three figurative marks with the European Union Intellectual Property Office (EUIPO).

In 2017, the transfer of those marks to Global Drinks Finland Oy, the intervener in the present case, was recorded in the register of EU trade marks.

In 2020, the applicant, Oy Shaman Spirits Ltd, requested EUIPO, on the basis of a licence agreement that it concluded with Brandavid Oy in 2016 ('the licence agreement'), to enter in the register an exclusive licence in its favour in respect of the marks in question. After registration of the licence, the intervener set out its disagreement with that registration.

In 2021, the EUIPO Register Department revoked the recordal of the licence in that register.

Considering that the registration of the licence requested constituted an obvious error attributable to EUIPO within the meaning of Article 103(1) of Regulation 2017/1001, [17] which warranted its cancellation, the Board of Appeal of EUIPO dismissed the applicant's appeal. The only item of evidence produced with the application for registration consisted of a licence agreement to which the intervener, as registered proprietor of the marks in question, has never been a party.

[17] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

By its judgment, the General Court dismisses the applicant's action. It rules on the conditions for the registration of a licence and on the concept of 'obvious error attributable to EUIPO'.

Findings of the General Court

In the first place, the Court observes that, by revoking the registration of the licence, EUIPO correctly applied Articles 25 and 26 of Regulation 2017/1001, [18] read in conjunction with the provisions to which those articles refer. [19] Those applicable rules require, for reasons of legal certainty, the registered proprietor to state actively that he or she wishes to grant a licence, namely either by lodging directly with EUIPO the licence registration request or by placing his or her signature on a declaration, agreement or standard form. [20] However, the licence agreement did not mention the intervener, which was the registered proprietor at the time of the application for and registration of the licence, nor had the licence agreement been signed by the intervener. The previously registered proprietor was no longer empowered to give the consent required.

Even assuming that the licence granted by the intervener's predecessor in law has effects vis-à-vis the intervener [21] in so far as the parties had carried out that transfer of the marks in question in full awareness of the licence, this does not, however, mean that the licence may be registered. Even if a licence can, under those conditions, remain valid or confer rights under national law, that substantive legal situation cannot impact the right to registration which follows a formalised approach. The lawfulness of the decision of the Board of Appeal is dependent only on the formalised conditions provided for by the applicable provisions, the wording of which leaves no scope for interpretation. It remains, however, open to the applicant to rely on its rights deriving from substantive law before the national courts.

In the second place, the Court rejects the applicant's arguments based on the applicability of Finnish law on account of the fact that the companies concerned have their seat in Finland. The recordal in the register of a licence relating to an EU trade mark is governed autonomously by EU law. [22] Accordingly, the question whether Finnish law has formal conditions for a licence contract or under which conditions such a contract is also binding on the succeeding proprietor of the marks in question is irrelevant to whether the registration of the licence in the applicant's favour in the EU trade marks register was correct.

In the third and last place, the Court rejects the applicant's argument that EUIPO exceeded its powers by revoking the registration of a licence contract which was legal under Finnish law. The cancelled entry was vitiated by an obvious error attributable to EUIPO. As the registration of a licence follows the same rules as that of a transfer, the Court applies mutatis mutandis the case-law according to which it does not fall to EUIPO to examine the validity and legal effects of the transfer of an EU trade mark under national law. It follows that, when dealing with a request for registration of a licence, EUIPO's competence is, in principle, confined to examining the formal requirements, which does not imply an assessment of substantive issues that may arise under the applicable national law.

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18 Under Article 25(5) of Regulation 2017/1001, on request of one of the parties, the grant or transfer of a licence in respect of an EU trade mark is to be entered in the register and published.

19 Article 20(5) of the regulation provides that an application for registration of a transfer is to contain the documents duly establishing the transfer; paragraph 3 provides that 'an assignment of the EU trade mark shall be made in writing and shall require the signature of the parties to the contract, except when it is a result of a judgment; otherwise it shall be void'. Article 13(3)(a), (c) and (d) of Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Implementing Regulation (EU) 2017/1431 (OJ 2018 L 104, p. 37), specifies that the signature or agreement of the registered proprietor is a prerequisite for the valid transfer of a licence.

20 Article 26(1)(b) of Regulation 2017/1001 and Article 13(3)(a), (b), (c) and (d) of Implementing Regulation 2018/626.

21 Pursuant to the second sentence of Article 27(1) of Regulation 2017/1001.

22 Article 19(1) of Regulation 2017/1001, which refers to the law of the Member State in which the proprietor of the EU trade mark has its seat, applies only 'unless Articles 20 to 28 provide otherwise'. See Articles 25 to 28 of that regulation and Article 13 of Implementing Regulation 2018/626.

IV. INTERNET AND ELECTRONIC COMMERCE: ELECTRONIC COMMERCE

Judgment of the Court of Justice (Second Chamber) of 9 November 2021, Google Ireland and Others, C-376/22

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2000/31/EC – Information society services – Article 3(1) – Principle of control in the home Member State – Article 3(4) – Derogation from the principle of free movement of information society services – Concept of 'measures taken against a given information society service' – Article 3(5) – Possibility of a posteriori notification of measures restricting the free movement of information society services in urgent cases – Failure to provide notification – Enforceability of those measures – Legislation of a Member State imposing on providers of communication platforms, whether established on its territory or not, a set of obligations relating to the monitoring and notification of allegedly unlawful content – Directive 2010/13/EU – Audiovisual media services – Video-sharing platform service

Google Ireland Limited, Meta Platforms Ireland Limited and Tik Tok Technology Limited are companies established in Ireland which provide, inter alia in Austria, communication platform services.

By its decisions, adopted in 2021, the Kommunikationsbehörde Austria (KommAustria) (the Austrian communications regulatory authority) declared that the three companies referred to above were subject to Austrian law. [23]

Taking the view that that Austrian law, which imposes a set of obligations on providers of communication platform services, whether established in Austria or elsewhere, relating to the monitoring and notification of allegedly unlawful content, should not be applied to them, those companies brought actions against the KommAustria decisions. Those actions were dismissed at first instance.

Following that dismissal, those companies lodged appeals on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). In support of those appeals, they submit in particular that the obligations introduced by the Austrian law are disproportionate and incompatible with the free movement of information society services and with the principle of control of those services by the home Member State, in other words, by the State on whose territory the service provider is established, as laid down in the Directive on electronic commerce. [24]

Having doubts as to the compatibility of the Austrian law and the obligations it imposes on service providers with the Directive on electronic commerce, which allows a Member State other than the home Member State to derogate, under certain conditions, from the principle of free movement of

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23 Namely, the Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen (Kommunikationsplattformen-Gesetz) (Federal Law on measures for the protection of users of communications platforms) (BGBl. I, 151/2020).

24 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1) ('the Directive on electronic commerce').

information society services, the Supreme Administrative Court made a reference to the Court of Justice on the interpretation of that directive.

In its judgment, the Court rules on the question whether a Member State of destination of information society services may derogate from the free movement of those services by taking not only individual and specific measures, but also general and abstract measures aimed at a category of given services and, specifically, whether those measures are likely to fall within the concept of 'measures taken against a given information society service' within the meaning of the Directive on electronic commerce. [25]

Findings of the Court

First of all, the Court notes that the possibility of derogating from the principle of free movement of information society services concerns, according to the wording of the Directive on electronic commerce, a 'given information society service'. In this context, the use of the word 'given' tends to indicate that the service referred to must be understood as an individualised service. Consequently, Member States cannot adopt general and abstract measures aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services.

That assessment is not called into question by the fact that the Directive on electronic commerce uses the concept of 'measures'. By using such a broad and general term, the EU legislature has left to the discretion of the Member States the nature and form of the measures they may adopt to derogate from the principle of free movement of information society services. However, the use of that term in no way prejudges the substance or material content of those measures.

Next, the Court notes that that literal interpretation is corroborated by the contextual analysis of the Directive on electronic commerce.

The possibility of derogating from the principle of free movement of information society services is subject to the condition that the Member State of destination of those services must first ask the Member State of their origin to take measures, [26] which presupposes the possibility of identifying the service providers and, consequently, the Member States concerned. If Member States were authorised to restrict the free movement of such services by means of measures of a general and abstract nature applying without distinction to any provider of a category of such services, such identification would be, if not impossible, at least excessively difficult, so that Member States would not be able to comply with such a condition.

Finally, the Court points out that the Directive on electronic commerce is based on the application of the principles of home Member State control and mutual recognition, so that, within the coordinated field, [27] information society services are regulated solely in the Member State on whose territory the providers of those services are established. However, if Member States of destination were authorised to adopt measures of a general and abstract nature applying without distinction to any provider of a category of such services, whether established in the latter Member State or not, the principle of control in the Member State of origin would be called into question. That principle results in a division of regulatory powers between the Member State of origin and the Member State of destination. To authorise the latter State to adopt such measures would encroach on the regulatory powers of the Member State of origin and would have the effect of subjecting such providers to the legislation of both that State and the Member State or Member States of destination. Calling into question that principle would undermine the system and objectives of the Directive on electronic commerce. Furthermore, to allow the Member State of destination to adopt such measures would

25 Article 3(4) of the Directive on electronic commerce.

26 Article 3(4)(b) of the Directive on electronic commerce.

27 Within the meaning of Article 2(h) of the Directive on electronic commerce.

undermine mutual trust between Member States and would be in conflict with the principle of mutual recognition.

In addition, the Court states that the Directive on electronic commerce seeks to eliminate legal obstacles to the proper functioning of the internal market arising from divergences in legislation and from the legal uncertainty as to which national rules apply to such services. However, the possibility of adopting the abovementioned measures would ultimately amount to subjecting the service providers concerned to different laws and, consequently, reintroducing the legal obstacles to freedom to provide services which that directive seeks to eliminate.

Thus, the Court concludes that general and abstract measures aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services do not fall within the concept of 'measures taken against a given information society service' within the meaning of the Directive on electronic commerce.

V. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Third Chamber, Extended Composition) of 22 November 2021, Del Valle Ruíz and Others v SRB, T-302/20, T-303/20 and T-307/20

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution of Banco Popular Español – Decision of the SRB refusing to grant compensation to the shareholders and creditors affected by the resolution actions – Right to property – Right to be heard – Right to an effective remedy – Valuation of difference in treatment – Independence of the valuer

Judgment of the General Court (Third Chamber, Extended Composition) of 22 November 2021, Molina Fernández v SRB, T-304/20

Judgment of the General Court (Third Chamber, Extended Composition) of 22 November 2021, ACMO and Others v SRB, T-330/20

Link to the full text of the judgment

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution of Banco Popular Español – Decision of the SRB refusing to grant compensation to the shareholders and creditors affected by the resolution actions – Valuation of difference in treatment – Independence of the valuer

In Joined Cases T-302/20, T-303/20 and T-307/20 and in Case T-304/20, the applicants are natural and legal persons who were shareholders in Banco Popular Español, SA ('Banco Popular') before the adoption of a resolution scheme in respect of Banco Popular. In Case T-330/20, on the other hand, the applicants are investment funds which, before the adoption of that scheme, owned capital

instruments, with the exception of one of the applicants, which was the successor to the rights of an entity holding Banco Popular bonds.

On 7 June 2017, the Executive Session of the Single Resolution Board (SRB) adopted, on the basis of Regulation No 806/2014, [28] a resolution scheme in respect of Banco Popular, [29] which was endorsed on the same day by the European Commission. [30]

Prior to the adoption of that scheme, the SRB had engaged Deloitte Reviseurs d'Entreprises as valuer ('the Valuer') in order to carry out a valuation of Banco Popular, in preparation for a potential resolution, and a valuation of the difference in treatment, after a potential resolution. On 6 June 2017, the Valuer submitted to the SRB a valuation ('Valuation 2'), the purpose of which was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and to inform the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool. According to the resolution scheme, given that the necessary conditions [31] had been met, the SRB decided to place Banco Popular under resolution. Following an open and transparent sale process conducted by the Spanish resolution authority, the Fund for Orderly Bank Restructuring (FROB), Banco Popular's new shares were transferred to Banco Santander SA.

After the adoption of the resolution scheme, the Valuer submitted to the SRB the valuation of the difference in treatment [32] ('Valuation 3'), seeking to determine whether the affected shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings than that which they received as a result of the resolution. That valuation was carried out in the context of a liquidation scenario, in accordance with Spanish law, at the time the resolution scheme was adopted. The Valuer maintained that the opening of normal insolvency proceedings would have resulted in an unplanned liquidation. It concluded that no recovery would have been expected under such proceedings and that there was therefore no difference in treatment by comparison with the treatment resulting from the resolution action.

Subsequently, in order to be able to take a final decision on whether the affected shareholders and creditors should be granted compensation from the Single Resolution Fund, [33] the SRB invited them to express their interest in exercising their right to be heard with respect to the preliminary decision in that regard, [34] in which it concluded that, in the light of Valuation 3, it was not required to pay them compensation. The right to be heard process was conducted in two successive phases, namely the registration phase, in which the affected shareholders and creditors were invited to express their interest in exercising their right to be heard, and then the consultation phase, during which the affected persons were able to submit their comments on the preliminary decision, to which the non-confidential version of Valuation 3 was annexed.

At the end of the consultation phase, the SRB examined the relevant comments and received from the Valuer a clarification document in which the latter confirmed that the strategy and various

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

29 Decision SRB/EES/2017/08 concerning the adoption of a resolution scheme in respect of Banco Popular ('the resolution scheme').

30 Commission Decision (EU) 2017/1246 endorsing the resolution scheme for Banco Popular Español (OJ 2017 L 178, p. 15).

31 Under Article 18(1) of Regulation No 806/2014.

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

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

34 Preliminary decision of the SRB on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular have been effected and the launching of the right to be heard process (SRB/EES/2018/132) ('the preliminary decision').

hypothetical liquidation scenarios detailed in Valuation 3, as well as the methodologies followed and analyses used, remained valid.

On 17 March 2020, the SRB adopted Decision SRB/EES/2020/52 determining whether compensation needed to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular had been effected ('the contested decision'), in which it considered that the Valuer was independent and that Valuation 3 was in line with the applicable legal framework and was sufficiently reasoned and comprehensive. It also presented the comments submitted by the affected shareholders and creditors and their assessment, and concluded that there was no difference between the actual treatment of the affected shareholders and creditors and the treatment that they would have received if Banco Popular had been subject to normal insolvency proceedings at the resolution date.

By its judgments, in which it dismisses the three actions based on Article 263 TFEU, the General Court rules for the first time on an application for annulment of a decision of the SRB on whether compensation should be granted to the affected shareholders and creditors following a bank resolution. In that regard, the General Court examines a number of novel issues raised in the three actions, in particular concerning the assessment of the situation of the affected shareholders and creditors in the event that Banco Popular had entered into normal insolvency proceedings, the independence of the Valuer, the right to be heard during the proceedings, the right to an effective remedy and the right to property.

Findings of the Court

In the first place, the Court rejects the complaints that the contested decision is unlawful as regards the examination of whether Banco Popular's former shareholders would have received better treatment under normal insolvency proceedings.

First, the Court observes that it is clear from the provisions of Regulation No 806/2014 that the reference [35] to the treatment which the entity's shareholders and creditors would have received if that entity had entered into normal insolvency proceedings refers to their hypothetical treatment in the event of the winding up of that entity. It also observes that the methodology for valuation of that treatment defined in Delegated Regulation 2018/344 [36] consists of the realisation of the institution's assets, and therefore a winding up, as defined in Article 3(1)(42) of Regulation No 806/2014.

Secondly, in order to establish the difference in treatment, the comparison to be made is between the actual treatment of the shareholders and creditors affected as a result of the resolution and the assessment of the situation they would have been in if the resolution action had not been effected, namely in the event of liquidation of the entity.

Thirdly, the Court finds that, in the context of the assessment of difference in treatment following a resolution decided by the FROB, Spanish law provides that the counterfactual scenario is to be based on the entity's liquidation scenario, taking into account the provisions of Spanish law on liquidation. It concludes that the determination of difference in treatment must be based on a liquidation scenario, and therefore may not be based on a going concern scenario or a scenario in which a composition agreement has been concluded with the creditors.

Fourthly, the Court points out that the counterfactual liquidation scenario envisaged in Valuation 3 had to be defined in the light of Banco Popular's situation at the resolution date. On that date, Banco Popular was unable to continue as a going concern on account of its liquidity position, of the assessment that it was failing or likely to fail and of the possible revocation of its banking licence, and

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35 Under Article 20(16) to (18) of Regulation No 806/20104.

36 Commission Delegated Regulation (EU) 2018/344 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution (OJ 2018 L 67, p. 3).

for that reason, neither a composition agreement nor an insolvency scenario based on the going concern assumption was conceivable.

Similarly, the Court rejects the argument that the Valuer's valuation of Banco Popular should have taken into account the sale of the institution as a whole or divided into business units, since that implies a continuation of the undertaking's activities. The Valuer did not therefore make an error by using a methodology based on a liquidation scenario and the sale of individual assets or asset portfolios.

Fifthly, the contested decision is not vitiated by any manifest errors of assessment either as regards the taking into account of a maximum liquidation scenario of seven years – having regard, in particular, to the objective of carrying out a liquidation within a reasonable time and to the uncertainties caused by a prolonged liquidation period – or as regards the valuation of the performing and non-performing loans portfolios, Banco Popular's real estate subsidiaries and the legal contingencies.

In the second place, the Court rejects the plea alleging that the Valuer was not independent.

First, the Court notes that the circumstances of the case, on the one hand, do not establish that, in carrying out Valuation 3, the Valuer was influenced by the fact that it had carried out Valuation 2 and, on the other, contradict the argument that the Valuer could reasonably appear not to be objective or impartial.

In Valuation 3, the assessment of difference in treatment is based on the actual treatment of the shareholders and creditors affected as a result of the resolution. The valuation of Banco Popular's assets and liabilities in the first part of Valuation 2 was not taken into account in Valuation 3 and could not therefore influence the Valuer when it carried out Valuation 3.

In addition, Valuation 2 contained several reservations as to the reliability of the liquidation scenario simulation. Accordingly, the Court rejects the complaint that, in an effort to protect its professional reputation, the Valuer considered itself bound by the findings of Valuation 2 when it carried out Valuation 3.

Moreover, the Court rejects the argument that the Valuer had an incentive to avoid any rectification or modification of the findings contained in Valuation 2, on the ground that that argument is contradicted by the circumstances in which Valuations 2 and 3 were carried out. Valuation 3 was performed on the basis of more granular information than the information available to the Valuer at the time of Valuation 2. Furthermore, as soon as it received Valuation 2, the SRB was informed of the fact that the Valuer would have to base Valuation 3 on new data, and therefore modify the assessment carried out in the liquidation scenario simulation. In Valuation 3, the Valuer did not merely confirm the outcome of the simulation set out in Valuation 2. Moreover, the mere fact that the Valuer reached the same conclusion is not sufficient to establish that it considered itself bound by its assessment in Valuation 2 when it carried out Valuation 3.

Lastly, the Court rejects the complaint that the SRB should have appointed another valuer to carry out a valuation using a different methodology, because the assessment of the treatment of the affected shareholders and creditors had to be carried out on the basis of a liquidation scenario. Similarly, no provision of Regulation No 806/2014 or Delegated Regulation 2016/1075 expressly precludes Valuations 2 and 3 from being carried out by the same valuer.

Secondly, the Court rejects the complaints that the Valuer was not independent on account of its alleged links with Banco Popular and Banco Santander.

In that regard, it observes that, on the date that the Valuer was appointed as independent valuer, the identity of the purchaser was unknown, so it was not possible to take into account the links between

the Valuer and Banco Santander, and the Valuer was no longer providing auditing services to Banco Santander.

The Court emphasises that, throughout the procedure relating to the resolution of Banco Popular, the SRB ensured, as it was required to do, that the Valuer complied with the requirements of independence and, in particular, those relating to the absence of a conflict of interest laid down in Delegated Regulation 2016/1075. [37]

Thus, the SRB did not err in finding that the services provided by the Valuer both to Banco Popular and to Banco Santander could not influence the Valuer's judgement in carrying out Valuation 3, and could not therefore establish that there were actual or potential material interests in common or in conflict with Banco Popular or Banco Santander.

Similarly, none of the arguments calls into question the SRB's assessments relating to the absence of a link between, on the one hand, the auditing services and services relating to the integration of Banco Popular provided by the Valuer to Banco Santander and, on the other hand, the elements relevant to Valuation 3, which concerned only the valuation of Banco Popular and not that of Banco Santander.

Furthermore, the applicants do not explain how those services provided by the Valuer could have influenced or could have been reasonably perceived to influence the Valuer's judgement in carrying out Valuation 3.

Moreover, the Court considers that in order to make a finding that the SRB should have taken into consideration an apparent lack of objectivity or impartiality on the part of the Valuer on account of its links with Banco Santander, it would need to be established that by submitting, in Valuation 3, that the affected shareholders and creditors would not have received better treatment under normal insolvency proceedings, the Valuer intended to favour Banco Santander. Furthermore, even if the Valuer had concluded, in Valuation 3, that the affected shareholders and creditors would have received better treatment in the event of Banco Popular's liquidation, the compensation which might have resulted therefrom is paid by the Single Resolution Fund, and not by Banco Santander.

In addition, the Court holds that the outcome of Valuation 3 has no influence on the legality and legitimacy of the decision to place Banco Popular under resolution or on the outcome of that resolution, namely the sale of Banco Popular to Banco Santander, and that it cannot have the effect of granting the affected shareholders and creditors entitlement to compensation from Banco Santander.

The Court concludes that, in so far as Valuation 3, whatever its outcome, could not affect Banco Santander's situation, the Valuer was not in a position to favour Banco Santander. Accordingly, the links between them cannot give rise to a legitimate doubt as to the existence of possible bias, or point to a lack of objectivity or impartiality on the part of the Valuer. Those links did not constitute a circumstance capable of calling into question the Valuer's independence in carrying out Valuation 3 or its appointment by the SRB as an independent valuer.

In the third place, the Court rejects the plea alleging infringement of the right of the shareholders and creditors to be heard, in particular, in so far as the SRB required them to submit their comments on a form.

In that regard, first, it points out that respect for the right to be heard must be ensured even where there is no legislation which expressly provides for the exercise of that right, and that neither Regulation No 806/2014 nor the Charter of Fundamental Rights of the European Union ('the Charter')

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37 Under Article 41 of Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (OJ 2016 L 184, p. 1).

lays down a specific procedure for implementing the right to be heard. Thus, the SRB's decision to use a form to collect the comments of the affected shareholders and creditors was within its margin of discretion in organising that procedure, in order to allow the affected shareholders and creditors to exercise their right to be heard, provided that they would be able to exercise their right effectively.

Secondly, in the present case, the Court observes that the SRB examined all the comments received and that it explained, in the contested decision, why certain comments were not relevant for the purpose of adopting the contested decision. The Court rejects the argument alleging infringement of the right to be heard on the ground that the SRB dismissed irrelevant comments.

Thirdly, the Court finds that the questions on the form were drafted in a neutral manner, in the form of a brief presentation of the issue in question with a reference to the relevant parts of the preliminary decision or of Valuation 3, which was followed by an invitation to the affected shareholders and creditors to submit their comments or opinions on that issue.

Fourthly, the Court rejects the argument concerning the limitation of the length of the responses that could be entered on the form, on the ground that it is purely theoretical and does not establish to the requisite legal standard that, in the absence of such a limitation, the outcome of the procedure could have been different.

On the one hand, the comments submitted during the right to be heard process in response to the form were carefully examined in the contested decision and led the Valuer to adopt the clarification document. Thus, even though the length of the comments was limited, the SRB and the Valuer provided detailed responses to those comments.

On the other, the applicants do not indicate which comments, other than those which had been submitted and to which the SRB and the Valuer had responded, they had been prevented from making on account of the length of the form. They also fail to specify which documents they would have liked to be able to attach to the form.

In the fourth place, the Court rejects as ineffective the plea alleging that the basis of Valuation 3 on Banco Popular's financial situation when it was put into resolution is incorrect.

It recalls that the assessment of difference in treatment had to be made at the time the resolution scheme was adopted. However, the Bank of Spain's expert report of 8 April 2019, on which the applicants rely and whose production by way of a measure of inquiry had been requested, concerns events prior to the resolution of Banco Popular, which were not relevant for the purpose of carrying out Valuation 3.

In the fifth place, the Court rejects the plea alleging that the SRB improperly delegated to the Valuer the decision-making powers conferred on it by Regulation No 806/2014.

First, having found that the applicants do not raise a plea of illegality in respect of Regulation No 806/2014, nor claim that the SRB exercised a discretionary power or that its executive powers are not clearly defined in that regulation, or that the SRB infringed Regulation No 806/2014 by exceeding the powers conferred on it by that regulation, the Court holds that the arguments criticising the SRB for conferring a decision-making power on the Valuer cannot establish an infringement of the principles relating to the delegation of powers.

Secondly, the Court points out that the decision not to grant compensation to the affected shareholders and creditors was adopted by the SRB, not by the Valuer.

Furthermore, pursuant to Regulation No 806/2014, the economic and technical aspects of the valuation of the treatment which the affected shareholders and creditors would have received if Banco Popular had been subject to normal insolvency proceedings were to be assessed by an independent valuer and not by the SRB itself. Thus, the fact that the SRB entrusted the Valuer with carrying out Valuation 3 cannot be construed as a delegation of its power to adopt the decision.

Thirdly, as regards the provisions of Regulation No 806/2014, the fact that the SRB approved the conclusions of Valuation 3 cannot be interpreted as a failure by the SRB to monitor compliance with the requirements with which the independent valuer must comply when carrying out the valuation. Furthermore, it is clear from the content of the contested decision that the SRB did not merely

summarise Valuation 3 and the clarification document, but examined whether they remained valid in the light of the comments made by the affected shareholders and creditors.

In the sixth place, the Court rejects the plea alleging infringement of the right to an effective remedy.

As regards the non-disclosure of certain information in the non-confidential version of Valuation 3 annexed to the preliminary decision, the Court observes that the SRB's assessment, according to which the redacted information relating to provisions for legal contingencies set out in Valuation 3 was covered by professional secrecy and was confidential, is not disputed. Nor is it disputed that the SRB is under an obligation to protect confidential information. [38] Furthermore, the applicants do not indicate that the redacted information is required in order to understand the contested decision or to exercise their right to an effective judicial remedy.

In the seventh place, the Court rejects the plea alleging infringement of the right to property.

The Court points out that Regulation No 806/2014 establishes a mechanism to ensure fair compensation for the shareholders or creditors of the entity under resolution, in accordance with the requirements of Article 17(1) of the Charter.

In the present case, having failed to establish that the SRB had made a manifest error of assessment in concluding, on the basis of Valuation 3, that the affected Banco Popular shareholders and creditors would not have received better treatment under normal insolvency proceedings than in the resolution, the applicants have not shown that the contested decision infringes their right to property.

Moreover, it cannot validly be maintained that the SRB infringed Article 17 of the Charter, in so far as the amount of the compensation under the no-creditor-worse-off principle was calculated on the basis of the worst-case scenario for the shareholders, namely proceedings for the liquidation of Banco Popular. The application of a counterfactual liquidation scenario complies with the applicable provisions.

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

Judgment of the Court of Justice (Grand Chamber) of 28 November 2021, Commune d'Ans, C-148/22

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Establishing a general framework for equal treatment in employment and occupation – Prohibition of discrimination on the grounds of religion or belief – Public sector – Terms of employment of a public administration prohibiting the visible wearing of any philosophical or religious sign in the workplace – Islamic headscarf – Requirement of neutrality in contacts with the public, hierarchical superiors and colleagues

OP has held, since 11 October 2016, the post of 'head of office' in the municipality of Ans (Belgium), a function which she performs primarily without being in contact with users of public service.

38 Under Article 88(5) of Regulation No 806/2014.

On 8 February 2021, she requested authorisation to wear an Islamic headscarf in her workplace. That request was provisionally rejected by her employer.

Subsequently, the municipal board amended the terms of employment of the municipality of Ans by inserting a requirement of 'exclusive neutrality' in the workplace, understood as prohibiting all its workers from wearing, in that workplace, any visible sign that might reveal their beliefs – religious or philosophical in particular – whether or not they were in contact with the public.

Taking the view that she had been discriminated against because of her religion, OP brought an action for an injunction before the tribunal du travail de Liège (Labour Court, Liège, Belgium).

According to that court, the prohibition on wearing the Islamic headscarf, imposed on OP by her employer pursuant to the terms of employment, creates a difference in treatment constituting discrimination, within the meaning of Directive 2000/78. [39] In view of the doubts that it has as to the compatibility with that directive of the provision of the terms of employment at issue, the said court decided to refer questions to the Court of Justice for a preliminary ruling.

The Court, sitting as the Grand Chamber, rules that an internal rule of a municipal authority prohibiting, in a general and indiscriminate manner, the members of that authority's staff from visibly wearing in the workplace any sign revealing, in particular, philosophical or religious beliefs may be justified by the desire of the said authority to establish an entirely neutral administrative environment provided that that rule is appropriate, necessary and proportionate in the light of its context and taking into account the various rights and interests at stake.

Findings of the Court

After having rejected, on the basis of the factual elements put forward by the referring court, the possibility of direct discrimination, the Court recalls that an internal rule decreed by an employer, such as that at issue in the main proceedings, may constitute a difference of treatment indirectly based on religion or belief, within the meaning of Article 2(2)(b) of Directive 2000/78, if it is established that the apparently neutral obligation contained in that rule results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.

Such a difference in treatment does not, however, amount to indirect discrimination if, in accordance with Article 2(2)(b)(i) of Directive 2000/78, it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

In the first place, according to the Court, a provision of a public administration's terms of employment, such as that at issue in the present case, may be regarded as pursuing a legitimate aim within the meaning of that provision.

In the absence of consensus at EU level, each Member State, including, where appropriate, its infra-State bodies, in compliance with the powers conferred on them, must be afforded a margin of discretion in designing the neutrality of the public service which it intends to promote in the workplace. That margin of discretion allows the Member States and those infra-State bodies to take account of their own specific context, having regard to the diversity of their approaches as to the place they intend to accord, within their respective systems, to religion and philosophical beliefs in the public sector. However, it is for the national and EU courts to verify whether the national, regional or local measures taken were justified in principle and proportionate.

In the second place, the Court states that the provision of the terms of employment must be appropriate for the purpose of ensuring that the aim pursued by the employer is properly applied. In that regard, it will be for the referring court, first of all, to determine whether the municipality of Ans

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39 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

pursues the objective of 'exclusive neutrality' in a genuinely consistent and systematic manner with respect to all employees.

Next, the Court states that the legitimate objective of ensuring, through a policy of 'exclusive neutrality', an entirely neutral administrative environment can be effectively pursued only if no visible manifestation of beliefs – philosophical or religious in particular – is allowed when employees are in contact with users of the public service or with other employees. The wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy.

Finally, it will be for the referring court, in the light of all the factors characteristic of the context in which that rule was adopted, to weigh up the interests at stake, taking into account, on the one hand, the fundamental rights and principles at issue, and, on the other hand, the principle of neutrality seeking to guarantee the users of its services and the members of the public administration's staff an administrative environment devoid of visible manifestations of beliefs, philosophical or religious in particular.

VII. CONSUMER PROTECTION: UNFAIR TERMS

Judgment of the Court of Justice (Fourth Chamber) of 9 November 2021, Všeobecná úverová banka, C-598/21

Link to the full text of the judgment

Reference for a preliminary ruling – Unfair terms in consumer contracts – Consumer credit contract – Directive 93/13/EEC – Article 1(2) – Term reflecting a mandatory statutory provision – Article 3(1), Article 4(1), Article 6(1) and Article 7(1) – Acceleration clause – Judicial review – Proportionality with regard to the consumer breaches of contract – Articles 7 and 38 of the Charter of Fundamental Rights of the European Union – Contract secured by a charge on immovable property – Extrajudicial sale of the consumer's home

SP and CI, the applicants in the main proceedings, took out a consumer credit repayable over a period of 20 years and secured by a charge on immovable property, namely the family home in which they were resident.

Less than a year after the conclusion of that agreement, since the applicants in the main proceedings were in default of payment, the lender demanded repayment in full of the sums due under the credit agreement, on the basis of an acceleration clause contained in that agreement. It then proceeded to enforce its charge by extrajudicial auction of the pledged property.

Hearing an application by the applicants for suspension of that sale, the Okresný súd Prešov (District Court, Prešov, Slovakia) dismissed their application by a first judgment, which it subsequently confirmed, on remittal, notwithstanding the annulment of that judgment by the Krajský súd v Prešove (Regional Court, Prešov, Slovakia). The applicants brought an appeal against that second judgment before the Prešov Regional Court, the referring court. According to that court, the national legislation

authorising the extrajudicial enforcement of a charge by auction of the property constituting the home of the consumers may be contrary to Directive 93/13 and to the principle of proportionality.

In its judgment, the Court of Justice examines the interpretation of Directive 93/13 [40] and, more specifically, the scope of judicial review of the unfairness of a clause accelerating the term contained in a consumer credit agreement, where that clause allows the extrajudicial sale of the consumer's family home.

Findings of the Court

In the first place, the Court finds that an acceleration clause which allows the creditor to claim repayment in advance of the entire outstanding balance in the event of the debtor's failure to fulfil his or her contractual obligations falls within the scope of Directive 93/13. Thus, it points out that, subject to verification by the referring court, that clause is not to be classified as a '[term] which reflect[s] mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13. Although that clause reproduces certain provisions of national law, [41] those provisions are not mandatory and do not satisfy the second condition laid down in Article 1(2) for the application of the exclusion provided for therein.

In the second place, after recalling the general rules governing judicial review of the unfairness of contractual terms falling within the scope of Directive 93/13, the Court recalls the criteria in the light of which the national court may determine whether a term in a long-term mortgage loan agreement determining the conditions under which the creditor is authorised to demand early repayment, such as the acceleration clause, is unfair.

Thus, in making that assessment, it is important to know, first, whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation of essential importance in the context of the contractual relationship in question and, second, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan. It is also important to know, third, whether the seller or supplier's right derogates from the ordinary law applicable, in the absence of specific contractual provisions and, fourth, whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.

Therefore, when assessing whether an acceleration clause is unfair, the national court must, inter alia, examine the proportionality of the option available to the creditor under that clause to demand all the sums due under the contract. Therefore, that court must take into account, inter alia, the extent to which the consumer fails to fulfil his or her contractual obligations, such as the amount of the instalments which have not been paid in relation to the total amount of the credit and the duration of the contract.

However, the criteria set out above are neither cumulative or alternative nor exhaustive. Thus, first, when reviewing the proportionality of the acceleration clause, additional criteria, such as any contractual imbalance created by that acceleration clause and the fact that the application of that clause may, where appropriate, lead to the recovery by the creditor of the sums owed under the contract by the sale of the family home of the consumer without any judicial process, may be added. Second, when assessing the means enabling the consumer to remedy the effects of the loan becoming due, the national court must take into account, in particular with regard to the fundamental right to housing, [42] the consequences of the consumer and his or her family being evicted from the dwelling constituting their principal residence. Therefore, applying those criteria and taking into

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40 See, in particular, Article 3(1), Article 4(2), Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

41 In the present case, Paragraph 53(9) and Paragraph 565 of the Slovak Civil Code.

42 See Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

account all the circumstances in which the contract was concluded, the national court could conclude that the acceleration clause was unfair if it finds that the seller or supplier may, under that clause, exercise its right to claim early repayment of the outstanding balance due under the loan without taking into account the extent of the consumer's failure to fulfil obligations in relation to the amount granted and the duration of the loan.

In those circumstances, the Court ruled that Directive 93/13, read in the light of the Charter,[43] precludes national legislation under which the judicial review of the unfairness of an acceleration clause contained in a consumer credit agreement does not take account of the proportionality of the option given to the seller or supplier to exercise his or her right under that clause, in the light of specific criteria. Those include criteria linked, in particular, to the extent of the consumer's failure to fulfil his or her contractual obligations, such as the amount of the instalments that have not been paid in relation to the total amount of credit and the duration of the contract, as well as the possibility that implementation of the clause would result in the seller or supplier being able to recover the sums due under that clause by selling the consumer's family home without any judicial process.

VIII. JUDGMENT PREVIOUSLY DELIVERED

1. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Seventh Chamber), 25 October 2023, BNP Paribas Public Sector v SRB, T-688/21

Link to the full text of the judgment

Arbitration clause – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Contracts concerning the irrevocable payment commitment and the collateral arrangements – Rejection of the request for return of collateral linked to ex ante contributions provided in the form of irrevocable payment commitments – Institution whose authorisation has been withdrawn – Article 7(3) of Implementing Regulation (EU) 2015/81 – Non-contractual liability – Unjust enrichment

The applicant, the company BNP Paribas Public Sector SA, was an authorised French credit institution until 24 March 2021, the date on which it obtained the withdrawal of its authorisation from the European Central Bank (ECB). For the contribution periods from 2016 to 2021, it contributed to the Single Resolution Fund (SRF) for at least part of its ex ante contributions by means of an irrevocable payment commitment. To that end, it entered into irrevocable payment commitments with the Single Resolution Board (SRB) for each of those periods ('the 2016-2021 IPCs'). On 1 April 2021, the applicant informed the SRB that, at its request, the ECB had withdrawn its authorisation and requested information from the SRB with a view to obtaining repayment of the collateral linked to the irrevocable payment commitments entered into.

43 Articles 7 and 38 of the Charter.

On 29 July 2021, the applicant notified the SRB of the termination of the 2016-2021 IPCs. By letter of 13 August 2021, the SRB informed the applicant that it would return to it the collateral linked to the 2016-2021 IPCs following receipt of an amount in cash corresponding to the amount committed under those commitments. It stated, inter alia, that, having regard to Article 70(4) of Regulation No 806/2014, [44] according to which duly received contributions are not to be reimbursed to entities, and to Article 7(1) of Implementing Regulation 2015/81, [45] according to which recourse to irrevocable payment commitments must in no manner affect the financial capacity and the liquidity of the SRF, the cancellation of the 2016-2021 IPCs and the subsequent return of collateral backing those commitments could take place only after the payment in cash of an amount equal to the amount of the irrevocable payment commitment concerned. The SRB then invited the applicant to transfer a sum of a certain amount to it. On 25 October 2021, the applicant informed the SRB that, since, according to its understanding of the applicable legal framework, it was not required to transfer to the SRB the cash corresponding to the amounts committed under the 2016-2021 IPCs in order to be returned the collateral, it would not proceed with that transfer.

By its action, brought on the basis of Article 272 TFEU [46] and the first paragraph of Article 340 TFEU, the applicant asks the General Court, inter alia, to declare that the position set out by the SRB in its letter of 13 August 2021 is contrary to the terms of the 2016-2021 IPCs and to order the SRB to return to it the sums corresponding to the cash collateral relating to those commitments which the SRB retained in breach of its contractual obligations.

By its judgment, the Court dismissed the applicant's action. First, it confirms that the fact that an entity ceases to carry on its activities as a credit institution during the contribution period as a result of the withdrawal of its licence, does not affect its obligation to pay the full ex ante contribution due in respect of that contribution period and, second, it states that the obligation to pay that contribution in full is not limited to only the part of the payment immediately made, but also includes the part provided by means of an irrevocable payment commitment.

Findings of the Court

In the first place, the General Court points out that it follows from Article 70(1) of Regulation No 806/2014 that, for each contribution year, credit institutions established in a participating Member State are required to pay the ordinary contribution to the SRF. That annual collection of ex ante contributions from credit institutions was put in place to ensure that, at the end of the initial period, the available financial means of the SRF reach the target level. [47] Taking into account that objective, the EU legislature specified, in Article 70(4) of Regulation No 806/2014, that 'duly received' ex ante contributions were not to be reimbursed. By that wording, it laid down a rule without exceptions. That is why no mention is made of the possibility of adjusting ex ante contributions a posteriori. [48] It follows that a change in the status of an institution during the contribution period has no effect on the amount of the contribution due for the year in question. In that regard, the EU judicature has already held that the fact that an entity ceased to carry on the business of a credit institution during

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

45 Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund (OJ 2015 L 15, p. 1).

46 The General Court has jurisdiction to hear the applicant's application submitted on the basis of Article 272 TFEU, pursuant to the arbitration clauses in Clause 13.2 of each of the 2016-2021 IPCs, which confer jurisdiction on it to rule on any dispute concerning the legality, validity, interpretation or implementation of those agreements.

47 In accordance with Article 69(1) of Regulation No 806/2014.

48 Judgment of 29 September 2022, ABLV Bank v SRB (C-202/21 P, EU:C:2022:734, paragraph 56).

the contribution period as a result of the withdrawal of its licence, did not affect its obligation to pay the full ex ante contribution due in respect of that contribution period. [49]

In the second place, the General Court notes that, in order to fulfil their obligation to contribute to the SRF, credit institutions have, in accordance with Article 70(3) of Regulation No 806/2014, the possibility either to pay their contribution immediately or to enter into an irrevocable payment commitment.

In the third and last place, the Court recalls that Article 7 of Implementing Regulation 2015/81 sets out certain rules applicable to irrevocable payment commitments, which have the particular feature of being contracts entered into for an unlimited duration allowing institutions to defer payment of their contribution.

In that context, the Court observes, in view of the ordinary meaning of the word 'irrevocable', that an irrevocable payment commitment implies an obligation, which cannot be called into question, to pay the sum in respect of which that commitment was entered into. It also notes that, although Article 7(3) of Implementing Regulation 2015/81 does not expressly state that institutions must first pay their contribution in order for their collateral to be subsequently returned to them, Regulation No 806/2014 requires those institutions to pay, during the initial period, an annual contribution to the SRF in order for the latter to reach the target level at the end of that period. It follows that, if the collateral backing an irrevocable payment commitment were returned without prior receipt of the contribution in respect of which that commitment was entered into, not only would the institution concerned not fulfil its obligation to pay the entire contribution due in respect of the period in which it fell within Regulation No 806/2014, but the ex ante contribution in the form of an irrevocable payment commitment would not achieve the objective of providing the SRF with financial means corresponding to the level provided for by the EU legislature.

As stated by the EU judicature, [50] the fact that an entity ceases to carry on the business of a credit institution during the contribution period, as a result of the withdrawal of its licence, does not affect its obligation to pay the full ex ante contribution due in respect of that contribution period. The Court considers that, to assess the scope of the obligation to pay that contribution in full, it is not appropriate to confine that assessment to only the part of the payment immediately made, without taking account of the other part provided by means of an irrevocable payment commitment. Article 7(1) of Implementing Regulation 2015/81 expressly provides that recourse to irrevocable payment commitments must in no manner affect the financial capacity or the liquidity of the SRF. The cancellation of an irrevocable payment commitment, caused by the withdrawal of the establishment from the scope of Regulation No 806/2014, and the return of the corresponding collateral, provided for in Article 7(3) of Implementing Regulation 2015/81, cannot therefore be to the detriment of the SRF. If that were not the case, that latter provision would run counter to the objective pursued by the annual collection of ex ante contributions. [51] Thus, Article 7(1) of Implementing Regulation 2015/81 applies to the treatment of irrevocable payment commitments of an institution which falls outside the scope of Regulation No 806/2014 and, therefore, Article 7(3) of Implementing Regulation 2015/81 must be interpreted in the light of that provision. Therefore, the Court considers that the purpose of the cancellation of the irrevocable payment commitment provided for by the latter provision is to put an end to that commitment, with the result that it does not continue after the contributing institution has left the scope of Regulation No 806/2014. The purpose of that provision is therefore not to enable institutions which fall outside the scope of that regulation to avoid their obligation to pay in full the contribution due; rather, it is intended to ensure that the financial means of the SRF will be available to the SRB as quickly as possible in the event of a resolution, that is to say, to safeguard the financial capacity and liquidity of the SRF.

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49 Judgment of 20 January 2021, ABLV Bank v SRB (T-758/18, EU:T:2021:28, paragraph 85).

50 Judgment of 20 January 2021, ABLV Bank v SRB (T-758/18, EU:T:2021:28, paragraph 85).

51 As follows from Articles 69 and 70 of Regulation No 806/2014.

Furthermore, the fact that the departure of an institution reduces the total amount of covered deposits, and therefore the target level, even if it were established, does not relieve that institution of paying in full the ex ante contribution due in respect of the contribution period. In that regard, the Court notes that, over the period from 2016 to 2021, the applicant fell within the scope of Regulation No 806/2014 and was thus liable to pay the contribution to the SRF and that, for each of those years, the SRB calculated its individual contribution on the basis, inter alia, of its projection, the year in question, of the target level to be reached at the end of the initial period. Therefore, the fact that the target level may change after the applicant's exit from the scope of Regulation No 806/2014, cannot have any effect on the calculation, and therefore on the amount, of the contributions due for the period prior to its departure from the system. Consequently, the fact that the applicant's exit from the scope of Regulation No 806/2014 could influence the target level, if it were established, could not justify altering the amount of the contributions which it was required to pay for the years 2016 to 2021. Nor can that justify the repayment of the collateral backing the 2016-2021 IPCs without the prior payment of the contributions in respect of which those commitments were entered into.

Moreover, the Court recalls that it has already been held that the departure of an institution from the scope of Regulation No 806/2014 did not entitle it to a new calculation of the ex ante contribution since, if the SRB had to take into account the evolution of the legal and financial situation of credit institutions during the contribution period concerned, it would be difficult for it to calculate reliably and stably the contributions due by each of them and to pursue the objective of reaching, at the end of the initial period, at least 1% of the amount of deposits covered by all institutions authorised in the territory of a Member State. [52] It follows that the cancellation of the irrevocable payment commitment and the return of the collateral provided for in Article 7(3) of Implementing Regulation 2015/81 cannot mean that the part of the ex ante contribution for which an irrevocable payment commitment has been entered into does not have to be provided where the contributing institution falls outside the scope of Regulation No 806/2014. That institution remains liable to pay the full individual contribution regularly calculated by the SRB for the period in question and is not authorised to pay only a fraction thereof.

Consequently, the Court considers that the position expressed by the SRB, in the letter of 13 August 2021, according to which it may return the cash collateral backing the 2016-2021 IPCs only after the payment of an amount of the contribution for which those instruments were used, is not contrary to either Article 7(3) of Implementing Regulation 2015/81 or Clause 12.5 of the 2016-2021 IPCs, which refers to that provision.

[52] Judgment of 20 January 2021, ABLV Bank v SRB (T-758/18, EU:T:2021:28, paragraphs 75 and 76).

Nota bene:

The résumé of the following case is currently being finalised and will be published in a future issue of the Monthly Case-Law Digest:

- Judgment of 15 November 2021, OT v Council, T-193/22, EU:T:2023:716