COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

Monthly Case-Law Digest March 2024

I. INSTITUTIONAL PROVISIONS

1. EU INSTITUTIONS AND BODIES (EUROPOL)

Judgment of the Court of Justice (Grand Chamber), 5 March 2024, Kočner v Europol, C-755/21 P

Link to the full text of the judgment

Appeal – Law enforcement cooperation – Regulation (EU) 2016/794 – Article 49(3) and Article 50 – Protection of personal data – Unlawful data processing – Criminal proceedings brought in Slovakia against the appellant – Expert's report drawn up by the European Union Agency for Law Enforcement Cooperation (Europol) for the purposes of the investigation – Retrieval of data from a mobile phone and a USB storage device belonging to the appellant – Disclosure of those data – Non-material damage – Actions for damages – Nature of non-contractual liability

Hearing an appeal brought by Mr Kočner, the appellant, against the judgment of the General Court in Kočner v Europol, [1] the Grand Chamber of the Court of Justice upholds that appeal in part and provides details on the nature of the non-contractual liability of the European Union Agency for Law Enforcement Cooperation ('Europol') under Article 50 of Regulation 2016/794, [2] interpreted in the light of recital 57 of that regulation.

In the course of an investigation carried out by the Slovak authorities following the murder of a journalist and his fiancée in Slovakia in 2018, Europol supported those authorities at the request of the Národná kriminálna agentúra (National Crime Agency, Slovakia; 'NAKA'). In particular, it extracted the data stored on two mobile telephones allegedly belonging to the appellant. On 23 October 2018, it delivered to NAKA a hard drive containing the encrypted data it had extracted and the password protecting those data. Furthermore, on 13 January 2019, it sent a report to NAKA ('the Europol report') which stated, inter alia, that the appellant's name is directly linked to the 'so-called mafia lists'.

On 1 April 2019, the Slovak criminal authorities allegedly made use of that information in a criminal prosecution brought against the appellant. In 2019 and 2020, various press articles and websites referred to a very large amount of information relating to the appellant, some of which came from the mobile telephones at issue. In particular, a website and the Slovak press published transcripts of intimate communications stored on those telephones, which had been exchanged between the appellant and his girlfriend by means of an encrypted messaging service.

After having sent a complaint to Europol, the appellant brought an action for damages before the General Court under Articles 268 and 340 TFEU and Article 50(1) of the Europol Regulation, which establishes rules on liability for the incorrect processing of personal data. [3] In that action he sought compensation for the non-material damage he claimed he suffered as a result of Europol's actions. When that action was dismissed by the General Court, the appellant brought an appeal against the judgment under appeal. That appeal was directed against the rejection, first, of the first head of claim, which sought compensation for the non-material damage allegedly suffered by the appellant as a

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1 Judgment of 29 September 2021, Kočner v Europol (T-528/20, EU:T:2021:631; 'the judgment under appeal').

2 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ 2016 L 135, p. 53; 'the Europol Regulation').

3 Article 50(1) of the Europol Regulation.

result of the disclosure to the public of personal data from the mobile telephones at issue, and, second, of the second head of claim, which sought compensation for the non-material damage which he claims to have suffered as a result of the inclusion of his name on the 'mafia lists'.

Findings of the Court

First, the Court examines the grounds of appeal raised against the judgment under appeal.

As regards the non-material damage resulting from the disclosure to the public of personal data from the mobile telephones at issue, it specifies the nature of the rules on liability established by Article 50(1) of the Europol Regulation.

In the first place, the Court holds that it is apparent from an analysis of the wording of that provision and of the objective pursued by that regulation that the latter, read in the light of its preamble, [4] establishes, in accordance with the EU legislature's intention to favour an individual who has suffered damage, a set of rules under which Europol and the Member State concerned are jointly and severally liable. That interpretation is supported by the context of that provision. Article 50 of the Europol Regulation seeks to establish special rules regarding non-contractual liability concerning unlawful data processing operations, which derogate from the general liability rules laid down in Article 49 of that regulation.

The Court concludes from this that Article 50 of the Europol Regulation establishes rules on liability under which Europol and the Member State in which the damage resulting from the unlawful processing of data occurred are jointly and severally liable.

In the second place, as regards the conditions under which liability may be incurred under Article 50 of the Europol Regulation, the Court recalls that, in accordance with the rules on the non-contractual liability of the European Union set out in Article 340 TFEU, to which Article 50 of the Europol Regulation refers, such liability requires a number of conditions to be satisfied.

In that regard, it observes that, in the specific context of the Europol Regulation, it is apparent from the wording of Article 50(1) of that regulation that an individual who intends to assert his or her right to compensation need establish only that unlawful data processing took place in the context of cooperation involving Europol and a Member State under that regulation.

That literal interpretation is borne out by the objective pursued by Article 50 of the Europol Regulation, which, according to the preamble to that regulation, is to address the difficulties which the individual concerned may experience in determining whether the damage suffered as a result of unlawful data processing which has occurred in the context of such cooperation is a consequence of an action by Europol or the Member State concerned. In order not to deprive Article 50, read in the light of recital 57 of the Europol Regulation, of its effectiveness, that individual cannot be required to establish to whom, out of Europol or the Member State concerned, that damage is attributable or to bring proceedings against both of those entities in order to obtain full compensation for the damage suffered.

The Court also notes that the EU legislature has made provision, as regards compensation for damage caused by unlawful data processing in the context of cooperation under the Europol Regulation, for a two-stage liability mechanism, precisely in order to take account of those evidential difficulties. That mechanism relieves the individual concerned, at the first stage, of the burden of establishing the identity of the entity whose conduct gave rise to the alleged damage and provides, in the second stage, that, after that individual has been compensated, the 'ultimate responsibility' for that damage must, where appropriate, be definitively settled in proceedings involving only Europol and the Member State concerned before the Management Board of Europol.

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4 Recital 57 of the preamble.

The Court infers from this that the Europol Regulation does not require the individual concerned to identify which of the entities involved in cooperation between Europol and a Member State undertook the conduct constituting unlawful data processing. It is sufficient, in order for Europol or the Member State concerned to incur joint and several liability, that that individual show that unlawful data processing which caused him or her to suffer damage has been carried out.

However, the Court notes that it remains open to the defendant entity to establish by any legal means that the alleged damage did not arise in connection with an alleged unlawful processing of data occurring in the context of such cooperation, for example where that damage occurred before the relevant processing.

The Court of Justice concludes that the General Court erred in law in that it incorrectly held that Article 50(1) of the Europol Regulation, read in the light of its preamble, did not relieve the individual concerned of the obligation to establish to which of the two entities involved the processing of unlawful data is attributable. Consequently, it sets aside the judgment under appeal in so far as the General Court rejected the first head of claim.

As regards the non-material damage that is the subject of the second head of claim resulting from the inclusion of the appellant's name on the 'mafia lists', the Court notes that it is apparent from the judgment under appeal that the Europol report was subsequent to and, on that ground alone, unrelated to the event that gave rise to the damage alleged by the appellant in the context of the second head of claim. The appellant has not demonstrated that the findings on which the judgment under appeal is based in that regard are vitiated by a distortion of the evidence or an error of law. The Court concludes that it cannot be accepted that the damage on which the appellant relies in the second head of claim may be linked to any unlawful data processing in the context of cooperation between Europol and the Slovak authorities.

The Court of Justice therefore holds that, notwithstanding the error made by the General Court in rejecting the principle itself of the joint and several liability of Europol in the context of the Europol Regulation, the requirement that the appellant must prove the existence of unlawful data processing which caused him damage has not been met in the present case, with the result that Europol cannot, in any event, be held liable under that second head of claim. It concludes from this that the ground of appeal seeking the rejection of that head of claim must be rejected as ineffective.

Second, having regard to the fact that the judgment under appeal has been set aside in part, the Court of Justice, finding that the state of the proceedings so permits, decides to give final judgment in the matter before the General Court and, on that basis, examines whether the conditions for the European Union to incur non-contractual liability under Article 50 of the Europol Regulation are satisfied in the present case.

As regards the requirement of a breach of a rule of EU law intended to confer rights on individuals, the Court notes that the Europol Regulation imposes on that EU agency and on the competent authorities of the Member States called upon to cooperate in criminal proceedings an obligation to protect individuals against the unlawful processing of their personal data. [5]

The Court infers from a combined reading of a series of provisions of the Europol Regulation that any disclosure of personal data processed in the context of cooperation between Europol and the national competent authorities to persons who are not authorised to receive them constitutes a breach of a rule of EU law intended to confer rights on individuals. That is the case here with the unauthorised disclosure of personal data in the form of the appellant's intimate conversations.

As regards the requirement of a sufficiently serious breach of a rule of EU law, the Court recalls that the decisive criterion in that regard is whether there has been a manifest and grave disregard for the limits of the discretion laid down by the rule infringed. In addition, the assessment to be carried out

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5 Combined reading of Article 2(h), (i) and (k), Article 28(1)(a) and (f), Article 38(4) and Article 50(1) of the Europol Regulation.

requires account to be taken of the field, the circumstances and context in which the obligation in question falls on the authority concerned. Account must also be taken, in particular, of the degree of clarity and precision of the rule infringed and of the measure of discretion left by that rule to the authority concerned, the complexity of the situation to be regulated and the difficulties in the application or interpretation of the legislation.

In the present case, the Court concludes that there is such a sufficiently serious breach. First, the provisions of the Europol Regulation do not leave the entities involved in cooperation between Europol and a Member State under that regulation any discretion as to the need to protect data subjects against unlawful processing of personal data concerning them. Second, that obligation forms part of the sensitive context of cooperation for the purposes of criminal prosecution, in which such data are processed without any intervention by the data subjects, most often without their knowledge, and therefore without them being able to intervene in any way in order to prevent any unlawful processing of their data.

As regards the conditions relating to whether the damage actually occurred and whether there was a causal link, the Court notes that the European Union can incur non-contractual liability only if the applicant has genuinely suffered actual and certain damage and the damage must flow sufficiently directly from the alleged breach of a rule of EU law. In the present case, it finds that the disclosure to unauthorised persons of data relating to intimate conversations between the appellant and his girlfriend infringed the appellant's right to respect for his private and family life and for his communications and that that disclosure adversely affected his honour and reputation, which caused him non-material damage.

In those circumstances, the Court sets aside the judgment under appeal in part and orders Europol to pay the appellant EUR 2 000 by way of compensation for the non-material damage suffered.

2. RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the Court of Justice (Grand Chamber), 5 March 2024, Public.Resource.Org and Right to Know v Commission and Others, C-588/21 P

Link to the full text of the judgment

Appeal – Access to documents of the institutions of the European Union – Regulation (EC) No 1049/2001 – Article 4(2) – Exceptions – Refusal to grant access to a document whose disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property – Overriding public interest in disclosure – Harmonised standards adopted by the European Committee for Standardisation (CEN) – Protection deriving from copyright – Principle of the rule of law – Principle of transparency – Principle of openness – Principle of good governance

By upholding the appeal of Public.Resource.Org Inc. and Right to Know CLG, the appellants, brought against the judgment of the General Court in Public.Resource.Org and Right to Know v Commission, [6] the Court, sitting as the Grand Chamber, rules, for the first time, on the existence of an overriding public interest justifying the disclosure of harmonised standards adopted by the European Committee for Standardisation (CEN).

6 Judgment of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445).

The appellants are non-profit organisations whose main focus is to make the law freely accessible to all citizens. On 25 September 2018, they made a request to the European Commission for access to four harmonised standards adopted by CEN, three of which concerned the safety of toys, and one the maximum nickel content for certain products. [7]

The Commission refused to grant the request for access on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, [8] pursuant to which access to a document must be refused where disclosure would undermine the protection of the commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.

The action, brought by the appellants against the Commission's decision, was dismissed by the General Court in its entirety. They then brought an appeal before the Court of Justice, claiming that the General Court had erred in finding that there was no overriding public interest capable of justifying free access to the requested harmonised standards.

Findings of the Court

As a preliminary point, the Court recalls that the right of access to documents of the institutions of the European Union is wide in scope. [9] It states that those institutions may rely on an exception based on the protection of commercial interests of a given natural or legal person in order to refuse access to a document where disclosure would undermine the protection of those interests, including intellectual property. However, that exception is not applicable where there is an overriding public interest in disclosure of the document concerned.

In that regard, in the first place, the Court notes that the procedure for drawing up harmonised standards was laid down by Regulation No 1025/2012, [10] pursuant to which the Commission plays a central role in the European standardisation system. Thus, even if the development of those standards is entrusted to a body governed by private law, only the Commission is empowered to request that a harmonised standard be developed in order to implement a directive or a regulation. In that context, it determines the criteria as to the content to be met by the requested harmonised standard, sets a deadline for its adoption, supervises its development, provides financing and decides on the publication of the references to the harmonised standard concerned in the Official Journal of the European Union.

Moreover, although compliance with harmonised standards is not compulsory, products which comply with those standards benefit from a presumption of conformity with the essential requirements relating to them laid down in the relevant EU harmonisation legislation. [11] That legal effect, conferred by that legislation, is one of the essential characteristics of those standards and makes them an essential tool for economic operators, for the purposes of exercising the right to free movement of goods or services on the EU market.

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7 The standards in question were standard EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; standard EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; standard EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and standard EN 12472:2005+A 1:2009; 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items' ('the requested harmonised standards').

8 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

9 That right of access to documents is guaranteed by the first subparagraph of Article 15(3) TFEU and by Article 42 of the Charter of Fundamental Rights of the European Union. It is implemented in particular by Regulation No 1049/2001.

10 Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12).

11 Article 2(1) of Regulation No 1025/2012, read in the light of recital 5 thereof.

The Court notes that, in the present case, three of the four requested harmonised standards which concern the safety of toys refer to Directive 2009/48 [12] and that their references were published in the Official Journal of the European Union. In accordance with Article 13 of that directive, toys which have been manufactured in compliance with those standards enjoy a presumption of conformity with the requirements covered by those standards. The fourth standard, which concerns maximum nickel content, refers to Regulation No 1907/2006 [13] and is, in the present case, manifestly mandatory, in so far as paragraph 3 of entry 27 of the table in Annex XVII to that regulation provides that, as regards nickel, the standards adopted by CEN are to be used as test methods for demonstrating the conformity of the products concerned with the requirements set out in that entry.

Consequently, the Court considers that the requested harmonised standards form part of EU law.

In the second place, the Court notes that it follows from Article 2 TEU that the European Union is based on the principle of the rule of law, which requires free access to EU law for all natural or legal persons of the European Union, and that individuals must be able to ascertain unequivocally what their rights and obligations are. [14] That free access must in particular enable any person whom legislation seeks to protect to verify, within the limits permitted by law, that the persons to whom the rules laid down by that law are addressed actually comply with those rules. Accordingly, by the effects conferred on it by EU legislation, a harmonised standard may specify the rights conferred on individuals as well as their obligations and those specifications may be necessary for them to verify whether a given product or service actually complies with the requirements of such legislation.

In those circumstances, the Court finds that there is an overriding public interest in the disclosure of the requested harmonised standards.

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12 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p. 1).

13 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1, and corrigendum OJ 2007 L 136, p. 3), as amended by Commission Regulation (EC) No 552/2009 of 22 June 2009 (OJ 2009 L 164, p. 7).

14 Judgment of 22 February 2022, Stichting Rookpreventie Jeugd and Others (C-160/20, EU:C:2022:101, paragraph 41 and the case-law cited).

II. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Fourth Chamber), 7 March 2024, IAB Europe, C-604/22

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 – Regulation (EU) 2016/679 – Standard-setting sectoral organisation proposing to its members rules on the processing of users' consent – Article 4(1) – Concept of 'personal data' – String of letters and characters capturing, in a structured and machine-readable manner, the preferences of an internet user relating to the consent of that user to the processing of his or her personal data – Article 4(7) – Concept of 'controller' – Article 26(1) – Concept of 'joint controllers' – Organisation which does not itself have access to the personal data processed by its members – Responsibility of the organisation extending to the subsequent processing of data carried out by third parties

Asked to give a preliminary ruling, the Court of Justice clarifies, first, the concept of 'personal data' [15] and, second, the circumstances in which a sectoral organisation, in so far as it proposes to its members a framework of rules relating to consent to the processing of personal data, must be classified as a 'joint controller'. [16] The Court also sets the limits of the joint controllership of such an organisation.

IAB Europe is a non-profit association established in Belgium which represents undertakings in the digital advertising and marketing sector at European level.

IAB Europe has drawn up the Transparency & Consent Framework ('the TCF'), a framework of rules intended to ensure that the processing of personal data of a user of a website or application carried out by certain operators is in compliance with the GDPR. The TCF promotes compliance with the GDPR when those operators rely on the OpenRTB protocol, which is used for Real Time Bidding, an instant and automated online auction system of user profiles for the purpose of selling and purchasing advertising space on the internet.

In that context, the TCF facilitates the recording of users' preferences which are subsequently encoded and stored in a string composed of a combination of letters and characters referred to by IAB Europe as the Transparency and Consent String ('the TC String'). That string is shared with personal data brokers and advertising platforms participating in the OpenRTB protocol, so that they know to what the user has or has not consented. A cookie is also placed on the user's device; that cookie, when combined with the TC String, can be linked to that user's IP address.

Following a number of complaints against IAB Europe, the Litigation Chamber of the Gegevensbeschermingsautoriteit (Data Protection Authority, Belgium), by its decision of 2 February 2022, ordered IAB Europe, the data controller, to bring into conformity with the provisions of the GDPR the processing of data carried out in the context of the TCF.

IAB Europe brought an action against that decision before the hof van beroep te Brussel (Court of Appeal, Brussels, Belgium). Having doubts as to whether a TC String, be it combined with an IP address or not, constitutes personal data and, if so, whether IAB Europe must be classified as a data

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

16 Within the meaning of Article 26(1) of the GDPR.

controller in the context of the TCF, in particular with regard to the processing of the TC String, the Court of Appeal, Brussels, has made a reference to the Court of Justice for a preliminary ruling.

Findings of the Court

In the first place, the Court notes that a string composed of a combination of letters and characters, such as the TC String, contains the preferences of a user of the internet or of an application relating to that user's consent to the processing by third parties of personal data concerning him or her or relating to any objection by him or her to the processing of such data based on an alleged legitimate interest. [17]

In that regard, the Court considers that, in so far as associating the TC String with the IP address of a user's device or with other identifiers allows that user to be identified, the TC String contains information concerning an identifiable user and therefore constitutes personal data. [18] Furthermore, the fact that IAB Europe cannot itself combine the TC String with the IP address of a user's device and does not have the possibility of directly accessing the data processed by its members in the context of the TCF does not preclude a TC String from being classified as 'personal data'. [19]

Moreover, the members of IAB Europe are required to provide that organisation, at its request, with all the information allowing it to identify the users whose data are the subject of a TC String. It therefore appears, subject to the verifications which are for the referring court to carry out, that IAB Europe has reasonable means allowing it to identify a particular natural person from a TC String, on the basis of the information which its members and other organisations participating in the TCF are required to provide to it. [20]

Thus, the Court concludes that a TC String constitutes personal data within the meaning of Article 4(1) of the GDPR. It is irrelevant that, without an external contribution which it is entitled to require, such a sectoral organisation can neither access the data that are processed by its members under the rules which it has established nor combine the TC String with other identifiers, such as the IP address of a user's device.

In the second place, the Court examines whether IAB Europe may be regarded as a joint controller. [1] To that end, it is necessary to assess whether that organisation exerts influence over the processing of personal data, such as the TC String, for its own purposes, and determines, jointly with others, the purposes and means of such processing.

As regards, first of all, the purposes of such data processing, the Court notes that the TCF established by IAB Europe aims, in essence, to promote and enable the sale and purchase of advertising space on the internet by certain operators which participate in the online auctioning of advertising space. Accordingly, subject to the verifications which are for the referring court to carry out, IAB Europe exerts influence over personal data processing operations for its own purposes and determines, as a result, jointly with its members, the purposes of such operations.

Next, as regards the means employed for the purposes of that processing, the Court observes, subject to the verifications to be carried out by the referring court, that the TCF constitutes a framework of rules which the members of IAB Europe are supposed to accept in order to join that association. In particular, if one of its members does not comply with those rules, IAB Europe may adopt a non-compliance and suspension decision which may result in the exclusion of that member from the TCF and prevent it from relying on the guarantee of GDPR compliance provided by the TCF with regard to the data processing carried out using TC Strings. Furthermore, the TCF established by IAB Europe contains technical specifications relating to the processing of the TC String as well as

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17 Under Article 6(1)(f) of the GDPR.

18 Within the meaning of Article 4(1) of the GDPR.

19 Within the meaning of Article 4(1) of the GDPR.

20 In accordance with what is stated in recital 26 of the GDPR.

precise rules regarding the content, storage and sharing of the TC String. Moreover, the Court points out that IAB Europe prescribes, as part of those rules, the standardised manner in which the various parties involved in the TCF may consult the preferences, objections and consents of users contained in the TC Strings.

In those circumstances, and subject to the abovementioned verifications, the Court concludes that a sectoral organisation such as IAB Europe exerts influence over personal data processing operations for its own purposes, and determines, as a result, jointly with its members, the means behind such operations. It must therefore be regarded as a 'joint controller'. [21]

Lastly, the Court states that there is a distinction between the processing of personal data carried out by the members of IAB Europe, such as website or application providers, data brokers or advertising platforms, when the consent preferences of the users concerned are recorded in a TC String in accordance with the rules established in the TCF, on the one hand, and the subsequent processing of such data carried out by those operators and by third parties on the basis of those preferences, such as the transmission of the data to third parties or the offering of personalised advertising to those users, on the other.

Accordingly, a sectoral organisation, such as IAB Europe, may be regarded as a controller in respect of such subsequent processing only where it is established that that organisation has exerted an influence over the determination of the purposes and means of that processing, which it is for the referring court to ascertain.

III. BORDER CHECKS, ASYLUM AND IMMIGRATION

1. IMMIGRATION POLICY

Judgment of the Court of Justice (Second Chamber), 14 March 2024, EP (Removal of a long-term resident), C-752/22

Link to the full text of the judgment

Reference for a preliminary ruling – Immigration policy – Status of third-country nationals who are long-term residents – Directive 2003/109/EC – Articles 12 and 22 – Reinforced protection against expulsion – Applicability – Third-country national residing in the territory of a Member State other than the one which had granted him long-term resident status – Decision taken by that other Member State on grounds of public policy and public security to remove the person concerned to the Member State which had granted him that status – Temporary ban on entering the territory of that other Member State imposed by that other Member State – Breach of the obligation to apply to that other Member State for a residence permit in accordance with the provisions of Chapter III of Directive 2003/109 – Decision taken by that Member State on the same grounds to remove that third-country national to his country of origin

Ruling on a request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), the Court of Justice determines whether a third-country national who is a long-term

21 For the purposes of Article 4(7) and Article 26(1) of the GDPR.

resident in one Member State enjoys reinforced protection against expulsion from the territory of the European Union, provided for by Directive 2003/109, [22] in another Member State whose territory he or she has entered in breach of an entry ban.

EP, a Russian national, holds a long-term resident – EU residence permit which was issued by Estonia for a period of five years and attests that he has long-term resident status in that Member State. Before obtaining that status, EP had entered Finland on numerous occasions where he was subject to four decisions for his removal to Estonia, three of which were accompanied by a ban on entering Finnish territory. Those decisions were adopted in response to EP's convictions in Finland for various offences.

By decision of 19 November 2019, the Maahanmuuttovirasto (Immigration Service, Finland) decided to expel EP to Russia on the ground, inter alia, of the threat he posed to public policy and public security in Finland. Although EP did not object to his removal to Estonia, he did object to being removed to Russia. He argued that he had resided almost his entire life in Estonia and had no ties to Russia other than his nationality. Following the dismissal, at first instance, of his action against the expulsion decision, EP brought an appeal before the Supreme Administrative Court, which is the referring court.

Before that court, the Immigration Service submitted, in particular, that Directive 2003/109 was not applicable to EP's removal because he was not residing legally in Finnish territory. Indeed, EP was subject to a ban on entering Finnish territory and had not applied for a residence permit there after entering Finland with a long-term resident – EU residence permit issued by another Member State. Accordingly, in the light of those two circumstances, it is Directive 2008/115 [23] which is applicable to his removal. In accordance with that directive, a return decision can only order a person's return to a third country, not to another Member State. The question also arises as to whether those two circumstances prevent EP from receiving the reinforced protection against expulsion conferred by Article 22(3) of Directive 2003/109. [24]

In those circumstances, the referring court asks the Court whether the provisions of Directive 2003/109 laying down reinforced protection against expulsion for third-country nationals are applicable in the present case and whether those provisions have direct effect such that they can be relied on as against the competent public authorities. The Court answers both questions in the affirmative.

Findings of the Court

In the first place, the Court states, as a preliminary point, that, since the provisions of Directive 2003/109 laying down reinforced protection against expulsion for third-country nationals who are long-term residents are 'more favourable' for such nationals than the provisions on removal laid down in Directive 2008/115, it is those former provisions which apply to the removal from the territory of the European Union of a third-country national who is a long-term resident, such as the person concerned in the main proceedings. [25]

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22 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

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

24 Under that provision, 'until the third-country national has obtained long-term resident status ... [a Member State other than the one which for the first time granted long-term resident status to him or her and in which that long-term resident exercises the right of residence ("the second Member State")] may adopt a decision to remove the third-country national from the territory of the [European] Union, in accordance with and under the guarantees of Article 12, on serious grounds of public policy or public security. In such cases, when adopting the said decision the second Member State shall consult the first Member State. ...' Furthermore, according to Article 12(1) and (3) of that directive, '1. Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security. ... 3. Before taking a decision to expel a long-term resident, Member States shall have regard to the following factors: (a) the duration of residence in their territory; (b) the age of the person concerned; (c) the consequences for the person concerned and family members; (d) links with the country of residence or the absence of links with the country of origin.' »

25 See Article 4(2) of Directive 2008/115, according to which that directive is to be 'without prejudice to any provision which may be more favourable for the third-country national, laid down in the Community acquis relating to immigration and asylum'.

Next, it finds that the wording of Article 22(3) of Directive 2003/109 does not provide a basis for interpreting that provision in such a way that the reinforced protection against expulsion from the territory of the European Union which it lays down does not apply where, first, a third-country national with long-term resident status in the first Member State is staying on the territory of the second Member State in breach of an entry ban and, second, he or she has not applied for a residence permit in that second Member State in accordance with the provisions of Chapter III of that directive. However, the wording of Article 22(1)(b) and (c) of that directive, for its part, expressly refers to those two circumstances as grounds justifying the adoption, in respect of such a third-country national, of a decision to remove him or her from the territory of that Member State. [26] Such an express reference to those two circumstances as grounds able to justify the adoption of a removal decision supports the conclusion already drawn from the wording of Article 22(3) of Directive 2003/109 that the existence of those circumstances does not have the effect of rendering that latter provision inapplicable.

As regards, in particular, the ground relating to failure to apply for a residence permit, it is true that the wording used in Article 22(1) of that directive, namely the reference to the power to refuse to renew or to withdraw a residence permit granted in accordance with the provisions of Chapter III of that directive, might suggest that that provision is concerned only with a situation relating to the withdrawal or non-renewal of such a permit. However, the fact remains that that provision expressly refers not only to measures by the second Member State refusing to renew or withdrawing a residence permit granted in accordance with the provisions of Chapter III, but also to other measures such as, specifically, decisions to remove the person concerned from the territory of that Member State.

That literal and contextual interpretation of Article 22(3) of Directive 2003/109 is also borne out by the purpose of that provision. In so far as that interpretation is based on a delimitation of the respective scopes of paragraphs 1 and 3 of Article 22 of Directive 2003/109, depending on whether the case involves removal from the territory of the second Member State or removal from the territory of the European Union and the resulting reinforced protection against expulsion in its different permutations, it makes it possible to avoid loopholes in the arrangements for 'reinforced protection against expulsion' which Article 22 of that directive seeks to achieve, and, therefore, also ensures that those arrangements are effective.

In the second place, the Court finds that Article 12(3) and Article 22(3) of Directive 2003/109 are capable of producing a direct effect to the advantage of the third-country nationals concerned, with the result that they may rely on those provisions against the competent public authorities. Those provisions are unconditional and sufficiently precise in that, without imposing any condition or necessitating the adoption of additional measures, they unequivocally require the second Member State, when it takes a decision to remove from the territory of the European Union a third-country national who is a long-term resident on grounds of public policy or public security, to ensure compliance with the various conditions [27] and guarantees [28] established in favour of such a third-country national, which are in keeping with the objective of reinforced protection against expulsion pursued by Directive 2003/109.

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26 First, Article 22(1)(b) of Directive 2003/109 permits the adoption of such a removal decision in particular in the event of non-compliance with the obligation, laid down in Article 15(1) of that directive, requiring a third-country national who is a long-term resident to apply for a residence permit in the second Member State as soon as possible and no later than three months after entering its territory. Second, Article 22(1)(c) of Directive 2003/109, in so far as it refers to the situation in which a third-country national 'is not lawfully residing', covers the situation of a stay on that territory in breach of an entry ban.

27 See Article 22(3) of Directive 2003/109.

28 See Article 12(3) of Directive 2003/109.

2. BORDER CHECKS

Judgment of the Court of Justice (Grand Chamber), 21 March 2024, Landeshauptstadt Wiesbaden, C-61/22

Link to the full text of the judgment

Reference for a preliminary ruling – Regulation (EU) 2019/1157 – Strengthening the security of identity cards of EU citizens – Validity – Legal basis – Article 21(2) TFEU – Article 77(3) TFEU – Regulation (EU) 2019/1157 – Article 3(5) – Obligation for Member States to include two fingerprints in interoperable digital formats in the storage medium of identity cards – Article 7 of the Charter of Fundamental Rights of the European Union – Respect for private and family life – Article 8 of the Charter of Fundamental Rights – Protection of personal data – Regulation (EU) 2016/679 – Article 35 – Obligation to carry out a data protection impact assessment – Maintaining the effects for a certain time of a regulation which has been declared invalid

Having received a reference for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany), the Court of Justice, sitting in Grand Chamber formation, declares invalid Regulation 2019/1157 [29] on strengthening the security of identity cards of Union citizens, in so far as it was adopted on an incorrect legal basis. It notes, however, that the mandatory insertion in identity cards of two fingerprints, provided for by that regulation, is compatible, inter alia, with the fundamental rights to respect for private life and to the protection of personal data. The Court is therefore maintaining its effects until the entry into force of a new regulation, based on the appropriate specific legal basis, and intended to replace it.

In November 2021, the applicant in the main proceedings applied to the City of Wiesbaden [30] for a new identity card to be issued, requesting that it should not contain his fingerprints. The City of Wiesbaden rejected that application on the ground, inter alia, that, since 2 August 2021, the inclusion of two fingerprints in the storage medium of identity cards had been mandatory under the provision of national law which transposes, in essence, Article 3(5) of Regulation 2019/1157.

On 21 December 2021, the applicant in the main proceedings brought an action before the referring court against the decision of the City of Wiesbaden, seeking an order requiring the City of Wiesbaden to issue him with an identity card with no fingerprints being collected.

Since it had doubts as to the lawfulness of the grounds of the contested decision, because, inter alia, it was uncertain whether the validity of Regulation 2019/1157 could itself be disputed, the referring court stayed the proceedings and asked the Court whether that regulation is invalid on the grounds that, first, it had been incorrectly been adopted on the basis of Article 21(2) TFEU instead of Article 77(3) TFEU, second, it infringed the General Data Protection Regulation, [31] and, third, it infringed Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. [32]

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29 Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (OJ 2019 L 188, p. 67).

30 Landeshauptstadt Wiesbaden (City of Wiesbaden, Land capital, Germany).

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

32 'The Charter'. Those provisions concern respect for private and family life and the protection of personal data, respectively.

Findings of the Court

- *The first ground of invalidity: incorrect legal basis*

As regards the respective scopes of Article 21(2) TFEU and Article 77(3) TFEU, the Court notes that the competence conferred on the European Union by the first of those two provisions to adopt the provisions necessary to facilitate the exercise of the right of citizens of the European Union to move and reside freely within the territory of the Member States [33] is subject to the powers laid down to that effect by the Treaties. Article 77(3) TFEU [34] expressly lays down such powers in relation to the adoption of provisions concerning passports, identity cards, residence permits or any other such document issued to citizens of the European Union for the purpose of facilitating the exercise of the right to move and reside freely.

It is true that Article 77(3) TFEU falls within the title of the TFEU which concerns the area of freedom, security and justice and the chapter entitled 'Policies on border checks, asylum and immigration'. However, it follows from Article 77(1) TFEU that the European Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders, to carrying out checks on persons and efficient monitoring of the crossing of external borders, and to the gradual introduction of an integrated management system for such borders. The provisions [35] referred to in Article 77(3) TFEU form an integral part of any such EU policy. As regards EU citizens, those documents enable them, inter alia, to certify that they benefit from the right to move and reside freely, and therefore to exercise that right. Consequently, Article 77(3) is capable of providing the basis for the adoption of measures relating to those documents if such action appears necessary to facilitate the exercise of the right to move and reside freely.

That interpretation of the scope of Article 77(3) TFEU cannot be invalidated either by the historical development of the Treaties in relation to the European Union's competence to adopt measures relating to, inter alia, passports and identity cards, or by the fact that that provision states that it is to apply 'if the Treaties have not provided the necessary powers'.

In that regard, the Court notes, first, that it is true that the Treaty of Lisbon removed the provision [36] which expressly excluded the EU legislature from having recourse to Article 18(2) EC (now Article 21(2) TFEU) as the legal basis for the adoption of, inter alia, 'provisions concerning passports [and] identity cards'. However, at the same time, that treaty expressly conferred on the European Union a power to take action in that field, in Article 77(3) TFEU, making the adoption of measures in that field subject to a special legislative procedure and, in particular, to unanimity in the Council.

In those circumstances, that removal cannot mean that it would from then on be possible to adopt provisions concerning passports and identity cards on the basis of Article 21(2) TFEU. On the contrary, according to the Court, it follows from the historical treaty development that, by means of Article 77(3) TFEU, the authors of the Treaties intended to confer on the European Union a competence for the adoption of such provisions intended to facilitate the exercise of the right to move and reside freely, which is more specific than the more general competence laid down in Article 21(2) TFEU.

Second, the Court interprets the statement that Article 77(3) TFEU is to apply 'if the Treaties have not provided the necessary powers', as meaning that the powers referred to are conferred not by a

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33 Right referred to in Article 20(2)(a) TFEU ('the right to move and reside freely').

34 That provision states that 'if action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament'.

35 Namely, the provisions concerning passports and identity cards, residence permits or any other such document ('the provisions concerning passports and identity cards').

36 Previously set out in Article 18(3) EC.

provision with a more general scope, such as Article 21(2) TFEU, but by a provision which is even more specific.

From that, the Court infers that Regulation 2019/1157 could be adopted on the basis of Article 21(2) TFEU only if the purpose or the main or predominant component of that regulation were to fall outside the specific scope of Article 77(3) TFEU, which concerns, for the purposes of facilitating the exercise of the right to move and reside freely, the issuing of passports, identity cards, residence permits or any other such document.

It follows from the purpose and main components of Regulation 2019/1157 that that regulation falls within the specific scope of Article 77(3) TFEU. Consequently, by adopting that regulation on the basis of Article 21(2) TFEU, and having done so in accordance with the ordinary legislative procedure, the EU legislature had recourse to an incorrect legal basis, which is such as to result in the invalidity of that regulation.

- *The second ground of invalidity: infringement of Article 35(10) of the GDPR*

Noting that Regulation 2019/1157 does not undertake any operation applied to personal data, but merely provides for Member States to carry out certain processing operations where an application for an identity card is made, the Court finds that Article 35(1) of the GDPR [37] did not apply when Regulation 2019/1157 was adopted. Since Article 35(10) of the GDPR establishes a derogation to Article 35(1) thereof, it was not possible therefore for the adoption of Regulation 2019/1157 to infringe Article 35(10).

- *The third ground of invalidity: infringement of Articles 7 and 8 of the Charter*

In the first place, the Court states that the obligation to include two complete fingerprints in the storage medium of identity cards issued by Member States, laid down in Article 3(5) of Regulation 2019/1157, constitutes a limitation both of the right to respect for private life and of the right to the protection of personal data, enshrined in Articles 7 and 8 of the Charter respectively. [38] In addition, that obligation involves carrying out, in advance, two successive personal data processing operations, namely the collection of those fingerprints from the data subject, then the temporary storage of those fingerprints for the purposes of personalisation of identity cards, which also constitute limitations of the rights enshrined in Articles 7 and 8 of the Charter.

In the second place, the Court examines whether the limitations in question are justified and proportionate.

In that regard, it considers, first, that the limitations in question comply with the principle of legality and do not adversely affect the essence of the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Second, as regards the principle of proportionality, the Court states, first, that the measure in question pursues a number of objectives of general interest recognised by the European Union, namely combating the production of false identity cards and identity theft, and the interoperability of verification systems, and that it is appropriate for attaining those objectives. The inclusion of fingerprints in identity cards makes it more difficult to produce false identity cards. It also makes it possible reliably to verify the authenticity of the identity card and the identity of the cardholder, thereby reducing the risk of fraud. As regards the objective of interoperability of identification document verification systems, the use of complete fingerprints makes it possible to ensure

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37 That provision lays down the obligation, for the [person responsible/controller] for processing personal data which is likely to result in a high risk to the rights and freedoms of natural persons, prior to the processing, to carry out an assessment of the impact of the envisaged processing operations on the protection of personal data.

38 Those limitations on the exercise of the fundamental rights guaranteed in Articles 7 and 8 of the Charter, on the one hand, and the obligation to include two complete fingerprints in the storage medium for identity cards, on the other, are referred to below as 'the limitations in question' and 'the measure in question' respectively.

compatibility with all automated systems for the identification of fingerprints used by the Member States, even though such systems do not necessarily use the same identification mechanism.

Second, the Court considers that the limitations in question comply with what is strictly necessary in order to attain the objectives pursued.

As regards the very principle of including fingerprints in the storage medium of identity cards, it is a reliable and effective means of establishing, with certainty, a person's identity. In particular, simply inserting a facial image is a less effective means of identification than inserting two fingerprints in addition to that image, since various factors may alter the anatomical characteristics of the face. The process used to collect those fingerprints is, in addition, simple to implement.

As regards the inclusion of two complete fingerprints rather than just some of the characteristics of those fingerprints, apart from the fact that the second option does not offer the same guarantees as a complete fingerprint, the inclusion of a complete fingerprint is also necessary for identification document verification systems to be interoperable. Member States use different fingerprints identification technologies. The inclusion in the storage medium of the identity card of only certain fingerprint characteristics would therefore compromise the attainment of the interoperability objective.

Third, the Court considers that, having regard to the nature of the data at issue, the nature of the processing operations and the manner in which they are carried out and the safeguards laid down, the limitations thereby placed on the fundamental rights enshrined in Articles 7 and 8 of the Charter are not of a seriousness which is disproportionate when compared with the significance of the objectives pursued, but that, on the contrary, the measure in question is based on a fair balance between, on the one hand, the objectives it pursues and, on the other, the fundamental rights involved.

IV. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 1215/2012 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Judgment of the Court of Justice (First Chamber), 21 March 2024, Gjensidige, C-90/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Article 45 – Refusal to recognise a judgment – Article 71 – Relationship between that regulation and conventions governing particular matters – Convention on the Contract for the International Carriage of Goods by Road (CMR) – Article 31(3) – Lis pendens – Agreement conferring jurisdiction – Concept of 'public policy'

In the context of a reference for a preliminary ruling, the Court of Justice clarifies the scope of the grounds, provided for by the Brussels Ia Regulation, [39] for refusing to recognise judgments given in

[39] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) ('the Brussels Ia Regulation').

the Member States, where the court of origin has declared itself to have jurisdiction in disregard of an agreement conferring jurisdiction contained in a contract of international carriage.

ACC Distribution UAB had concluded a contract with Rhenus Logistics UAB, a transport company, for the carriage of goods from the Netherlands to Lithuania. Some of the goods having been stolen during carriage, Gjensidige ADB, an insurance company, indemnified ACC Distribution.

In February 2017, Rhenus Logistics brought an action before a Netherlands court, seeking a declaration that its liability was limited. That court declared itself to have jurisdiction and found the agreement conferring jurisdiction on the Lithuanian courts, contained in the contract concluded between ACC Distribution and Rhenus Logistics, to be null and void, because it had the effect of limiting the ability to choose among the courts having jurisdiction, provided for by the Convention on the Contract for the International Carriage of Goods by Road ('the CMR'). [40]

In September 2017, Gjensidige brought proceedings before a Lithuanian court seeking an order that Rhenus Logistics reimburse the indemnity paid to ACC Distribution. That court stayed the proceedings until, in 2019, the Netherlands court gave a final decision on the limitation of the liability of Rhenus Logistics. Subsequently, the Lithuanian court dismissed the action brought by Gjensidige on the basis of the authority of a final judgment attaching to the Netherlands court judgment. That dismissal was upheld on appeal.

Hearing an appeal lodged by Gjensidige, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania, Lithuania) is uncertain whether the CMR is compatible with the Brussels Ia Regulation, in so far as that convention allows choice-of-court agreements, which, according to that regulation, are as a rule exclusive, to be disregarded. [41] Furthermore, even though it finds that that regulation does not expressly lay down any grounds for refusing to recognise a judgment issued in breach of a choice-of-court agreement, the referring court wonders whether the protection given to those agreements should be extended to the recognition and enforcement of such a judgment. Consequently, it has decided to refer a question to the Court for a preliminary ruling.

Findings of the Court

As a preliminary point, since the contract of international carriage at issue in the main proceedings falls within the scope of application of both the Brussels Ia Regulation and the CMR, the Court examines whether any refusal to recognise a judgment handed down notwithstanding the existence of an agreement conferring jurisdiction on the courts of another Member State must be assessed in the light of the Brussels Ia Regulation or of the CMR.

In that respect, first, the Brussels Ia Regulation [42] provides that judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter must be recognised and enforced in the other Member States in accordance with that regulation, whose provisions may in any event be applied even where the convention in question lays down conditions for the recognition or enforcement of those judgments. As regards the CMR, [43] it merely provides that the enforcement of a judgment is subject to compliance with the formalities required in the country concerned, which may not however permit the merits of the case to be re-opened.

Secondly, the application of that convention cannot compromise the principles that underlie judicial cooperation in civil and commercial matters in the European Union. As regards specifically the principle of mutual trust, the court of the State addressed is never in a better position than the court

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40 Article 31(1) of the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978.

41 See Article 25(1) of the Brussels Ia Regulation.

42 First subparagraph and second sentence of the second subparagraph of Article 71(2)(b) of the Brussels Ia Regulation.

43 Article 31(3) of the CMR.

of the State of origin to determine whether the latter has jurisdiction, and therefore the Brussels Ia Regulation does not as a general rule authorise a court in a Member State to review the jurisdiction of a court of another Member State.

In those circumstances, any refusal to recognise a judgment must be assessed in the light of the Brussels Ia Regulation.

That clarification having been made, in the first place, the Court infers from the wording of Article 45(1)(a) [44] and (e)(ii) [45] of the Brussels Ia Regulation that a Member State court cannot refuse to recognise the judgment of a court of another Member State on the ground that the latter declared itself to have jurisdiction in disregard of an agreement conferring jurisdiction.

In the second place, that literal interpretation is borne out by the context of those provisions and by the objectives and purpose pursued by the Brussels Ia Regulation. The Court notes that, in the system established by that regulation, mutual recognition is the rule, whereas the grounds on which recognition may be refused are listed exhaustively. The EU legislature chose not to include the existence of a conflict with the provisions of the regulation on prorogation of jurisdiction as one of those grounds. Accordingly, the protection of agreements conferring jurisdiction, which is an aim of that regulation, [46] therefore does not result in a breach of such an agreement being, in itself, a ground for refusing recognition.

In the third place, the Court observes that, in the present case, nothing in the documents before it suggests that recognition of the decision of the Netherlands court would be at variance with the Lithuanian legal order to an unacceptable degree inasmuch as it would breach a fundamental principle. In particular, the mere fact that an action is not heard by the court designated in an agreement conferring jurisdiction and that, as a result, it is not ruled upon under the law of the Member State to which that court belongs cannot be regarded as a sufficiently serious breach of the right to a fair trial to render recognition of the judgment in that action manifestly at odds with the public policy of the Member State addressed.

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44 That provision enshrines a breach of the public policy of the Member State addressed as a ground for refusing recognition.

45 That provision provides that, on the application of any interested party, the recognition of a judgment is to be refused if it conflicts with Section 6 of Chapter II of the Brussels Ia Regulation, on exclusive jurisdiction.

46 See recital 22 of the Brussels Ia Regulation.

V. APPROXIMATION OF LAWS

1. CONTROL OF THE ACQUISITION AND POSSESSION OF WEAPONS

Judgment of the Court of Justice (Grand Chamber), 5 March 2024, Défense Active des Amateurs d'Armes and Others, C-234/21

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Directive 91/477/EEC – Control of the acquisition and possession of weapons – Firearms prohibited or subject to authorisation – Semi-automatic firearms – Directive 91/477, as amended by Directive (EU) 2017/853 – Article 7(4a) – Power of Member States to confirm, renew or prolong authorisations – Presumed impossibility of using that power in respect of semi-automatic firearms converted to fire blanks or into salute or acoustic weapons – Validity – Article 17(1) and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union – Principle of the protection of legitimate expectations

Ruling on a request for a preliminary ruling from the Cour constitutionnelle (Constitutional Court, Belgium), the Court of Justice, sitting as the Grand Chamber, confirms the validity of Article 7(4a) of Directive 91/477 on control of the acquisition and possession of weapons, [47] as amended by Directive 2017/853, in the light of the right to property [48] and the principles of equality before the law, [49] non-discrimination [50] and the protection of legitimate expectations. According to the Court, that provision, contrary to the interpretative premiss adopted by the referring court, allows Member States to exercise the power to provide for transitional arrangements for all semi-automatic firearms lawfully acquired and registered before the entry into force of Directive 2017/853, on 13 June 2017, whether they are semi-automatic firearms capable of expelling bullets [51] or firearms that have been converted to fire blanks, irritants, other active substances or pyrotechnic rounds or into a salute or acoustic weapon ('converted semi-automatic firearms'). [52]

Défense Active des Amateurs d'Armes ASBL, NG and WL brought an action before the Cour constitutionnelle (Constitutional Court) for annulment of a provision of a Belgian law which did not provide for the possibility, as a transitional measure, of continuing to possess converted semi-automatic firearms acquired before 13 June 2017, unlike semi-automatic firearms capable of expelling bullets. [53] The Cour constitutionnelle (Constitutional Court) considered that Article 153(5) of the Law of

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47 Under Article 7(4a) of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons (OJ 1991 L 256, p. 51), as amended by Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 (OJ 2017 L 137, p. 22) ('Directive 91/477'), 'Member States may decide to confirm, renew or prolong authorisations for semi-automatic firearms classified in point 6, 7 or 8 of category A in respect of a firearm which was classified in category B, and lawfully acquired and registered, before 13 June 2017, subject to the other conditions laid down in this Directive. Furthermore, Member States may allow such firearms to be acquired by other persons authorised by Member States in accordance with this Directive'.

48 Laid down in Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

49 Laid down in Article 20 of the Charter.

50 Laid down in Article 21 of the Charter.

51 Referred to in points 6 to 8 of 'Category A – Prohibited firearms', contained in point A of Part II of Annex I to Directive 91/477 ('categories A.6 to A.8').

52 Referred to in point 9 of 'Category A – Prohibited firearms', contained in point A of Part II of Annex I to Directive 91/477 ('category A.9').

53 Loi du 5 mai 2019 portant des dispositions diverses en matière pénale et en matière de cultes (Law of 5 May 2019 laying down various provisions on criminal and religious matters (Moniteur belge of 24 May 2019, p. 50023) ('the law of 5 May 2019'). Articles 151 to 163 of that law partially transpose Directive 2017/853 into the Belgian legal order.

5 May 2019, read in conjunction with Article 163 of that law, establishes in that regard a difference in treatment between, on the one hand, persons who, before 13 June 2017, had lawfully acquired and registered a semi-automatic weapon capable of expelling bullets and, on the other hand, persons who, before that date, had lawfully acquired and registered a semi-automatic firearm converted for the sole use of firing blanks, in so far as only the former benefit from transitional arrangements allowing them to continue, subject to conditions, to possess their semi-automatic firearms, which are currently prohibited. According to the referring court, that difference in treatment arises from Article 7(4a) of Directive 91/477, since that provision did not allow a Member State to extend such transitional arrangements to the latter category of semi-automatic weapons. Accordingly, it decided to refer a question to the Court for a preliminary ruling concerning the validity of that article.

Findings of the Court

At the outset, the Court ascertains the accuracy of the premiss on which the question before it is based, according to which Article 7(4a) of Directive 91/477 allows Member States to provide for transitional arrangements only for semi-automatic firearms capable of expelling bullets, in categories A.6 to A.8., and not for converted semi-automatic firearms, in category A.9.

In that regard, in the first place, it observes that, in the light of the wording of that provision, the power afforded to Member States to confirm, renew or prolong authorisations applies only to semi-automatic firearms in categories A.6 to A.8 which were, before the entry into force of Directive 2017/853, classified in 'Category B – Firearms subject to authorisation' [54] and which had been lawfully acquired and registered before 13 June 2017, [55] subject to compliance with the other conditions laid down in Directive 91/477.

In the second place, as regards the context of Article 7(4a) of Directive 91/477, the Court examines, first, whether converted semi-automatic firearms in category A.9, lawfully acquired and registered before 13 June 2017, were classified in 'Category B – Firearms subject to authorisation'. In that regard, it stresses that those weapons satisfy, despite their conversion, the criteria defining the concept of 'firearm', laid down by Directive 91/477. [56] In addition, as stated in recital 20 of Directive 2017/853, [57] there is a significant risk that such semi-automatic firearms converted to fire blanks can return to their previous level of danger by being reconverted to expel a shot, bullet or projectile by the action of a combustible propellant.

Thus, as regards those converted semi-automatic firearms, the Court observes that the EU legislature did not expressly exclude them from the definition of a firearm. Moreover, the clarification in Directive 2017/853, according to which it is essential to address the issue raised by such weapons by including them in the scope of Directive 91/477, [58] cannot be understood as meaning that those firearms fall within the scope of that directive only since the entry into force of Directive 2017/853. It rather intends to confirm that converted semi-automatic firearms fall within the scope of Directive 91/477, as amended by Directive 2017/853. Accordingly, semi-automatic firearms in category A.9, lawfully acquired and registered before 13 June 2017, must be regarded as having been classified in category B of Directive 91/477, applicable before the entry into force of Directive 2017/853.

Secondly, the Court confirms whether converted firearms may fall both within category A.9 and within one of categories A.6 to A.8. In that regard, according to the wording of category A.9, it includes 'any

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54 Contained in point A of Part II of Annex I to Directive 91/477, as applicable before the entry into force of Directive 2017/853.

55 Contained in point A of Part II of Annex I to Directive 91/477, as amended by Directive 2008/51, under 'Category B – Firearms subject to authorisation' ('category B').

56 See Article 1(1) of Directive 91/477, in the version prior to the entry into force of Directive 2017/853 and Article 1(1)(1) of Directive 91/477, in the version amended by Directive 2017/853.

57 See, inter alia, recital 20 of Directive 2017/853.

58 See recital 20 of Directive 2017/853.

firearm in this category' which has been converted. Accordingly, for a firearm to fall within that category, it must not only have been converted to fire blanks, irritants, other active substances or pyrotechnic rounds or into a salute or acoustic weapon, but must also satisfy the criteria set out in point 2, 3, 6, 7 or 8 of 'Category A – Prohibited firearms'. [59] That wording thus tends to indicate that the fact that such a conversion took place on a weapon, involving its inclusion in category A.9, does not have the effect of removing it from its classification in category A.2, A.3, A.6, A.7 or A.8. First, weapons in category A.9 satisfy the criteria defining the concept of a 'firearm' and, secondly, those categories A.2, A.3, A.6, A.7 and A.8 make no distinction between whether the firearms they cover have been converted or not.

As regards, in the third place, the objectives pursued by Directives 91/477 and 2017/853, the Court finds, first, that the addition of category A.9 during the legislative procedure leading to the adoption of Directive 2017/853 sought to clarify that converted firearms fell within the scope of Directive 91/477. By contrast, there is no element indicating that the EU legislature intended, by that addition, to exclude converted firearms from categories A.2, A.3, A.6, A.7 or A.8 or from the scope of Article 7(4a) of Directive 91/477.

Secondly, since Directive 2017/853 respects fundamental rights and observes the principles recognised in particular by the Charter, [60] the Court holds that Article 7(4a) of Directive 91/477 seeks to ensure respect for acquired rights and, in particular, that of the right to property. [61] In that regard, that article allows, in essence, Member States to retain authorisations already granted for semi-automatic firearms in categories A.6 to A.8, which, before the entry into force of that directive, were classified in Category B and had been lawfully acquired and registered before 13 June 2017. Accordingly, Directive 91/477 cannot be understood as requiring the expropriation of the holders of such weapons. Thus, in the light of the objective to ensure observance of the rights to personal possessions which have been acquired, Article 7(4a), while it provides for an exception to the principle of prohibition of possession of firearms classified in categories A.6 to A.8, cannot be interpreted as excluding from its scope such weapons where they also satisfy the additional criteria set out in category A.9.

Thirdly, the Court points out that the objective of Directive 91/477 is to strengthen mutual trust between the Member States in the field of safeguarding the safety of persons and ensuring public security for Union citizens. None of those objectives precludes the holders of firearms falling within both categories A.6 to A.8 and category A.9 from benefiting from the transitional arrangements provided for in Article 7(4a) of Directive 91/477.

First, such an interpretation is capable of contributing to the objective of facilitating the functioning of the internal market. Secondly, as regards the objective of ensuring the public safety and security of Union citizens, first of all, firearms satisfying the criteria in category A.9 appear to present a less immediate danger than those falling exclusively within categories A.6 to A.8. Next, it is apparent from the wording of Article 7(4a) of Directive 91/477 that the power provided for in that provision applies only to firearms which were lawfully acquired and registered before 13 June 2017. That means, inter alia, that the requirements, in particular those relating to safety, laid down in that regard by Directive 91/477, in the version applicable before the entry into force of Directive 2017/853, have been complied with. Lastly, that wording implies that, at the time when a Member State intends, pursuant to that provision, to confirm, renew or prolong an authorisation for a semi-automatic firearm classified in categories A.6 to A.8, the other conditions, in particular those relating to safety, laid down in Directive 91/477, are satisfied.

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59 Contained in point A of Part II of Annex I to Directive 91/477 ('categories A.2, A.3, A.6, A.7 or A.8').

60 See recital 31 of Directive 2017/853.

61 Laid down in Article 17(1) of the Charter.

The Court concludes that the objective of ensuring the public safety and security of Union citizens cannot be compromised by the fact that the holders of firearms classified in both categories A.6 to A.8 and category A.9 may benefit from maintaining, under Article 7(4a) of Directive 91/477, authorisations already granted for weapons falling within categories A.6 to A.8.

In the fourth place, the Court considers that such an interpretation of Article 7(4a), which is consistent with its wording and its context and with the scheme and objectives of the legislation of which it forms part, likewise does not deprive that provision or the addition, by Directive 2017/853, of category A.9 of all effectiveness.

On the contrary, that interpretation ensures the effectiveness of Article 7(4a), in that it seeks to ensure respect for acquired rights and, in particular, that of the right to property. Moreover, it in no way affects the objective of clarification that the EU legislature sought to achieve by way of the addition of category A.9. In addition, that category covers not only firearms in both categories A.6 to A.8 and category A.9, but also those in categories A.2 and A.3 that have undergone such conversions, which were not covered by the power afforded to Member States by Article 7(4a) of Directive 91/477.

In the light of the interpretation thus adopted of Article 7(4a) of Directive 91/477, the Court concludes that the premiss on which the question from the Cour constitutionnelle (Constitutional Court) is based is incorrect and that, in those circumstances, the consideration of that question has not revealed any factor capable of affecting the validity of that article in the light of the right to property and the principles of equality before the law, non-discrimination and the protection of legitimate expectations.

2. MEDICINAL PRODUCTS FOR HUMAN USE

Judgment of the Court of Justice (Fourth Chamber), 14 March 2024, D & A Pharma v Commission and EMA, C-291/22 P

Link to the full text of the judgment

Appeal – Medicinal products for human use – Application for marketing authorisation – Independence of experts consulted by the Committee for Medicinal Products for Human Use (CHMP) of the European Medicines Agency (EMA) – Article 41 of the Charter of Fundamental Rights of the European Union – Right to good administration – Requirement of objective impartiality – Criteria for verifying the absence of conflict of interest – EMA's policy on competing interests – Activities as principal investigator, consultant or strategic adviser for the pharmaceutical industry – Rival products – Re-examination procedure – Regulation (EC) No 726/2004 – Articles 56, 62 and 63 – EMA Guidelines – Consultation of a scientific advisory group (SAG) or an ad hoc expert group

The Court of Justice upholds the appeal brought by Debrégeas et associés Pharma SAS (D & A Pharma) ('D & A Pharma') against the judgment of the General Court in D & A Pharma v Commission and EMA ('the judgment under appeal'). [62] In doing so, it clarifies the scope of the principles to be respected in the procedure conducted by the European Medicines Agency (EMA) for the evaluation of medicinal products.

62 Judgment of 2 March 2022, D & A Pharma v Commission and EMA (T-556/20, EU:T:2022:111).

The applicant submitted an application for a conditional marketing authorisation ('MA') to the EMA, under Regulation No 507/2006, [63] for the medicinal product Hopveus. The Committee for Medicinal Products for Human Use ('the CHMP') issued an unfavourable opinion on that application. Following a request for re-examination of that opinion submitted under Regulation No 726/2004, [64] the CHMP convened an ad hoc expert group, in which, inter alia, an expert who was simultaneously a principal investigator for the medicinal product AD 04 participated. Since that expert group also delivered an unfavourable opinion, the Commission refused the application for a conditional MA on 6 July 2020 ('the contested decision').

Following the dismissal by the General Court of its action against the contested decision, the appellant brought the present appeal against the judgment under appeal.

Findings of the Court

(i) The claim to set aside the judgment under appeal

The Court of Justice recalls that the objective impartiality of the CHMP, and therefore of the EMA, is compromised where a conflict of interest on the part of one of the members of the CHMP is likely to result from an overlap of functions, irrespective of the personal conduct of that member. Such a failure to fulfil obligations is liable to render unlawful the decision adopted by the Commission at the end of the procedure. The objective impartiality of the CHMP is also compromised where an expert who is in a situation of conflict of interest is part of the expert group that is consulted by that committee in the context of the re-examination leading to the opinion of the EMA and the Commission's decision on the MA application.

The opinion expressed by the expert group convened by the CHMP has a potentially decisive influence on the EMA's opinion and, through that opinion, on the Commission's decision. Each member of that group may, where appropriate, significantly influence the discussions and deliberations that take place on a confidential basis within that group.

Therefore, contrary to what the General Court held, a conflict of interest on the part of a member of the expert group consulted by the CHMP substantially vitiates the procedure. The fact that, at the end of its discussions and deliberations, that group of experts expresses its opinion collegially does not remove such a defect.

Persons whose affairs are handled by an EU institution, body, office or agency cannot be required to prove specific indications of bias. Objective impartiality is assessed on the basis of criteria that are independent of the specific conduct of the experts concerned.

As regards those criteria, which must make it possible to ensure the impartiality and independence of persons contributing to the preparation of the EMA's scientific opinions, the Court of Justice notes, first, that, in order to enable the EMA to pursue effectively the objective assigned to it, and in view of the complex technical assessments that it has to make, its broad discretion is reflected in the definition of those criteria.

However, notwithstanding the existence of that broad discretion and the importance of the public interest pursued, the EMA is, in the exercise of its powers, bound by the requirements of the Charter of Fundamental Rights of the European Union, which states that any limitation on the exercise of rights and freedoms must respect the essence of those rights and freedoms and the principle of proportionality.

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63 Commission Regulation (EC) No 507/2006 of 29 March 2006 on the conditional marketing authorisation for medicinal products for human use falling within the scope of Regulation (EC) No 726/2004 of the European Parliament and of the Council (OJ 2006 L 92, p. 6).

64 Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

It follows that, even though the objective of general interest relating to the need for the best possible scientific advice may justify a mitigation of the requirement of objective impartiality of persons, a requirement that stems from the fundamental right to sound administration, the EMA must respect the essence of that fundamental right and the principle of proportionality. In particular, it cannot be accepted that that agency, on the pretext of wishing to maximise the number of experts available, lays down restrictions on the exercise of their mandate that appear insufficient to guarantee an impartial procedure. That would be the case if experts whose activities revealed a current interest in relation to a rival product of the product concerned were allowed to be members of the expert group convened by the CHMP for the purposes of re-examining the MA application for that product.

Secondly, the Court finds that the EMA's policy on competing interests defines the concept of 'rival product' as a 'medicinal product that targets a similar patient population with the same clinical purpose (i.e. to treat, prevent or diagnose a particular condition) and constituting potential commercial competition'.

That definition reflects the criterion used in the case-law of the Court of Justice to assess whether two pharmaceutical products are in competition on a given market. According to that case-law, that is the case where, for the same therapeutic indication, those products are interchangeable or substitutable.

It is therefore on the basis of an examination to determine whether, in the event that AD 04 and Hopveus are marketed, those products, both of which have been developed for the purpose of treating alcohol dependence, would present such a degree of interchangeability or substitutability that it would be necessary to determine the existence or absence of potential commercial competition between those two products.

That assessment of interchangeability or substitutability need not be carried out solely in relation to the objective characteristics of those products. The examination of potential commercial competition between the products at issue must be based on an overall assessment of the factors that may be taken into account in order to assess whether patients and their prescribing doctors will be able to view one product as a valid alternative to the other.

By excluding the possibility of commercial competition on the ground that AD 04 and Hopveus have different clinical objectives and target different groups of patients, namely, as regards the former, those who intend to limit their alcohol consumption and, as regards the latter, those who intend to stop that consumption altogether, the General Court did not carry out such an overall assessment.

In that regard, the Court of Justice considers that the mere difference in intensity in the scope of the therapeutic action between two products intended to treat the same pathology is precisely likely to encourage certain patients suffering from that pathology to replace, in the course of their treatment, one of those products with the other depending on changes in their symptoms or considerations of therapeutic expediency and efficacy from their prescribing doctors.

Consequently, the General Court failed to examine whether those products were likely to compete with each other in the light, in particular, of the fact that changes in the treatment of the same patient may lead his or her doctor to prescribe those two products alternately during that treatment, depending on the symptoms and considerations of therapeutic appropriateness and efficacy.

Thirdly, the Court of Justice observes that the EMA must, in any event, interpret and apply its policy on competing interests in a manner consistent with the Charter of Fundamental Rights of the European Union.

In the present case, the policy relating to competing interests imposes on experts who have a current competing interest as principal investigator a mitigating measure, according to which they may, in procedures relating to the 'medicinal product concerned', be involved 'only in the discussions', without participating in the 'final deliberations and voting'. That mitigation measure cannot, without disproportionately limiting the protection of objective impartiality, be interpreted or applied as meaning that an expert who is at the same time the principal investigator for a rival product of the product concerned may participate in the work of an expert group that is consulted by the CHMP in the procedure for re-examination of an MA application for the product concerned.

Such participation, by its very nature, would be inappropriate in order to ensure that the re-examination procedure in question is conducted impartially. A refusal to grant an MA for the rival

product under re-examination is likely to be of considerable commercial interest to the company at the instigation and/or under the sponsorship of which such an expert carries out his or her activity as principal investigator.

It follows that the judgment under appeal is vitiated by an error of law, in that the General Court's interpretation of the policy relating to competing interests is incompatible with the principle of objective impartiality.

Similarly, the restrictions – within the meaning of the policy on competing interests – imposed on experts cannot, contrary to what the General Court held, be interpreted and applied as meaning that a consultant or strategic adviser for individual medicinal products of a pharmaceutical company may be a member of the ad hoc expert group convened by the CHMP for the purpose of re-examining the MA application submitted for a rival product of one of those individual medicinal products. Such an interpretation is also incompatible with the principle of objective impartiality.

Accordingly, the plea alleging failure to observe the principle of objective impartiality is well founded and justifies the setting aside of the judgment under appeal.

(ii) The action before the General Court

The Court of Justice observes, first of all, that it follows from the guidelines on the re-examination procedure that the EMA undertakes that the CHMP will systematically consult a scientific advisory group ('SAG') when the applicant for re-examination requests such consultation, in good time and on a duly motivated basis. It is also apparent from this that the SAG referred to for that purpose must be the one established in the therapeutic area to which the product in question belongs, and that an ad hoc expert group will be convened if no SAG is established in that area.

The CHMP must, in its capacity as the competent committee of the EMA, apply the rules of conduct laid down by that agency, which include the guidelines on the re-examination procedure. It is settled case-law that, in adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, an EU institution, body, office or agency imposes a limit on the exercise of its discretion.

In view of the self-imposed limitation on the EMA's discretion, the Court finds that the CHMP manifestly exceeds the limits of that discretion where it decides to convene an ad hoc expert group, even though it has established that the therapeutic indication of the product at issue falls, at least predominantly, within a therapeutic area for which a SAG has been established, or where it decides to convene an ad hoc expert group on the basis of elements that already relate to the substantive treatment, by the CHMP, of the request for re-examination or on hypothetical considerations.

The Court notes, in that regard, that consultation of the SAG enables the CHMP to receive an opinion drawn up by the permanent experts of that SAG. Furthermore, that 'core' group of the SAG may be supplemented by additional experts who are specialised in dealing with specific issues raised by the questions that the CHMP intends to ask. Consultation of such an expert group comprising, on the one hand, a group which ensures, by its permanent nature and its balanced composition, continuity and consistency in the treatment of dossiers and, on the other hand, additional experts specialised in dealing with specific issues raised in the context of the re-examination, ensures that the 'best possible scientific opinion' is drawn up, and thus enables the EMA to comply with the task entrusted to it.

In those circumstances, the convening, in a therapeutic area for which a SAG is established, of an ad hoc expert group cannot be accepted on the basis of the CHMP's consideration that an ad hoc expert group would be better able to answer its questions than the SAG established, where appropriate reinforced by additional experts.

The Court infers from this that the decision to convene an ad hoc expert group instead of the SAG on Psychiatry constitutes a defect vitiating the procedure for adopting the opinion of the EMA. Consequently, the procedure for adopting the contested decision is itself vitiated by a formal defect.

Consequently, the Court annuls the contested decision.

VI. INTERNATIONAL AGREEMENTS: JURISDICTION OF THE COURT OF JUSTICE CONCERNING THE INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court of Justice (Fifth Chamber), 14 March 2024, Commission v United Kingdom (Judgment of the Supreme Court), C-516/22

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Default procedure – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Article 127(1) – Transition period – Jurisdiction of the Court of Justice – Judgment of the Supreme Court of the United Kingdom – Enforcement of an arbitral award granting the payment of compensation – Decision of the European Commission declaring that that payment constitutes State aid which is incompatible with the internal market – Article 4(3) TEU – Sincere cooperation – Obligation to stay proceedings – First paragraph of Article 351 TFEU – International agreement between Member States and third countries concluded before the date of their accession to the European Union – Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) – Application of EU law – Article 267 TFEU – National court or tribunal adjudicating at last instance – Obligation to make a reference to the Court for a preliminary ruling – Article 108(3) TFEU – Suspension of implementation of the aid

Hearing an action for failure to fulfil obligations, the Court of Justice holds, in a judgment delivered by default in the absence of a defence, that, by a judgment of the Supreme Court of the United Kingdom, the United Kingdom of Great Britain and Northern Ireland failed to fulfil its obligations during the transition period following the entry into force of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. [65]

The Court rules on the novel question of whether the enforcement by a Member State of an arbitral award made against another Member State under the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [66] – which was concluded by most of the Member States which are parties to that convention, before their accession to the European Union, and therefore constitutes for them a prior international agreement for the purposes of the first paragraph of Article 351 TFEU – implies that those States are bound by 'obligations' vis-à-vis third countries that have concluded that convention, with the result that the latter derive from it correlative 'rights' which would be 'affected' by the provisions of the Treaties.

The ICSID Convention entered into force in respect of the United Kingdom and Romania prior to their accession to the European Union. It provides that each Contracting State must recognise an award rendered pursuant to that convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [67] In 2002, the

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65 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'), adopted on 17 October 2019, approved on behalf of the European Union and the European Atomic Energy Community (EAEC) by Council Decision (EU) 2020/135 of 30 January 2020 (OJ 2020 L 29, p. 1) and which entered into force on 1 February 2020.

66 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded in Washington on 18 March 1965 ('the ICSID Convention').

67 Article 54(1) of the ICSID Convention.

Kingdom of Sweden and Romania had concluded a bilateral investment treaty [68] which provides that each Contracting Party must at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and must not impair the management, maintenance, use, enjoyment or disposal thereof, through unreasonable or discriminatory measures. [69]

With a view to its accession to the European Union, Romania repealed a regional investment aid scheme in the form of tax incentives. Swedish investors allegedly harmed thereby then obtained an arbitral award, from an arbitral tribunal established under the ICSID Convention, ordering Romania to pay them the sum of EUR 178 million by way of compensation, and sought recognition and enforcement of that award, in particular in the United Kingdom.

After ordering Romania to suspend the execution of that arbitral award, on the ground that such action appeared to constitute unlawful State aid, the European Commission adopted, in 2014, a decision initiating a formal investigation procedure ('the opening decision'). [70] In 2015, it adopted a further decision, by which, after stating that Article 351 TFEU was not applicable to the present case given that the BIT was a treaty concluded between two Member States of the European Union, with the result that no third country Contracting Party to the ICSID Convention was involved in the proceedings at issue, it found that the payment of the compensation awarded by the arbitral award constituted 'State aid' incompatible with the internal market [71] which Romania is required in particular not to pay out ('the final decision').

In 2019, the General Court annulled the final decision, [72] on the ground, in essence, that the Commission lacked competence ratione temporis to adopt it under Article 108 TFEU ('the judgment of the General Court'). That judgment was the subject of an appeal to the Court of Justice. Before the Court of Justice could rule on that appeal, the Supreme Court of the United Kingdom ordered, on 19 February 2020, in Micula v Romania ('the judgment at issue'), the enforcement of the arbitral award. By the judgment in Commission v European Food and Others, [73] the Court of Justice set aside the judgment of the General Court and referred the case back to it.

At the end of a pre-litigation procedure initiated in December 2020, the Commission brought an action under Article 258 TFEU, seeking a declaration that, by the judgment at issue, the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations under EU law.

Findings of the Court

First of all, the Court recalls that, in accordance with the Withdrawal Agreement, [74] it is to have jurisdiction in actions for failure to fulfil obligations brought before it within four years after the end of the transition period, that transition period having concluded on 31 December 2020 ('the transition period'), where it considers that the United Kingdom has failed to fulfil an obligation under the Treaties before the end of that transition period. In the present case, since the alleged failure to fulfil obligations arises from the judgment at issue, delivered during the transition period, and the present action was brought by the Commission during the four-year period following the end of that transition period, the Court has jurisdiction over that action.

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68 Bilateral Investment Treaty, concluded on 29 May 2002, between the Government of the Kingdom of Sweden and Romania on the Promotion and Reciprocal Protection of Investments ('the BIT'), which entered into force on 1 April 2003.

69 Article 2(3) of the BIT.

70 Under Article 108(2) TFEU.

71 See Article 107(1) TFEU.

72 Judgment of 18 June 2019, European Food and Others v Commission (T-624/15, T-694/15 and T-704/15, EU:T:2019:423).

73 Judgment of 25 January 2022, Commission v European Food and Others (C-638/19 P, EU:C:2022:50).

74 Article 87(1) of the Withdrawal Agreement.

Subsequently, the Court examines and upholds the four complaints raised by the Commission in support of its action for failure to fulfil obligations. To that end, the Court notes at the outset that the United Kingdom – even if the failure to fulfil obligations of which it is accused is subsequent to its withdrawal from the European Union, although prior to the expiry of the transition period – must be regarded as a 'Member State', and that, moreover, EU law was applicable to the United Kingdom during that transition period.

(i) The complaint alleging an infringement of Article 351 TFEU

The Court notes, in the first place, that it is established that the ICSID Convention, which does not form part of EU law, is a multilateral treaty which was concluded by the United Kingdom, before its accession to the European Union, with both Member States and third countries and that, consequently, that international agreement is capable of falling within the scope of Article 351 TFEU, which provides, in particular, that the rights and obligations arising from agreements concluded before the date of accession to the European Union are not to be affected by EU law.

However, the mere fact that a prior international agreement has been concluded by a Member State with third countries is not sufficient to trigger the application of that provision. Such international agreements may be relied upon in relations between Member States only where those third countries derive rights which they can require the Member State concerned to respect.

The Court examines, in the second place, whether the ICSID Convention imposes on the United Kingdom obligations which it is bound to fulfil towards third countries and which those countries are entitled to rely upon as against the United Kingdom. In that regard, the Court recalls that an arbitral tribunal established under the ICSID Convention, pursuant to the arbitration clause provided for in the BIT concluded between the Kingdom of Sweden and Romania before Romania's accession to the European Union, ordered Romania to pay compensation to the Swedish investors. However, since Romania's accession to the European Union, the BIT must be regarded as a treaty concerning two Member States.

In the present case, the dispute submitted to the Supreme Court of the United Kingdom concerned the alleged obligation of the United Kingdom to comply with the provisions of the ICSID Convention, vis-à-vis the Kingdom of Sweden and its nationals and, accordingly, the alleged right of the latter to require the United Kingdom to comply with those provisions.

By contrast, the Court notes that a third country does not appear entitled to require the United Kingdom to enforce the arbitral award pursuant to the ICSID Convention. Indeed, that international agreement, despite its multilateral nature, is intended to govern bilateral relations between the contracting parties in an analogous way to a bilateral treaty. In that regard, the Court observes that the United Kingdom Supreme Court confines itself, in essence, to making clear that third countries that have concluded the ICSID Convention could have an interest in the United Kingdom complying with its obligations vis-à-vis another Member State by enforcing an arbitral award. As it is, such a purely factual interest cannot be equated with a 'right', within the meaning of Article 351 TFEU, capable of justifying the application of that provision.

However, in the judgment at issue, the Supreme Court of the United Kingdom failed to examine the fundamental question of the extent to which a third country could engage the international liability of the United Kingdom for failure to fulfil its obligations under that convention in the context of the enforcement of an arbitral award made at the conclusion of a dispute between Member States.

The Court points out that Article 351 TFEU is a rule which may allow derogations from the application of EU law, including primary law. That provision is thus capable of having a considerable impact on the EU legal order, since it makes it possible to derogate from the principle of the primacy of EU law. In that context, were the judgment at issue followed, all the Member States which concluded the ICSID Convention before their accession to the European Union could, by relying on Article 351 TFEU, be in a position to remove disputes concerning EU law from the judicial system of the European Union by entrusting them to arbitral tribunals. However, the Court recalls that the system of judicial remedies laid down by the Treaties had replaced the arbitration procedures established between the Member States. Article 351 TFEU must, therefore, be interpreted strictly, so that the general rules laid down by the EU Treaties are not negated.

In those circumstances, the Supreme Court of the United Kingdom was required, before giving a ruling, to examine in detail whether such an enforcement obligation entails rights which third countries might rely on as against the Member States in question. Such a detailed examination is, however, lacking in the judgment at issue, with the result that that court misinterpreted and misapplied Article 351 TFEU by conferring on it a broad scope, the object and effect of which is deliberately to exclude the application of EU law in its entirety. Such an interpretation, which has the effect of setting aside the principle of the primacy of EU law, that principle being one of the essential characteristics of that law, is such as to call into question the consistency, full effect and autonomy of EU law as well as, ultimately, the particular nature of the law established by the Treaties. Accordingly, the Supreme Court of the United Kingdom seriously compromised the EU legal order.

(ii) The complaint alleging an infringement of Article 4 TEU

In the first place, the Court finds that where the outcome of the dispute depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation laid down in Article 4 TEU that the national court should stay its proceedings pending final judgment in the action for annulment before the Courts of the European Union, unless it takes the view that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

In the present case, the proceedings pending before the EU institutions and the Supreme Court of the United Kingdom concerned the same matter, involved the interpretation of the same provisions and concerned the validity or effectiveness of the decisions adopted by the Commission. Thus, as at the date on which the Supreme Court of the United Kingdom delivered the judgment at issue, the matter of the effect of Article 351 TFEU on the application of EU law was the subject of a provisional examination by the Commission and could still be assessed by the Courts of the European Union. In those circumstances, there was a risk of conflicting decisions. That risk, moreover, materialised, since in contradistinction to the conclusion arrived at in the judgment at issue quite the opposite conclusion had been reached in the opening decision, as in the final decision, the legality of which was subject to an appeal as at the date on which that judgment was delivered.

In the second place, the Court holds that that finding cannot be called into question by the grounds advanced by the Supreme Court of the United Kingdom in order to disapply the application of the principle of sincere cooperation.

As regards the ground that questions as to the existence and extent of obligations stemming from prior international agreements are not reserved to the Courts of the European Union or even fall outside their jurisdiction, the Court states that the obligation of sincere cooperation incumbent on national courts presupposes that the same question may fall within the concurrent jurisdiction of the Courts of the European Union and that of the national courts, with the result that there is a risk of conflicting decisions.

The matter which was referred, in the present case, both to the Supreme Court of the United Kingdom, on the one hand, and to the Commission and Courts of the European Union, on the other hand, concerned the scope of Article 351 TFEU, which is a provision of EU law. Its definitive interpretation falls, therefore, within the exclusive jurisdiction of the Court of Justice. The Court points out that that article does not make any reference to the law of the Member States or to international law, with the result that the expressions in that provision must be regarded as autonomous concepts of EU law. It follows that the Courts of the European Union have jurisdiction to determine whether the ICSID Convention imposes obligations with which a third country is entitled to require compliance and whether those rights and obligations are affected by the EU Treaties. That is the case, in the context of an action for annulment, an action for failure to fulfil obligations or even a reference for a preliminary ruling. In the case of a reference for a preliminary ruling, the jurisdiction of the national court or tribunal cannot deprive the Court of Justice of all jurisdiction to examine those questions. This is all the less the case where the application of Article 351 TFEU to such an international agreement is likely to exert a decisive effect on the outcome of a parallel direct action, seeking the annulment of a final Commission decision.

Indeed, where the Courts of the European Union are called upon to rule on the validity of an act of EU law, it is consistent with the division of roles between the national courts and the Courts of the European Union for the Court of Justice alone to have jurisdiction to interpret the relevant prior

international agreement in order to determine whether or not Article 351 TFEU precludes the application of EU law by that act, the Court alone having jurisdiction to declare an EU act invalid.

(iii) The complaint alleging infringement of Article 267 TFEU

The Court finds, first, that the question of the scope of Article 351 TFEU, in the circumstances of the present case, is a novel question in the Court's case-law and that the scope of the expression 'affected by the provisions of the Treaties' in that article has not yet been clarified by the Court. Yet that article is capable of having a considerable impact on the EU legal order.

Secondly, in the opening decision and in the final decision, the Commission had adopted an interpretation of Article 351 TFEU which conflicts with that adopted by the Supreme Court of the United Kingdom in the judgment at issue. That interpretation is, moreover, called into question by the investors in support of their action before the General Court seeking the annulment of the final decision. In the light of the appeal brought against that judgment before the Court of Justice, the question of the effect of Article 351 TFEU on the enforcement of the arbitral award therefore remains pending before the Courts of the European Union.

Thirdly, both the High Court of Justice (England & Wales) and the Court of Appeal (England & Wales), before which the investors had previously brought an action, had refused to rule on the question of the applicability of Article 351 TFEU, on the ground that there was a risk of conflicting decisions.

Fourthly, the Court notes that the Nacka tingsrätt (Nacka District Court, Sweden), had held that Article 351 TFEU did not apply to the enforcement of the arbitral award and had, therefore, refused to enforce that award in Sweden.

Fifthly, the issue of the enforcement of the arbitral award was pending before the Belgian courts at the time when the Supreme Court of the United Kingdom ruled.

In the light of those findings, the Court of Justice concludes there was, in the present case, sufficient evidence to raise doubts as to the interpretation of Article 351 TFEU. Those doubts, in view of the impact of that provision on one of the essential characteristics of EU law and the risk of conflicting decisions within the European Union, ought to have led the Supreme Court of the United Kingdom to consider that the interpretation of that provision is not so obvious as to leave no scope for any reasonable doubt.

In those circumstances, the Court of Justice holds that it was for the Supreme Court of the United Kingdom, as a national court or tribunal against whose decisions there is no judicial remedy under national law, to make a reference to the Court of Justice concerning the interpretation of Article 351 TFEU, in order to avert the risk of an incorrect interpretation of EU law which it did in fact reach in the judgment at issue.

(iv) The complaint alleging an infringement of Article 108 TFEU

The Court holds that the judgment at issue requires Romania to pay the compensation awarded by the arbitral award, in breach of the obligation, laid down in Article 108 TFEU, not to implement planned aid before the Commission has taken a final decision. Romania is thus faced with conflicting decisions concerning the enforcement of that award. Therefore, by ordering another Member State to infringe the aforementioned provision, the judgment at issue fails to comply with that provision.

It is irrelevant, in that regard, that Article 108 TFEU lays down an obligation on 'the Member State concerned', namely, in this case Romania. Indeed, the obligation of sincere cooperation required the national courts and tribunals of the United Kingdom to facilitate Romania's compliance with its obligations under Article 108 TFEU, if that provision is not to be deprived of its effectiveness.

VII. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Ninth Chamber, Extended Composition), 20 March 2024, Belshyna v Council, T-115/22

Link to the judgment as published in extract form

Common foreign and security policy – Restrictive measures taken because of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine – Freezing of funds – Lists of persons, entities and bodies to whom the freezing of funds and economic resources applies – Registering and maintaining the applicant's name on the lists – Support for Lukashenko's regime – Financial support – State-owned business – Repression of civil society – Error of assessment

In its judgment, the General Court upholds the action for annulment brought by Belshyna AAT against the acts by which it was included, and then retained for a second time, by the Council of the European Union, on the list of persons and entities subject to restrictive measures on account of the situation in Belarus. This case gives the Court the opportunity to clarify the admissibility, under Article 86(1) of the Rules of Procedure of the General Court, of an application for modification of the application in proceedings concerning restrictive measures.

This judgment forms part of the restrictive measures adopted by the European Union since 2004 in view of the situation in Belarus with regard to democracy, the rule of law and human rights. Those measures provide for, inter alia, the freezing of funds and economic resources belonging to persons, entities or bodies responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities seriously undermine democracy or the rule of law in Belarus, as well as persons, entities or bodies supporting the Lukashenko regime. [75] The applicant, an undertaking established in Belarus that manufactures tyres, was placed on that list in 2021 [76] by the Council, and then retained on the list in 2022 [77] and 2023, [78] on the grounds that it represented a major source of revenue for the Lukashenko regime and that it had dismissed employees who had gone on strike in the wake of the 2020 presidential elections. After requesting the annulment of the initial acts, the applicant modified its application to also request the annulment of the 2023 maintaining acts, without however having made such a request for the 2022 maintaining acts.

Findings of the Court

With regard to the examination of the admissibility of the modification of the application, which is a matter of public policy, the Court points out that, where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before

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75 Article 4(1)(a) and (b) of Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus (OJ 2012 L 285, p. 1) and Article 2(4) of Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President [Lukashenko] and certain officials of Belarus (OJ 2006 L 134, p. 1), as amended by Council Regulation (EU) No 1014/2012 of 6 November 2012 (OJ 2012 L 307, p. 1).

76 Council Implementing Decision (CFSP) 2021/1001 of 21 June 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2021 L 219 I, p. 67) and Council Implementing Regulation (EU) 2021/999 of 21 June 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (OJ 2021 L 219 I, p. 1) ('the initial acts').

77 Council Decision (CFSP) 2022/307 of 24 February 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 46, p. 97) and Council Implementing Regulation (EU) 2022/300 of 24 February 2022 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 46, p. 3) ('the 2022 acts').

78 Council Decision (CFSP) 2023/421 of 24 February 2023 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2023 L 61, p. 41) and Council Implementing Regulation (EU) 2023/419 of 24 February 2023 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2023 L 61, p. 20).

the oral part of the procedure is closed, or before the decision of the Court to rule without an oral part of the procedure, modify the application to take account of that new factor. [79]

In the present case, the Court observes, first of all, that both the initial acts and the maintaining acts, in so far as they concern the applicant, have as their subject matter the imposition on it of individual restrictive measures consisting of a freezing of all its funds and economic resources. [80]

The Court then notes that those individual restrictive measures take the form of the inclusion of the names of the targeted persons, entities or bodies on the lists at issue set out in the annexes to Decision 2012/642 and Regulation No 765/2006.

In that context, the initial acts amended the annexes to Decision 2012/642 and Regulation No 765/2006 to include, in particular, the applicant's name on the lists at issue. As regards the maintaining acts, the Court notes, first, that Decision 2023/421 extended until 28 February 2024 the applicability of Decision 2012/642, Annex I to which, as amended by Implementing Decision 2021/2125, mentioned the applicant's name. Secondly, Implementing Regulation 2023/419 amended Annex I to Regulation No 765/2006, while maintaining, at least implicitly, the inclusion of the applicant's name in that annex. Consequently, the maintaining acts must be regarded as having amended the initial acts within the meaning of Article 86(1) of the Rules of Procedure.

In the light of the foregoing, the Court concludes that the applicant, having sought annulment of the initial acts in the application, was entitled to modify the application in order to seek annulment of the 2023 maintaining acts, even though it had not previously modified the application in order to seek annulment of the 2022 acts.

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79 Article 86(1) of the Rules of Procedure.

80 Pursuant to Article 4(1)(a) and (b) of Decision 2012/642 and Article 2(4) and (5) of Regulation No 765/2006.