COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

Monthly Case-Law Digest
May 2024

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

Judgment of the Court of Justice (First Chamber), 8 May 2024, Asociaţia "Forumul Judecătorilor din România" (Associations of judges), C-53/23

Link to the full text of the judgment

Reference for a preliminary ruling – Rule of law – Judicial independence – Article 19(1) TEU – Cooperation and Verification Mechanism – Benchmarks subscribed to by Romania – Fight against corruption – Investigations of offences committed within the Judiciary – Action challenging the nomination of prosecutors with competence to conduct those investigations – Standing of professional associations of judges to bring proceedings

On a request for a preliminary ruling from the Curtea de Apel Piteşti (Court of Appeal, Pitești, Romania), the Court holds that EU law does not oblige the Member States to allow professional associations of judges to bring actions for annulment, with a view to defending the principle of the independence of the judiciary, against decisions relating to the appointment of prosecutors competent to conduct criminal prosecutions against judges.

In 2022, two professional associations of judges, the Asociaţia 'Forumul Judecătorilor din România' and the Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor', brought an action before the referring court seeking the partial annulment of an order appointing prosecutors for the conduct of criminal prosecutions against judges in corruption cases. Those associations submit, in essence, that the national legislation upon which that order is based is contrary to EU law.

The referring court states that, by application of the Romanian procedural rules, it should declare the action for annulment inadmissible. In respect of associations, the case-law of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) makes the admissibility of such an action subject to there being a direct link between the administrative act subject to judicial review and the objectives pursued by the applicant association. In several judgments, that court has thus found that professional associations of judges do not have an interest in bringing proceedings against decisions relating to the appointment of judges.

However, the referring court emphasises that the applicants in the main proceedings seek to obtain effective judicial protection in a field covered by EU law. It is therefore necessary to determine whether the interpretation of the national procedural rules by the High Court of Cassation and Justice is contrary to Article 2 and Article 19(1) TEU, read in conjunction with Articles 12 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Consequently, it decided to request a preliminary ruling by the Court.

Findings of the Court

In the first place, the Court emphasises that, subject to the principles of equivalence and effectiveness, it is for the Member States, in principle, to determine the standing and interest of a party to bring legal proceedings, without however undermining the right to effective judicial protection in fields covered by EU law, compliance with which must be ensured by the Member States, for the purposes of the second subparagraph of Article 19(1) TEU.

It is true that the Member States are required, in certain cases, to permit representative associations to bring proceedings in order to protect the environment or combat discrimination. [1] However, first, those findings flow from procedural rights specifically conferred on representative associations by an international convention [2] or by acts of secondary legislation. [3] Secondly, even in those fields, the Member States remain free, where that convention or those acts do not specifically require standing to bring proceedings to be granted to representative associations, to confer, or not to confer, that standing on such associations.

However, as regards professional associations of judges, there is no provision of EU law that requires the Member States to grant procedural rights to professional associations of judges enabling them to challenge any purported incompatibility with EU law of a national provision or measure connected with the status of judges. Hence, it cannot be concluded on the basis of the obligation to establish a system of legal remedies and procedures which ensures respect for the right to effective judicial protection for individuals in the fields covered by EU law that the Member States are required generally to guarantee for those associations the right to bring proceedings based on such an incompatibility with EU law.

In the second place, it is clear from the Court's case-law that, in certain circumstances, the Member States are required, in order to ensure that the requirement for the independence of the judiciary is observed, to provide for certain legal remedies permitting the lawfulness of national measures that have consequences for the careers of judges or the composition of national courts and tribunals to be reviewed. However, the Member States are required to guarantee that the action of prosecutors competent to conduct criminal prosecutions against judges is taken within a framework of effective rules which fully comply with the requirement of the independence of the judiciary. In addition, professional associations of judges are not, in principle, directly concerned by the appointment of prosecutors, including of those who will be competent to conduct criminal prosecutions against judges, and EU law does not require that those associations be granted, generally, specific procedural rights.

Consequently, the sole fact that national legislation does not permit those professional associations to bring an action for annulment against the appointment of those prosecutors does not suffice to create, in the minds of individuals, legitimate doubts as to the independence of judges.

Furthermore, a right for professional associations of judges to initiate legal proceedings against measures such as those at issue in the main proceedings also cannot be derived from Article 47 of the Charter. The Court has already held that an association that submits, before a national court, that national legislation relating to the appointment of judges is incompatible with Article 19(1) TEU cannot be regarded, on that basis alone, as invoking the breach of a right conferred on it by a provision of EU law, within the meaning of Article 51(1) of the Charter. [4]

---

1 See, to that effect, judgments of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (C-664/15, EU:C:2017:987, paragraph 58), and of 23 April 2020, Associazione Avvocatura per i diritti LGBTI (C-507/18, EU:C:2020:289, paragraph 60).

2 Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

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

4 See, to that effect, judgment of 20 April 2021, Repubblika (C-896/19, EU:C:2021:311, paragraphs 43 and 44).

II. INSTITUTIONAL PROVISIONS: RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the General Court (Fourth Chamber, Extended Composition), 8 May 2024, Izuzquiza and Others v Parliament, T-375/22

Link to the full text of the judgment

Access to documents – Protection of personal data – Regulation (EC) No 1049/2001 – Documents relating to the allowances and expenses paid to a Member of Parliament and the salaries and allowances of his or her parliamentary assistants – Refusal to grant access – Exception relating to the protection of privacy and the integrity of the individual – Article 4(1)(b) and (6) of Regulation No 1049/2001 – Protection of the data subject's legitimate interests – Necessity of the transmission of personal data for a specific purpose in the public interest – Article 9(1) of Regulation (EU) 2018/1725

Hearing an action for annulment brought by three natural persons, the General Court, ruling in extended composition, annuls the decision of the European Parliament of 8 April 2022 [5] by which that institution refused the applicants access to documents relating to the amounts paid by that institution to Mr Ioannis Lagos, a Member of the Parliament, and to his parliamentary assistants, in the context of that Member's mandate. In so doing, the Court clarifies the exception relating to public access to documents, based on the protection of privacy and the integrity of the individual provided for in Regulation No 1049/2001. [6] It finds that the Parliament should have authorised access to documents containing personal data concerning Mr Lagos and his parliamentary assistants and which related, more specifically, to the reimbursements of travel expenses and subsistence allowances paid to Mr Lagos by that institution and to the reimbursements of travel expenses of his assistants.

Mr Lagos was elected in Greece and took office as a Member of the European Parliament on 2 July 2019. On 7 October 2020, he was sentenced by the Greek courts to a term of imprisonment of 13 years and 8 months and to payment of a fine for membership and leadership of a criminal organisation and for two minor offences. Following the waiver of his parliamentary immunity, on 27 April 2021, Mr Lagos was arrested by the Belgian authorities and surrendered to the Greek authorities. Mr Lagos is currently serving his prison sentence in Greece.

After his criminal conviction, the waiver of his immunity and his imprisonment, Mr Lagos did not resign from his mandate as a Member of the European Parliament. Moreover, his conviction did not give rise to any communication from the Greek authorities to the Parliament concerning the withdrawal of his mandate.

On 7 December 2021, the applicants submitted to the Parliament an application for access to documents concerning Mr Lagos, based on Regulation No 1049/2001 and concerning all the documents relating to the allowances paid to Mr Lagos and to the expenses linked to the salaries of his accredited and local parliamentary assistants. By decision of 4 February 2022, the Parliament refused to grant the applicants access to those documents. Following a confirmatory application by the applicants, the Parliament adopted the contested decision by which it confirmed its initial refusal to grant them access to the requested documents, relying on the exception to the right of access to documents concerning the protection of personal data, provided for in Regulation No 1049/2001 and

5 Decision of the European Parliament bearing reference A(2021) 10718C of 8 April 2022 ('the contested decision').

6 And in particular by Article 4(1)(b) of 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). Under that provision, the institutions are to refuse access to a document where its disclosure would undermine the protection of the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

the obligation for the applicants to prove the need for the transmission of personal data for a specific purpose in the public interest, under Regulation 2018/1725. [7]

Findings of the Court

As a preliminary point, the Court points out that Article 9(1)(b) of Regulation 2018/1725 makes the transmission of personal data subject to the fulfilment of a number of cumulative conditions. Thus, the applicant for access must demonstrate the necessity of the transmission of personal data for a specific purpose in the public interest, then establish that that transmission is the most appropriate of the possible measures for attaining the objective pursued and that it is proportionate to that objective. Once this has been demonstrated, the institution concerned is required to determine that there is no reason to assume that that transmission might prejudice the legitimate interests of the data subject and, in such a case, to weigh, in a demonstrable manner, the various competing interests with a view to assessing the proportionality of the requested transmission of personal data.

Thus, in the first place, the Court examines, in the context of the exception to the right of access to documents concerning the protection of personal data, [8] whether the applicants fulfilled the obligation to prove the necessity of the transmission of personal data for a specific purpose in the public interest. [9]

It undertakes, first, an analysis of whether the purpose relied on by the applicants for the transmission of the personal data at issue constitutes a specific purpose in the public interest.

In that regard, the Court states that that transmission may be based on a general objective, such as the public's right to information concerning the conduct of Members of the Parliament in the exercise of their duties. In the present case, the purpose relied on by the applicants was to ascertain the specific amounts of the sums allocated by the Parliament to Mr Lagos during the period concerned and the manner in which those sums had been used in the exercise of his mandate as a Member of Parliament in order to facilitate public control, in the light of Mr Lagos' access to public funds. Contrary to the Parliament's assertions, that purpose is not general, but specifically linked to the particular circumstances of the case in question, which are quite exceptional in nature. They concern a Member of the Parliament who, after having been sentenced, inter alia, to a term of imprisonment of 13 years and 8 months for having, in particular, committed serious crimes, such as membership of a criminal organisation and its leadership, remained a Member of the Parliament and continued to receive allowances corresponding to the exercise of that function. Accordingly, in the light of those circumstances, the Parliament was wrong to refuse to recognise the purpose put forward by the applicants as a specific purpose in the public interest.

Secondly, the Court analyses whether the applicants demonstrated the necessity of the transmission of personal data, and in particular whether that transmission was the most appropriate measure for attaining the specific public interest objective pursued by the applicants and whether it was proportionate to that objective.

---

7 Following Article 9(1)(b) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39), personal data are only to be transmitted to recipients established in the European Union other than EU institutions and bodies if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

8 As provided for in Article 4(1)(b) of Regulation No 1049/2001.

9 Article 9(1)(b) of Regulation 2018/1725.

First, as regards the general expenses allowance [10] and Mr Lagos' monthly salary, [11] the Court finds that the information on those rights is freely accessible to the public on the Parliament's website. Since disclosure of the personal data in question was therefore not the most appropriate measure for attaining the objective pursued by the applicants, they have failed to demonstrate the necessity of such a transmission. According to the Court, the situation is different as regards the reimbursement of travel expenses and the payment of the subsistence allowance of Members, in so far as the information publicly available in that regard does not make it possible to ascertain either the amounts paid by the Parliament to Mr Lagos, in the exercise of his mandate as a Member of Parliament, during the period concerned, or the purpose of the travel, the destination or the route taken by him. Thus, in so far as the transmission of those data would enable the public to have access to that information, disclosure of those data is a more appropriate measure for attaining the objective pursued by the applicants than access to information which is already in the public domain. Accordingly, the Court concludes that the transmission of the data relating to Mr Lagos constitutes a measure necessary to achieve the specific public interest objective relied on by the applicants to justify the transmission of the personal data at issue and that the Parliament was wrong to find that the applicants had not fulfilled the obligation to demonstrate the necessity of that transmission for that purpose.

Secondly, as regards the salaries of Mr Lagos' accredited and local assistants, the Court points out that they are paid to them irrespective of their specific activities in the context of the parliamentary assistance provided to Mr Lagos. Accordingly, in so far as the transmission of documents concerning the payment of those salaries cannot provide the applicants with information about any direct or indirect contribution to the financing or perpetuation of a criminal or unlawful activity by Mr Lagos, the applicants have failed to demonstrate the need for such a transmission. However, the expenses relating to the travel of Mr Lagos' parliamentary assistants are closely linked to his activities and may give indications of a possible connection, even if only indirect, with illegal activities carried out by Mr Lagos. Accordingly, the Court concludes that the transmission of personal data contained in the documents relating to the reimbursement of those costs is a measure necessary to achieve the purpose relied on by the applicants and that the Parliament was wrong to consider that the applicants had not fulfilled the obligation to demonstrate the necessity of the transmission of personal data for a specific purpose in the public interest.

In the second place, the Court rules on the possible prejudice to the legitimate interests of Mr Lagos and his assistants, caused by the transmission of the personal data at issue. In that regard, in examining the proportionality of that transmission, the Court balances the various competing interests. [12] Thus, as regards, on the one hand, the interest in protecting the free exercise of a Member's mandate, as regards the request for access to information relating to the reimbursement of travel expenses and subsistence allowances received by Mr Lagos, public knowledge of such journeys is not such as to restrict, in one way or another, the free exercise of his mandate. Accordingly, it has not been demonstrated how the disclosure of information about the journeys made was likely to affect the free exercise of the mandate of Member of the European Parliament. So far as concerns, on the other hand, the interest in ensuring Mr Lagos' security, in the case of documents relating to subsistence allowances and reimbursements of travel expenses received in the past, the security of the Member can in principle no longer be regarded as being jeopardised by the transmission of the personal data at issue, in so far as it concerns travels which had already taken place at the time when the applicants' request was made. While it is true that disclosure to the public

---

10 It follows from Articles 25 and 26 of Decision 2009/C 159/01 of the Bureau of the European Parliament of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament (OJ 2009 C 159, p. 1) that Members of Parliament receive a lump-sum general expenditure allowance on a monthly basis, following a single application submitted at the beginning of their term of office.

11 Under Article 10 of Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (OJ 2005 L 262, p. 1) ('the Statute for Members'), the monthly salary of Members is to be paid automatically.

12 As provided for in Article 9(1)(b) of Regulation 2018/1725.

of Mr Lagos' recurrent travels, in particular to a private home in Greece, could be prejudicial to his security, the Court emphasises that it is for the Parliament, when weighing up competing interests, to ensure the protection of personal data essential to Mr Lagos' security, such as his personal address. Furthermore, as regards Mr Lagos' security during his future journeys in the exercise of his mandate, the question does not arise in so far as Mr Lagos was imprisoned on the date of the contested decision and could not therefore travel. In that context, the Court considers that, as the journeys at issue took place during a period when Mr Lagos had already been convicted of serious crimes, it was therefore legitimate for the applicants to be able to obtain information about the purpose and destinations of those journeys. Since the risks of a possible prejudice to the free exercise of Mr Lagos' mandate and to his security are not sufficient to justify the refusal to disclose the personal data at issue, the Parliament was wrong to consider that the transmission of those data would prejudice the legitimate interests of Mr Lagos and his assistants and that, having weighed up the various competing interests, such a transmission would not be proportionate.

In the light of the foregoing, the Court annuls the contested decision in so far as the Parliament refused access to the documents, containing personal data concerning Mr Lagos, relating to reimbursements of travel expenses and subsistence allowances paid to him by the Parliament and to the documents, containing personal data concerning Mr Lagos' parliamentary assistants, relating to reimbursements of travel expenses received by them.

III. PROCEEDINGS OF THE EUROPEAN UNION

1. REFERENCES FOR A PRELIMINARY RULING

Judgment of the Court of Justice (Grand Chamber), 7 May 2024, NADA and Others, C-115/22

Link to the full text of the judgment

Reference for a preliminary ruling – Admissibility – Article 267 TFEU – Concept of 'court or tribunal' – National arbitration committee competent to combat doping in sport – Criteria – Independence of the body making the reference – Principle of effective judicial protection – Inadmissibility of the request for a preliminary ruling

The Court of Justice, sitting as the Grand Chamber, dismisses as inadmissible the request for a preliminary ruling made by the Unabhängige Schiedskommission Wien (Independent Arbitration Committee, Vienna, Austria; 'the USK'), on the ground that that body does not fulfil the criterion of independence required in order to be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

The applicant in the main proceedings was a competitive athlete from 1998 to 2015. In 2021, the Nationale Anti-Doping Agentur Austria GmbH (NADA) (National Anti-Doping Agency) submitted a request for the examination of the applicant's case to the Österreichische Anti-Doping Rechtskommission (Austrian Anti-Doping Legal Committee; 'the ÖADR'), since it considered that the applicant had infringed the anti-doping rules. [13]

[13] The International Association of Athletics Federations adopted competition rules for 2014-2015 and anti-doping rules in 2017.

By a decision of 31 May 2021, the ÖADR found that the applicant had infringed those rules. It declared invalid all the results achieved by the applicant during the period in question and revoked all her entry fees and/or prize money. Furthermore, it banned the applicant from participating in sporting competitions of any kind for a period of four years. In the procedure, the applicant requested that that decision not be communicated to the general public, in particular that her name or other individual characteristics not be disclosed or published. The ÖADR rejected that request.

The applicant applied for a review to the USK, the referring body in the present case, requesting that that decision be amended so that the general public would not be informed, by way of publication of her full name on a freely accessible website, of the anti-doping violations committed by her and of the penalties imposed. By a decision of 21 December 2021, the USK confirmed those penalties. However, it decided to issue a separate decision on the request that it refrain from publishing the anti-doping violations committed by the applicant and the ensuing penalties, reserving its decision in that regard.

Since it has doubts as regards the conformity of that publication with the GDPR, [14] the USK made a reference to the Court for a preliminary ruling.

Findings of the Court

As a preliminary point, the Court ascertains, in the light of the latest developments in its case-law, [15] whether the referring body may be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

At the outset, the Court recalls its settled case-law in this area, pursuant to which, in order to determine whether the body in question is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, it takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. Accordingly, it is appropriate to determine whether a body may refer a case to the Court on the basis of criteria relating both to the constitution of that body and to its function.

As regards those criteria relating to a body's constitution, the Court states that it is apparent from the information in the file submitted to it, and in particular the provisions of the 2021 Federal Law on Anti-Doping, [16] that the USK fulfils the criteria relating to whether it is established by law, whether it is permanent, whether its jurisdiction is compulsory and whether the proceedings before it are inter partes. However, the question arises as to whether the USK fulfils the criterion of independence.

As regards that criterion, the Court points out that the independence of the national courts, which is essential to effective judicial protection, is inherent in the task of adjudication. It is thus essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU in that, in accordance with its settled case-law, that mechanism may be activated only by a body which satisfies, inter alia, that criterion of independence. Thus, the Court recalls that the concept of 'independence' has two aspects.

---

14 More specifically with Article 5(1)(a) and (c), Article 6(3) and Articles 9 and 10 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, and corrigendum OJ 2018 L 127, p. 2; 'the GDPR').

15 In its assessment, the Court referred, in particular, to the judgments of 21 January 2020, Banco de Santander (C-274/14, EU:C:2020:17), and of 3 May 2022, CityRail (C-453/20, EU:C:2022:341).

16 Anti-Doping-Bundesgesetz 2021 (2021 Federal Law on Anti-Doping) of 23 December 2020 (BGBl. I, 152/2020; 'the ADBG').

The first aspect, which is external, requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions. In that regard, the irremovability of the members of the body concerned constitutes a guarantee that is essential to judicial independence in that it serves to protect the person of those who have the task of adjudicating in a dispute.

More specifically, the principle of irremovability, the cardinal importance of which is to be emphasised, requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed. The guarantee of irremovability of the members of a court or tribunal thus requires that dismissals of members of the body concerned should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.

The second aspect of the concept of 'independence', which is internal, is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Thus, the concept of 'independence' implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

In that respect, as regards the USK, the Court finds that the rules of procedure of that committee concerning the ADBG state that its members are independent in the performance of their duties and that they are subject to the principle of impartiality. Nevertheless, under the ADBG, [17] the members of the USK are appointed by the Federal Minister for Arts, Culture, Civil Service and Sport for a renewable term of four years, which may be revoked early 'on serious grounds', without that concept being defined in the national legislation. In particular, the irremovability of USK members is not guaranteed by any specific rule. Furthermore, the decision to remove the members of the USK is a matter solely for the Federal Minister for Arts, Culture, Civil Service and Sport, namely a member of the executive, without precise criteria or precise guarantees having been established in advance.

The Court infers from this that the applicable national legislation does not ensure that the members of the USK are protected from external pressure, be it direct or indirect, that is liable to cast doubt on their independence, with the result that that body does not satisfy the external aspect of the requirement for a court or tribunal to be independent. Thus, the USK cannot be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

However, the Court states that that fact does not relieve it of the obligation to ensure that EU law is applied when adopting its decisions and to disapply, if necessary, national provisions which appear to

17 Pursuant to Paragraph 8(3) of the ADBG.

be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities.

Furthermore, the Court notes that it is apparent from the file before it that the applicant in the main proceedings lodged a complaint with the Österreichische Datenschutzbehörde (Austrian Data Protection Authority) concerning a breach of that protection, pursuant to Article 77(1) of the GDPR. That body adopted a rejection decision, which is the subject of a challenge before the Bundesverwaltungsgericht (Federal Administrative Court, Austria) pursuant to Article 78(1) of the GDPR. [18] Those proceedings were stayed pending an answer from the Court to the questions referred in the present case.

2. MESURES PROVISOIRES

Judgment of the General Court (Second Chamber, Extended Composition), 29 May 2024, Poland v Commission, T-200/22 and T-314/22

Link to the full text of the judgment

Environment – Lignite mining activities at an open-cast mine – Turów lignite mine (Poland) – Law governing the institutions – Failure to comply with an order of the Court of Justice imposing interim measures – Periodic penalty payment – Recovery of debts by offsetting – Article 101(1) and Article 102 of Regulation (EU, Euratom) 2018/1046 – Removal of the case in the main proceedings from the register – No retroactive effect on the interim measures ordered – Obligation to state reasons

The General Court, ruling in extended composition, has dismissed two actions for annulment brought by the Republic of Poland against multiple decisions of the European Commission by which the Commission recovered amounts payable in respect of a daily penalty imposed by the Court of Justice. In that case, in proceedings between the Czech Republic and Poland, the Court of Justice had adopted interim measures in order to ensure that its final decision was fully effective. Poland failed to comply with those interim measures and was therefore ordered to pay a daily penalty until it had complied with them. The case in the main proceedings was removed from the register after the parties had concluded a settlement agreement. In its judgment, the General Court clarifies the effects of that removal from the register on Poland's obligation to pay the amount payable in respect of the penalty.

On 26 February 2021, the Czech Republic brought an action against Poland for failure to fulfil its obligations on account of the extension and continuation of lignite mining activities at the open-cast mine in Turów (Poland), close to the Czech and German borders. At the same time, the Czech Republic brought an application for interim measures seeking the immediate cessation of those mining activities, which the Court of Justice granted on 21 May 2021. [19]

Taking the view that Poland had failed to comply with that order, the Czech Republic brought, on 7 June 2021, a fresh application for interim measures seeking the imposition on Poland of a daily penalty payment. On 20 September 2021, [20] Poland was ordered to pay to the Commission, from that date, a penalty of EUR 500 000 per day until it complies with the order imposing interim measures.

---

18 See, in that regard, judgment of 7 December 2023, SCHUFA Holding (Discharge from remaining debts) (C-26/22 and C-64/22, EU:C:2023:958, paragraphs 52 and 70).

19 Order of 21 May 2021, Czech Republic v Poland (C-121/21 R, EU:C:2021:420).

20 Order of 20 September 2021, Czech Republic v Poland (C-121/21 R, EU:C:2021:752).

The Commission issued Poland with formal notice to pay the amounts payable in respect of the periodic penalty and informed it that, if payment of those amounts was not made, it would recover them by means of offsetting pursuant to the Financial Regulation. [21]

Since Poland failed to make those payments, the Commission adopted the five contested decisions, [22] by which it offset its debt against various amounts owed to Poland by the European Union, for an amount of almost EUR 68 500 000 over the period from 20 September 2021 to 3 February 2022.

The Czech Republic and Poland concluded a settlement agreement on 3 February 2022 and requested that the case be removed from the register.

The case in the main proceedings having been removed from the register, [23] Poland lodged an application for cancellation of the order of 20 September 2021 imposing on it a periodic penalty payment. It also requested the Commission to discontinue the procedure for enforcement of the periodic penalty payments and to withdraw the contested decisions already adopted as at that date. The Commission stated that it would continue to recover by way of offsetting the amounts payable up to the date on which the settlement agreement was concluded as long as the order of 20 September 2021 had not been 'set aside'. By order of 19 May 2022, [24] the application for cancellation of the order of 20 September 2021 was dismissed.

By two separate actions, Poland claimed that the General Court should annul the contested decisions adopted by the Commission in view of the settlement agreement which led to the removal of the case in the main proceedings from the register of the Court of Justice.

Findings of the Court

By its first plea, Poland submits, in essence, that the settlement agreement and the removal of Case C-121/21 from the register led to the retroactive cessation of the effects of the interim measures ordered in that case, with the result that the debt recovered is non-existent and its recovery is contrary to Articles 101 and 102 of the Financial Regulation.

In that regard, the General Court points out that, in view of the ancillary nature of the proceedings for interim measures in relation to the main proceedings, the order of 21 May 2021 ordering the cessation of lignite mining activities at the Turów mine and the order of 20 September 2021 imposing a periodic penalty payment lapsed with effect from the date on which the case in the main proceedings was removed from the register, namely 4 February 2022.

As regards the consequences of removing the case in the main proceedings from the register with regard to the existence of Poland's debt, the General Court states that, first, the order removing the case from the register makes no mention of the interim measures prescribed by the order of 21 May 2021 or of the daily penalty payment. Secondly, Poland's application for cancellation of the order of 20 September 2021 imposing that periodic penalty payment was dismissed. Thirdly, the order dismissing that application expressly states that the daily penalty payment lapsed with effect from 4 February 2022. Consequently, the daily penalty was actually payable from the date of service of the order of 20 September 2021 until the date on which the case in the main proceedings was removed from the register, namely 4 February 2022.

---

21 More specifically, Article 101(1) and Article 102 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1; 'the Financial Regulation').

22 Commission Decisions of 7 and 8 February 2022, 16 and 31 March 2022 and 16 May 2022.

23 Order of 4 February 2022, Czech Republic v Poland (Turów mine) (C-121/21, EU:C:2022:82).

24 Order of 19 May 2022, Czech Republic v Poland (Turów mine) (C-121/21 R, EU:C:2022:408).

The General Court states that to reach a different conclusion would be to deviate from the purpose of the periodic penalty payment, which is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU.

That conclusion cannot be called into question by Poland's argument that continuing to enforce the interim measures despite the removal of the case in the main proceedings from the register goes beyond the sole objective pursued by those measures, namely, primarily to guarantee the effectiveness of the judgment on the substance. En effet, les astreintes imposées par les juridictions de l'Union visent non seulement à garantir l'efficacité de l'arrêt au fond, mais également à faire respecter les mesures provisoires et à dissuader, en l'occurrence, la Pologne de retarder la mise en conformité de son comportement avec celles-ci. L'argumentation de la Pologne reviendrait à vider de toute substance le mécanisme de l'astreinte, car elle permettrait qu'une partie manque délibérément à l'obligation de se conformer aux mesures provisoires ordonnées en référé jusqu'à la fin du litige au principal et porte ainsi atteinte à l'efficacité du droit de l'Union.

Similarly, Poland's argument that enforcing periodic penalty payments makes the conclusion of a settlement agreement less attractive cannot be upheld in view of the purpose of periodic penalty payments and the fact that the removal of the case in the main proceedings from the register had beneficial consequences for Poland in that the daily penalty ceased to be payable as from 4 February 2022 and not from the date of delivery of a judgment of the Court of Justice.

The General Court finds, lastly, that Article 101 of the Financial Regulation, contrary to Poland's submission, does not lay down any obligation on the part of the Commission to cancel an established amount receivable. Furthermore, the conditions laid down for recovery by offsetting were satisfied since the Commission did verify that Poland's debt existed and determined the amount of that debt.

Consequently, the General Court dismissed the first plea in law. The second plea in law, alleging failure to comply with the obligation to state reasons, was also dismissed as unfounded and the General Court therefore dismissed the actions in their entirety.

IV. FREEDOM OF MOVEMENT: FREEDOM OF ESTABLISHMENT

Judgment of the Court of Justice (Fifth Chamber), 16 May 2024, Fondee, C-695/22

Link to the full text of the judgment

Reference for a preliminary ruling – Freedom to provide services – Markets in financial instruments – Directive 2014/65/EU – Article 3 – Exemption from the application of Directive 2014/65/EU – Exempted investment intermediary – Legislation of a Member State prohibiting that intermediary from transmitting clients' orders to an investment firm established in another Member State

Ruling on a request for a preliminary ruling from the Městský soud v Praze (Prague City Court, Czech Republic) in a dispute concerning the freedom of an intermediary to provide services on the markets in financial instruments, the Court of Justice confirms that it is possible for an intermediary to whom

Directive 2014/65 [25] does not apply to transmit stock market orders to an investment firm established in a Member State other than its home Member State.

Fondee a.s. carries on, in the Czech Republic, the activity of investment intermediary. As such, and in accordance with the option exercised by the Czech Republic under Article 3(1) of Directive 2014/65, Fondee is exempt from the application of that directive, and therefore does not enjoy the freedom to provide investment services in accordance with Article 3(3) thereof.

In the course of its activity, Fondee transmitted, between 7 October and 27 December 2019, 407 orders for the purchase of units in exchange-traded funds, received from its clients, to a securities trader established in the Netherlands.

However, the national legislation prohibits investment intermediaries from transmitting orders to investment firms established in other Member States.

Consequently, the Czech National Bank imposed a fine on Fondee for carrying on its activities during the period in question.

Après un recours infructueux devant le Conseil bancaire de la Banque nationale tchèque, Fondee a saisi la cour municipale de Prague, la juridiction de renvoi. Celle-ci se posait la question de savoir, en substance, si les intermédiaires d'investissement ont la possibilité d'invoquer le droit à la libre prestation de services en se fondant sur l'article 56 TFUE, afin de pouvoir transmettre les ordres d'un client à un courtier en valeurs mobilières étranger.

Findings of the Court

In so far as Directive 2014/65 brings about full harmonisation of national legislation relating, inter alia, to the cross-border reception and transmission of orders in relation to one or more financial instruments, the Court decides, in accordance with its case-law, [26] to examine the questions referred for a preliminary ruling solely on the basis of the provisions of that directive.

Consequently, the Court considers that the question referred to it is whether, in essence, Article 3(1)(c)(i) of Directive 2014/65 must be interpreted as meaning that persons exempted by a Member State from the application of that directive are authorised to transmit, with a view to their execution, orders from clients residing or established in that Member State to authorised investment firms that are established in another Member State, and, accordingly, whether that provision precludes national legislation prohibiting such transmission.

The Court answers that question in the affirmative.

In reaching that conclusion, the Court states that Article 3(1) of Directive 2014/65 authorises Member States not to apply that directive to persons for which they are the home Member State, subject to compliance with certain conditions. Among those conditions, Article 3(1)(c)(i) of that directive expressly provides that those persons are authorised to transmit orders they receive to authorised investment firms.

That article concerns the transmission of orders to any authorised investment firm and not only to those established and authorised in the home Member State of the person exempted from the application of that directive.

---

25 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

26 Judgment of 20 April 2023, Autorità Garante della Concorrenza e del Mercato (Municipality of Ginosa) (C-348/22, EU:C:2023:301, paragraph 36 and the case-law cited).

V. COMPETITION: STATE AID

Judgment of the General Court (Eighth Chamber), 8 May 2024, Ryanair v Commission (Condor; restructuring aid), T-28/22

Link to the judgment as published in extract form

State aid – German air transport market – Restructuring aid granted by Germany to an airline – Changes to the terms of loans granted by Germany and the partial write-off of debts – Decision not to raise any objections – Action for annulment – Locus standi – Admissibility – Safeguarding of procedural rights – Serious difficulties – Article 107(3)(c) TFEU – Point 67 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Burden sharing

Adjudicating on an action for annulment brought by the airline Ryanair DAC, the General Court annuls the decision of the European Commission which approved an aid measure granted by the Federal Republic of Germany to the airline Condor Flugdienst GmbH ('Condor') in order to support its restructuring. [27] In that context, the Court provides clarification regarding the review of the compatibility of restructuring aid with the internal market in the light of the requirement, as set out in the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, [28] that any State aid that enhances the equity position of the beneficiary should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary.

In order to make good the damage incurred as a result of the imposition of travel restrictions linked to the COVID-19 pandemic, Germany granted, in 2020 and then in 2021, two individual aid measures to Condor.

By decision of 26 April 2020, [29] the Commission found that the COVID-19 aid granted to Condor in 2020, which took the form of two loans totalling EUR 550 million ('the COVID-19 loans of 2020'), backed by a State guarantee, was compatible with the internal market on the basis of Article 107(2)(b) TFEU. After an action for annulment was brought before it, the Court annulled that decision owing to a failure to state reasons, while suspending the effects of that annulment pending the adoption of a new decision. [30] Accordingly, on 26 July 2021, the Commission adopted a new decision, finding that the COVID-19 aid of 2020 was compatible with the internal market. [31]

On the same day, the Commission adopted a decision by which it found that the COVID-19 aid granted to Condor in 2021, which took the form of a partial write-off amounting to EUR 60 million of debt resulting from the loans provided under the COVID-19 aid of 2020, was also compatible with the internal market on the basis of Article 107(2)(b) TFEU. [32]

---

27 Commission Decision C(2021) 5729 final of 26 July 2021 on State aid SA.63203 (2021/N) – Germany – Restructuring aid for Condor ('the contested decision').

28 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the R&R Guidelines').

29 Decision C(2020) 2795 final of 26 April 2020 on State aid SA.56867 (2020/N, ex 2020/PN) – Germany – Compensation for the damage caused by the COVID-19 pandemic to Condor ('the decision on the COVID-19 aid of 2020').

30 Judgment of 9 June 2021, Ryanair v Commission (Condor; Covid-19) (T-665/20, EU:T:2021:344).

31 Decision C(2020) 5730 final of 26 July 2021 on State aid SA.56867 (2020/N, ex 2020/PN) – Germany – Compensation for the damage caused by the COVID-19 pandemic to Condor ('the amended decision on the COVID-19 aid of 2020').

32 Decision C(2021) 5731 final of 26 July 2021 on State aid SA.63617 (2021/N) – Germany COVID-19 – Condor damage compensation II.

Lastly, by another decision of 26 July 2021, [33] the Commission, on the basis of Article 107(3)(c) TFEU and the R&R Guidelines, approved an aid measure granted by Germany to support the restructuring and continuation of Condor's operations, which comprises two parts. The first part consists in a modification to the terms of the COVID-19 loans of 2020 and a partial write-off of EUR 90 million of debt resulting from those loans. The second part involves the write-off of EUR 20.2 million of debt corresponding to the interest payable by Condor following the amended decision of 26 July 2021 on the COVID-19 aid of 2020.

Ryanair brought an action for annulment before the General Court against the decision of 26 July 2021 approving the restructuring aid to Condor.

Findings of the Court

In support of its action, Ryanair claimed, inter alia, an infringement of its procedural rights, since the Commission had adopted the contested decision without initiating the formal investigation procedure provided for in Article 108(2) TFEU, despite doubts that it should have had as to the compatibility of the aid at issue with the internal market.

According to settled case-law, where the preliminary examination of an aid measure has not enabled the Commission to overcome the serious difficulties involved in assessing the compatibility of that measure with the internal market, the formal investigation procedure must be initiated. In that context, it has also been stated in the case-law that proof that the examination carried out by the Commission in its assessment of the compatibility of aid with the internal market is insufficient or incomplete is such as to establish that that assessment raised serious difficulties.

In the light of that case-law, Ryanair claimed, inter alia, that the Commission had infringed point 67 of the R&R Guidelines in the contested decision, which demonstrated the existence of serious difficulties and called for the initiation of the formal investigation procedure.

On that issue, the Court states that under point 67 of the R&R Guidelines, any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for.

Since the contested decision did not assess the question of whether the terms on which the measure at issue had been granted would afford Germany a reasonable share of future gains in value of Condor, the Court addresses the argument made by the Commission that the measure at issue did not fall within the scope of point 67 of the R&R Guidelines. According to the Commission, point 67 applies only where the aid measure constitutes a capital injection and the Member State concerned has a shareholding in the beneficiary's capital, which was not the case in the circumstances at hand.

In that regard, the Court observes, first of all, that the wording of point 67 of the R&R Guidelines is somewhat inconsistent since, on the one hand, its introductory part states that it is to apply to 'any State aid that enhances the beneficiary's equity position', namely grants, capital injections and debt write-offs, while its final part refers, on the other hand, only to 'State equity injected'. However, that inconsistency, which is, moreover, attributable to the Commission, as it drew up those guidelines, should have led it to examine that provision more thoroughly in the light of its context and objectives, which it failed to do.

As regards the context of which point 67 of the R&R Guidelines forms part, the Court observes, next, that that point forms part of the section of the guidelines related to burden sharing, which begins with point 65. That latter point, which provides that aid to cover losses should be granted on terms which involve adequate burden sharing by investors, refers, without distinction, to grants, injections

33 See footnote 27.

of capital and debt write-offs. Similarly, point 66 of the R&R Guidelines, which states that State intervention should only take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders, is to apply regardless of the form of that intervention. However, there is nothing to indicate that those points 65, 66 and 67 should have differing scopes, depending on the form taken by the State support. In particular, the broad logic of the requirements foreseen by points 66 and 67 and the fact that they are cumulative suggest that, as with point 65 of those guidelines, they are intended to apply to any State aid which enhances the beneficiary's equity position.

Lastly, as regards the objectives pursued by point 67 of the R&R Guidelines, the Court observes that the provisions in the section related to burden sharing are intended, inter alia, to prevent a situation whereby shareholders and subordinated creditors are protected from the consequences of their choice to invest in the beneficiary, which could create moral hazard and undermine market discipline. However, there is nothing in those guidelines to indicate that that risk of moral hazard arises only where a Member State injects capital into the beneficiary, but not where it writes off its debt or provides it with a grant. Furthermore, the objective underlying point 67, namely to reduce the possibility that undertakings anticipating that they are likely to be rescued or restructured when they run into difficulty might take excessive risks in order to generate more profits, cannot be fully achieved if certain types of aid measure, such as the write-off of debt, were to be excluded from its scope, even though they enhance the beneficiary's equity position and give rise to the same moral hazard as that resulting from a capital injection. In addition, ensuring the State a reasonable share of future gains in value of the beneficiary of restructuring aid, whether that is through a grant, an injection of capital or a debt write-off, is consistent with the objectives of the efficiency of public spending, as referred to in the R&R Guidelines.

In the light of the foregoing, the Court considers that the Commission was not entitled to find that the restructuring aid granted to Condor did not fall within the scope of point 67 of the R&R Guidelines and fail to examine whether that aid complied with the requirements set out in that point.

Since Ryanair has thus demonstrated that the examination of the compatibility with the internal market of the restructuring aid granted to Condor was incomplete and insufficient, the Court finds that the Commission should have had doubts justifying the initiation of the procedure under Article 108(2) TFEU and it annuls the contested decision.

VI. APPROXIMATION OF LAWS

1. COMMUNITY DESIGNS

Judgment of the General Court (Third Chamber, Extended Composition), 8 May 2024, Puma v EUIPO – Road Star Group (Footwear), T-757/22

Link to the full text of the judgment

Judgment of the General Court (Third Chamber, Extended Composition), 8 May 2024, Puma v EUIPO – Fujian Daocheng Electronic Commerce (Footwear), T-758/22

Link to the full text of the judgment

Community design – Invalidity proceedings – Registered Community design representing a shoe – Earlier Community designs – Grounds for invalidity – Individual character – Article 25(1)(b) and Article 6(1) of Regulation (EC) No 6/2002

Hearing an action, which it dismisses, the General Court addresses, for the first time, the question of whether the disclaimed features should be taken into account, that is to say, the features which are not protected by an earlier design, which, in the present case, appeared in the form of broken lines in the comparison carried out in invalidity proceedings based on a lack of individual character. It thus defines the ratio legis of the invalidity proceedings based on that ground and the limits of protection of an earlier design.

Fujian Daocheng Electronic Commerce Co. Ltd sought registration from the European Union Intellectual Property Office (EUIPO) of a Community design representing a shoe. Puma SE, the applicant, filed an application for a declaration of invalidity of the design based on a lack of individual character [34] in respect of seven earlier designs. That application was, however, rejected by the Invalidity Division on the ground that the contested design had such individual character. Likewise, the Board of Appeal dismissed the applicant's appeal against the decision of the Invalidity Division.

Findings of the Court

As a preliminary point, the Court points out that the comparison of the overall impression produced by the designs at issue must, first, be made in the light of the overall appearance of each of those designs and, secondly, take as a basis the features disclosed in the contested design and relate solely to the features which are protected by that contested design. The fact that the earlier design would disclose additional elements which are not present in the contested design is irrelevant for the comparison of the designs at issue. The elements which are actually protected by the contested design must therefore be determined.

First, the Court observes that, in order to compare the designs at issue in the present case, it is necessary to take into account all of the elements actually protected by the contested design, which represents a complete shoe consisting of both a sole and an upper of a shoe and not to be restricted to comparing only the appearance of the soles, which is the only protected part of the earlier design. The examination of the ground for invalidity constituted by a lack of individual character is not part of the rationale of protection of an earlier right, but consists in determining whether the contested

34 Within the meaning of Article 6(1) and Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

design satisfies the requirements for registration. [35] However, taking the protected features of the earlier design as a basis, instead of those of the contested design, would amount to excluding from the comparison the elements of the contested design which are protected and, consequently, to not ascertaining whether that design satisfies, in its entirety, the requirements for protection.

In addition, although it is possible that, in the comparison of the designs, the overall impression produced by each of them may be dominated by certain features of the products or parts of the products concerned, the Court finds that, in the present case, there is no reason to take the view that, from a purely visual point of view, the sole constitutes, for the informed user, a feature which is predominant in relation to the rest of the shoe and, accordingly, that the overall impression between the designs at issue will be dominated by that impression.

Secondly, the Court examines whether the appearance of the upper of the shoe of the earlier designs may also be taken into consideration in the comparison of the overall impressions produced by the designs at issue, notwithstanding the fact that they are not features in respect of which protection has been claimed. It notes, in that regard, that the assessment as to whether a design has individual character is based on whether the overall impression produced on an informed user clearly differs from that produced on him or her by the existing design corpus. In the context of invalidity proceedings based on that ground, the sole function of the earlier design is to reveal the state of the prior art, which corresponds to the corpus of previous designs relating to the product in question that were disclosed on the date of filing of the contested design. However, the fact that an earlier design belongs to that corpus of previous designs is the result of the mere disclosure of that design. Accordingly, in order to determine whether the elements of an earlier design may be taken into account, it is not necessary to focus on the subject of the protection of that design, but solely on the question whether those elements have been disclosed. [36] Moreover, in order for the making available to the public of a design to entail the making available of all of its elements, it is essential that those elements appear clearly and precisely when the design is made available.

Consequently, since, in the present case, the disclaimed elements of the earlier designs had been disclosed and appear sufficiently clear and precise to perceive the appearance of an upper of a shoe and of its various parts, the Court concludes that those features may be taken into account in order to assess the individual character of the contested design.

---

35 Set out in Articles 4 to 9 of Regulation No 6/2002.

36 Within the meaning of Article 7(1) of Regulation No 6/2002.

2. MEDICINAL PRODUCTS FOR HUMAN USE

Judgment of the General Court (Fifth Chamber, Extended Composition), 15 May 2024, Fresenius Kabi Austria and Others v Commission, T-416/22

Link to the full text of the judgment

Medicinal products for human use – Suspension of national marketing authorisations for medicinal products for human use containing the active substance hydroxyethyl starch (HES), solutions for infusion – Action for annulment – Direct concern – Partial inadmissibility – Obligation to state reasons – Error of law – Manifest error of assessment – Precautionary principle – Proportionality – Article 116 of Directive 2001/83/EC

The General Court, sitting in an enlarged formation of five judges, dismisses the action brought by Fresenius Kabi Austria GmbH and other legal persons ('the applicants') for annulment of the decision of the European Commission requiring the Member States concerned to suspend the marketing authorisations ('MAs') of medicinal products containing hydroxyethyl starch ('HES'). [37]

The applicants are part of the worldwide Fresenius group. The latter manufactures and distributes, inter alia, medicinal products containing HES as an active substance which, in the form of solutions for infusion, are mainly used for the treatment of hypovolaemia (low blood volume) caused by acute (sudden) blood loss, when treatment with alternative solutions is considered insufficient. The applicants hold MAs for some of those medicines.

Following several assessments, carried out since 2013, and successive attempts to establish risk minimisation measures ('the RMMs'), the Commission found, by the contested decision, that the risk-benefit balance of those medicinal products could not be considered to be favourable, in particular because of the risks associated with their off-label use. It ordered the suspension of the MAs for those medicinal products.

The applicants asked the Court to annul the contested decision on the grounds, inter alia, that the Commission had incorrectly interpreted the concept of 'risk-benefit balance' within the meaning of Directive 2001/83 [38] in so far as, in assessing the risk-benefit balance of the medicinal products in question, it took account of the risks posed by their off-label use. They also argued that the RMMs put in place were complied with in most Member States. In their view, failure to comply with those RMMs in other Member States should not lead to the conclusion that those RMMs were not effective in preventing the risks in question.

Findings of the Court

As a preliminary point, the Court notes that the conditions for amending, suspending or withdrawing an MA referred to in Directive 2001/83, namely a finding that the medicinal product is harmful, that the therapeutic effect is lacking, that the risk-benefit balance is not favourable or that the medicinal product does not have the declared qualitative and quantitative composition, [39] are alternative and

---

37 Commission Implementing Decision C(2022) 3591 final of 24 May 2022 concerning, in the framework of Article 107p of Directive 2001/83/EC of the European Parliament and of the Council, marketing authorisations of medicinal products for human use which contain the active substance 'hydroxyethyl starch (HES), solutions for infusion' following an assessment of a post authorisation safety study ('the contested decision').

38 Concept contained in the first paragraph of Article 116 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2010/84/EU of the European Parliament and of the Council of 15 December 2010 as regards pharmacovigilance (OJ 2010 L 348, p. 74).

39 Conditions laid down in the first paragraph of Article 116 of Directive 2001/83.

not cumulative. They must, moreover, be interpreted in accordance with the general principle that the protection of public health must unquestionably be given overriding importance in relation to economic considerations.

In that context, the Court rules on the condition relating to the risk-benefit balance of the medicinal product and, more specifically, on the concept of 'risk-benefit balance'.

It observes, in the first place, that, as regards the literal interpretation, the provisions of Directive 2001/83 which are concerned with the definition of this concept and that of 'risks related to use of the medicinal product' [40] neither explicitly include nor exclude consideration of the risks resulting from the off-label use of a medicinal product in the assessment of its risk-benefit balance. By contrast, those provisions refer to 'any risk' to patient or public health relating to the quality, safety or efficacy of the medicinal product and do not restrict the concept of 'safety of the medicinal product' to specific uses. Thus, they do not exclude risks resulting from the off-label use of a medicinal product from the concept of risks relating to the safety of that medicinal product.

In the second place, as regards the contextual interpretation of that concept, the Court analyses the provisions of Directive 2001/83 which lay down certain information obligations incumbent on the holder of an MA for a medicinal product. [41] It notes that those provisions explicitly lay down an obligation to communicate to the competent national authority 'data on the use of the medicinal product where such use is outside the terms of the [MA]' which may constitute 'new information which might influence the evaluation of the benefits and risks of the medicinal product concerned'.

Moreover, by referring to the provisions of Directive 2001/83 which describe the objective of the pharmacovigilance system and the scope of the information which it serves to collect, [42] the Court states that it follows, first, that the concept of 'risks … as regards patients' or public health' also covers risks resulting from use 'outside the terms of the [MA]'. Secondly, Member States may take into account all the information collected under the pharmacovigilance system, including information relating to the risks associated with the off-label use of a medicinal product, in order to examine options for preventing or reducing the risks and, if necessary, to take regulatory measures concerning the MA in question. Those provisions do not contain any indication that the suspension or revocation of an MA would be excluded as a matter of principle from the measures that Member States could take in order to address the risks related to the off-label use of a medicinal product.

Finally, the Court finds that, by the provisions of Directive 2001/83 concerning the decision to grant an MA subject to certain conditions, [43] the legislature has expressly provided for the conditions under which information on the efficacy and safety of a medicinal product relating to its use 'under normal conditions' may be limited. The fact that the provision of that directive providing for the suspension of an MA contains no reference to 'normal conditions' of use supports the interpretation that the concept of 'risks related to use of the medicinal product' also covers the risks related to its off-label use.

The Court therefore concludes that the contextual interpretation of the concept of 'risk-benefit balance' supports the conclusion that that concept covers the risks associated with the off-label use of a medicinal product.

In the third and last place, as regards the teleological interpretation of that concept, the Court emphasises that, in so far as Directive 2001/83 imposes an obligation on the competent authorities to suspend, withdraw or amend MAs where the risk-benefit balance of a medicinal product is considered to be unfavourable, it pursues its essential objective of safeguarding public health.

---

40 Respectively, in Article 1(28a) and (28), first indent, of Directive 2001/83.

41 Article 23(2) of Directive 2001/83.

42 Article 101(1) of Directive 2001/83.

43 Article 22, second paragraph, of Directive 2001/83.

Therefore, in order to ensure that that objective is effectively pursued, the competent authorities must be able to take into account information relating to all the risks that a medicinal product poses to public health, including those associated with its off-label use. The off-label use of a medicinal product, which is not uncommon and is decided by a medical professional weighing up the benefits and risks and who must be informed as fully as possible, may pose risks to public health similar to those associated with the use of that medicinal product in accordance with the MA. The teleological interpretation of the concept of 'risk-benefit balance' therefore confirms the conclusion that that concept also covers the risks associated with the off-label use of a medicinal product.

Consequently, the Court concludes that, in taking account of the risks posed by the off-label use of the medicinal products in question when assessing their risk-benefit balance, the Commission did not misinterpret that concept.

As regards compliance with the RMMs, the Court finds that the Commission made no manifest error of assessment in concluding that the off-label use of the medicinal products concerned persisted despite the RMMs put in place.

VII. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Eighth Chamber, Extended Composition), 8 May 2024, Max Heinr. Sutor v SRB, T-393/21

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the Single Resolution Board (SRB) on the calculation of the 2021 ex ante contributions – Obligation to state reasons – Plea of illegality – Limitation of the temporal effects of the judgment

Hearing an action for annulment – which it upholds – the General Court annuls the decision of the Single Resolution Board (SRB) setting the 2021 ex ante contributions [44] to the Single Resolution Fund (SRF), on account of the failure to fulfil its obligation to state reasons as regards the determination of the annual target level. Furthermore, the Court rules on the scope of Article 5(1)(e) of Delegated Regulation 2015/63 [45] and on the plea of illegality raised against that regulation. Lastly, it also examines the alleged infringement of Article 5(1)(e) of that regulation.

Max Heinr. Sutor OHG, the applicant, is a credit institution established in Germany. On 14 April 2021, the SRB adopted a decision in which it set [46] the 2021 ex ante contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant.

---

44 Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 ex ante contributions to the Single Resolution Fund ('the contested decision').

45 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

46 Conformément à l'article 70, paragraphe 2, du règlement (UE) nº 806/2014 du Parlement européen et du Conseil, du 15 juillet 2014, établissant des règles et une procédure uniformes pour la résolution des établissements de crédit et de certaines entreprises d'investissement dans le cadre d'un mécanisme de résolution unique et d'un Fonds de résolution bancaire unique, et modifiant le règlement (UE) nº 1093/2010 (JO 2014, L 225, p. 1).

Findings of the Court

In the first place, as regards the scope of Article 5(1) of Delegated Regulation 2015/63, the Court recalls that, according to the case-law, the derogation provided for in that provision, which allows certain liabilities to be excluded from the calculation of ex ante contributions, must be interpreted strictly. It also points out that Article 5(1)(e) of that delegated regulation lays down three cumulative conditions for the exclusion of the liabilities concerned, namely that those liabilities must be held by an investment firm, that they must arise by virtue of holding client assets or client money and that the clients must be protected under the applicable insolvency law.

As regards the first condition, the Court observes that, according to Delegated Regulation 2015/63 [47] and Directive 2014/59, [48] the derogation in Article 5(1)(e) of that delegated regulation did not apply, at the time of the adoption of the contested decision, to entities which were both a credit institution and an investment firm, as was the case with the applicant. It considers that if the European Commission had intended Article 5(1)(e) of Delegated Regulation 2015/63 to cover credit institutions which are also investment firms, it would have referred in that provision to 'institutions' and not to 'investment firms', [49] whereas, in order to limit the application of an exception to certain entities, it used more precise wording. [50]

In that regard, the Court recalls that the definition of 'investment firm' in Directive 2014/59 was amended by Directive 2019/2034, [51] which refers, in fine, to the concept of 'investment firm' in Directive 2014/65. However, the amendment of that definition was applicable only from 26 June 2021. [52] Therefore, Article 5(1)(e) of Delegated Regulation 2015/63, in the version applicable at the time of the adoption of the contested decision on 14 April 2021, must be interpreted as not allowing liabilities held by credit institutions, such as the applicant, to be excluded from the calculation of liabilities used to determine their ex ante contribution. Thus, the applicant's fiduciary liabilities do not satisfy the first of the three cumulative conditions laid down in Article 5(1)(e) of that delegated regulation and the Court rejects the plea in its entirety.

In the second place, as regards the infringement of Article 103(7) of Directive 2014/59, the applicant submits, first, that its fiduciary liabilities are risk free and, second, that the failure to exclude those liabilities from the calculation of the ex ante contribution entails a breach of the principle of equal treatment.

First, the Court observes, as a preliminary point, that the Commission enjoys broad discretion in determining the criteria for adjusting ex ante contributions in proportion to the risk profile, and that the review by the Courts of the European Union must be limited to examining whether the exercise of such discretion has been vitiated by a manifest error or a misuse of power, or whether the limits of that discretion have been manifestly exceeded. Principally, the Court recalls, first of all, that under Article 103(7) of Directive 2014/59, there are eight factors which the Commission must take into account for the purposes of adjusting those contributions in proportion to the risk profile of institutions. Next, there is nothing in that provision to indicate that the Commission is required to give precedence to one or more of those factors, such as the risk exposure of the institution, nor does it

---

47 In Article 3(2).

48 In accordance with point (3) of Article 2(1) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

49 As it did in subparagraphs (a), (b) and (f) of that provision, by employing the term 'institution'.

50 Such as central counterparties, central securities depositories and investment firms.

51 Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ 2019 L 314, p. 64).

52 In accordance with the second subparagraph of Article 67(1) of Directive 2019/2034, read in the light of recital 39 of that directive.

specify, moreover, how the Commission must take account of that exposure. Lastly, and in any event, the applicant has not established that the fiduciary liabilities were risk free in the event of resolution. First, in the event of insolvency, German law does not grant special protection to clients' funds while they are in the collective account created by the applicant within itself and administered in its own name but on behalf of clients ('the transit account'), and, second, in order for those funds to be protected by the deposit guarantee scheme, the European credit institutions concerned ('the financial product institutions') must have their registered office in a Member State and clients must not invest more than EUR 100 000 in such institutions. That protection is therefore limited both territorially and quantitatively.

Second, the Court states, as regards the subject matter and purpose of Directive 2014/59, Regulation No 806/2014 and Delegated Regulation 2015/63, that those acts fall within the scope of the Single Resolution Mechanism, the establishment of which seeks [53] to ensure, inter alia, a neutral approach in dealing with failing institutions. In order to examine whether credit institutions which are also authorised to perform investment activities, such as the applicant, are in a situation comparable to that of the investment firms [54] as regards the taking into account of fiduciary liabilities for the purposes of calculating ex ante contributions, the Court points out, first of all, that those ex ante contributions are intended to finance resolution actions the adoption of which is subject to the condition that such action is necessary in the public interest. [55] Credit institutions and investment firms do not present a comparable risk as regards the adverse effects that their failure could have on financial stability, since investment firms do not have large portfolios of retail and corporate loans to individuals and undertakings and do not take deposits. That is all the more so since credit institutions and investment firms each have a different clientele.

In those circumstances, the likelihood of a credit institution, such as the applicant, being placed under resolution is higher than in the case of an investment firm. Those two categories of institution are therefore not in a comparable situation.

Similarly, their situation is not comparable as regards the treatment of fiduciary liabilities. Under German law, investment firms are required immediately to segregate funds received from clients in trust accounts opened with credit institutions. By contrast, credit institutions, such as the applicant, are not required to transfer those funds immediately from the transit account to the financial product institutions.

Therefore, the applicant has not established that the fiduciary liabilities held by investment firms were exposed to a level of risk comparable to that of the fiduciary liabilities held by credit institutions also authorised to perform investment activities.

Next, as regards the unequal treatment alleged to have resulted, in essence, from the fact that the SRB used the same method of calculating the basic annual contribution for all institutions, without taking account of the fact that certain Member States availed themselves of the derogation permitting them to disclose funds off the balance sheet liabilities which they administer in their own name but on behalf of third parties off the balance sheet, [56] the Court recalls that, as regards the determination of the liabilities to be taken into account for the purposes of calculating the ex ante contribution, Delegated Regulation 2015/63 defines 'total liabilities' as those defined in Directive 86/635 or in accordance with the International Financial Reporting Standards referred to in Regulation

---

53 In accordance with recital 12 of Regulation No 806/2014.

54 Such as those referred to in Article 5(1)(e) of Delegated Regulation 2015/63.

55 As mentioned in Article 14(2)(b) of Regulation No 806/2014, by avoiding inter alia the significant adverse effects that the liquidation of an institution would have on financial stability, in particular, by preventing contagion, including to market infrastructures, and by maintaining market discipline.

56 Under the third sentence of Article 10(1) of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ 1986 L 372, p. 1).

No 1606/2002. [57] Moreover, although funds which an institution administers in its own name but on behalf of third parties must, as a general rule and as is the case in Germany, be shown in that institution's balance sheet if it acquires legal title to the assets concerned, some Member States have opted for the derogation laid down in Directive 86/635 which permits institutions to disclose those liabilities off the balance sheet. That situation follows from the joint application of the provisions of Regulation No 806/2014 and of Directive 2014/59, read in the light of Directive 86/635, the validity of which has not been challenged by the applicant in the light of the principle of equal treatment.

As regards the failure to take account of the differences between the accounting rules of the various Member States as regards the inclusion of fiduciary liabilities in the balance sheet of institutions, the Court points out that the principle of equal treatment cannot empower the Commission, when it adopts delegated acts, to act beyond the delegated powers conferred on it by the EU legislature. In the present case, neither Directive 2014/59 nor Regulation No 806/2014 empowered the Commission to harmonise the national accounting rules in that regard. Thus, it cannot be claimed that the Commission breached the principle of equal treatment by not addressing those differences. Moreover, the prohibition on discrimination is not concerned with divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it. In the present case, the applicant has not claimed, let alone demonstrated, that the German legislation did not affect equally all persons subject to it. Furthermore, the adoption of EU legislation within a particular field of activity may affect certain traders in different ways because of their individual situation or the national rules to which they are subject; that fact cannot be regarded as a breach of the principle of equal treatment if that legislation is based on objective criteria which are adapted to meet the aims pursued by the legislation. No evidence has been submitted to the Court showing that Article 3(11) of Delegated Regulation 2015/63 was not based on objective criteria adapted to the aims pursued by Delegated Regulation 2015/63.

Lastly, as regards unequal treatment between the applicant and the credit institutions which draw up their balance sheets in accordance with international accounting standards, while, under German law, only parent companies may use that method, the Court points out, first, that that situation is the consequence of the application of a rule of German law and not of Delegated Regulation 2015/63 and, second, that the applicant could have prepared accounts in accordance with those accounting standards, but chose not to do so for administrative and financial reasons. The applicant cannot therefore rely on a difference in treatment on that basis.

In the third and last place, as regards the infringement of Article 5(1)(e) of Delegated Regulation 2015/63, in so far as that regulation does not allow the applicant's fiduciary liabilities to be excluded from the calculation of its ex ante contribution, the Court considers, first, that the SRB did not err in law by not excluding the amount of those liabilities from that calculation.

Second, it recalls that it has already been held by the Court of Justice that Article 5(1)(e) of Delegated Regulation 2015/63 does not confer any discretion on the competent authorities to exclude certain liabilities when adjusting ex ante contributions in proportion to risk, but rather lists precisely the conditions governing whether certain liabilities can be so excluded. Consequently, the SRB did not err in law when it did not apply, by analogy, Article 5(1)(e) of that delegated regulation. In addition, as regards the taking into account of the principle of equal treatment, that delegated regulation distinguished situations that have significant and specific features, directly linked to the risks inherent in the liabilities at issue. In the light of those considerations, the non-application by analogy of Article 5(1)(e) of that delegated regulation does not breach the principle of equal treatment. The same is true as regards the principle of proportionality, in respect of which the General Court considers that the applicant has merely made unsubstantiated assertions.

---

[57] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1).

Third, as regards the complaint that the taking into account the applicant's fiduciary liabilities in the calculation of its ex ante contribution would lead to those liabilities being counted twice, the Court finds, first of all, that the applicant does not explain which specific method of calculating ex ante contributions would be less onerous for the institutions, while being appropriate to achieve, in an equally effectively manner, the objectives pursued by the regulation. Furthermore, and in any event, no evidence capable of challenging the SRB's assertion relating to the conditions for entitlement to protection under the deposit guarantee scheme has been adduced. Lastly, no argument has been put forward to show that the Commission intended to eliminate entirely any form of double counting of liabilities.

Fourth, as regards the argument that the inclusion of the applicant's fiduciary liabilities in the calculation of its ex ante contribution does not satisfy the criterion of necessity, since, in the event of insolvency, its clients would be entitled to the segregation of the fiduciary assets managed by it, which shows that there are adequate guarantees of protection for those clients, the Court states that the applicant has not established that its clients' assets and money would be covered in the event of insolvency by guarantees comparable to those covering client assets and client money at investment firms,

Fifth, the Court observes that no specific evidence has been submitted to show that the inclusion of the fiduciary liabilities in the calculation of the ex ante contribution would lead to disadvantages which are manifestly disproportionate to the objectives of Directive 2014/59.

VIII. SOCIAL POLICY: INVOLVEMENT OF EMPLOYEES

Judgment of the Court of Justice (Second Chamber), 16 May 2024, Konzernbetriebsrat, C-706/22

Link to the full text of the judgment

Reference for a preliminary ruling – European company – Regulation (EC) No 2157/2001 – Article 12(2) – Involvement of employees – Registration of the European company – Conditions – Prior implementation of the negotiation procedure on the involvement of employees referred to in Directive 2001/86/EC – European company which was established and registered without employees but which became the parent company of subsidiaries employing employees – No obligation to conduct a negotiation procedure retrospectively – Article 11 – Misuse of a European company – Deprivation of the rights of employees to employee involvement – Prohibition

Ruling on a request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany) in the context of a dispute relating to negotiations on the involvement of employees in a European company ('an SE'), the Court of Justice holds that there is no obligation arising from the provisions of Regulation No 2157/2001 [58] and of Directive 2001/86 [59] for a holding SE, none of whose participating companies or their subsidiaries employ employees and which was registered without

58 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1).

59 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ 2001 L 294, p. 22).

such negotiations having first been conducted, to open those negotiations at a later stage on the ground that it subsequently acquired control of subsidiaries in one or more Member States which employ employees.

On 28 March 2013, O Holding SE, formed [60] by two companies established in the United Kingdom and Germany, which have no employees or subsidiaries [61] employing employees, was registered in the companies register for England and Wales without any negotiations on the involvement of employees [62] having taken place prior to that registration.

On 29 March 2013, O Holding SE became the sole shareholder of O Holding GmbH, which had its registered office in Hamburg (Germany) and a supervisory board, one third of which consisted of employee representatives. In June 2013, O Holding SE decided to convert O Holding GmbH into a limited partnership, called O KG. That change in legal form was registered in the companies register in September 2013 and, from that date, the involvement of the employees on the supervisory board came to an end. In addition, as from October 2017, O Holding SE moved its registered office to Hamburg.

Although O KG has around 816 employees and has subsidiaries in several Member States which employ a total of around 2 200 employees, its partners (O Holding SE, a limited partner, and O Management SE, a company with personal liability, with a registered office in Hamburg, whose sole shareholder is O Holding SE) do not have any employees.

Taking the view that the management of O Holding SE was obliged retrospectively to form a special negotiating body, since the latter had subsidiaries which had employees in several Member States, the group Works Council of O KG brought employment litigation proceedings. The referring court, before which the dispute was brought following the dismissal of that application, requests an interpretation by the Court of Article 12(2) of Regulation No 2157/2001, [63] read in conjunction with Articles 3 to 7 of Directive 2001/86. [64] It wonders whether there is an obligation arising from the provisions of Regulation No 2157/2001 and of Directive 2001/86 for an SE, none of whose participating companies or their subsidiaries employ employees and which was registered without negotiations on the involvement of employees having first been conducted, retrospectively to conduct such a negotiation procedure on the ground that that SE has acquired control of subsidiaries in several Member States which employ employees.

Findings of the Court

In the first place, the Court notes that it is apparent from a combined reading of Article 12(2) of Regulation No 2157/2001 and Article 3(1) to (3) of Directive 2001/86 that the negotiation procedure between the parties on arrangements for the involvement of employees in the SE with a view to concluding an agreement on those arrangements is, as a general rule, to be conducted during the formation of the SE and prior to its registration. In that context, the Court states that those provisions are not applicable to an SE already established, where the participating companies that established it did not, at the time of its establishment, employ employees and negotiations on the involvement of employees in the SE could not, therefore, be opened prior to its registration. In that regard, although Directive 2001/86 nevertheless provides for three situations in which the negotiation procedure on

60 In accordance with Article 2(2) of Regulation No 2157/2001.

61 Within the meaning of Article 2(c) of Directive 2001/86.

62 As provided for in Articles 3 to 7 of Directive 2001/86.

63 Under Article 12(2) of Regulation No 2157/2001, 'an SE may not be registered unless an agreement on arrangements for employee involvement pursuant to Article 4 of Directive 2001/86/EC has been concluded, or a decision pursuant to Article 3(6) of the Directive has been taken, or the period for negotiations pursuant to Article 5 of the Directive has expired without an agreement having been concluded.'

64 Articles 3 to 7 of Directive 2001/86 lay down the rules governing the negotiation procedure on the involvement of employees in an SE.

the involvement of employees may be opened at a later stage, the wording of that directive does not require the subsequent implementation of that procedure within an SE already established.

In the second place, the Court observes, first of all, that it follows from Directive 2001/86 [65] that both the securing of acquired rights as regards employee involvement and the negotiations between the parties on the concrete procedures for that involvement relate to 'the creation' and to 'the establishment' of an SE. According to the Court, that conclusion does not support the view that the negotiation procedure on the involvement of employees is to be opened subsequently within an SE already established. Next, the Court notes that there is nothing in Regulation No 2157/2001 [66] to indicate that the provisions of Directive 2001/86 relating to the negotiation procedure on employee involvement are to be applied mutatis mutandis to an SE already established where the participating companies that established it have begun to carry on an economic activity and thus to employ employees after its establishment. Lastly, the Court also notes that Directive 2001/86 does not contain any provision which would give rise to an obligation to open negotiations on the involvement of employees or which would extend the guarantee of employees' existing participation rights to situations in which structural changes are made to a holding SE already established by participating companies which do not employ employees, and do not have subsidiaries employing employees.

In the third and last place, ruling on the question whether an obligation to open a subsequent negotiation procedure within an SE already established might be required, pursuant to Article 11 of Directive 2001/86, [67] in the case of misuse of an SE for the purpose of depriving employees of their rights to employee involvement, the Court states that that article leaves a margin of discretion to the Member States as regards the choice of appropriate measures to be taken in that respect, subject to compliance with EU law, and does not lay down, where an SE is in a situation such as that at issue in the main proceedings, an obligation subsequently to open that negotiation procedure.

65 And, in particular, from recitals 3 and 6 to 8 of Directive 2001/86.

66 And, in particular, in recitals 1 and 2 thereof.

67 Article 11 of Directive 2001/86, entitled 'Misuse of procedures', provides that Member States must take appropriate measures in conformity with EU law 'with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights'.

IX. JUDGMENTS PREVIOUSLY DELIVERED

1. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR FAILURE TO FULFIL OBLIGATIONS

Judgment of the Court of Justice (First Chamber), 25 April 2024, Commission v Poland (Whistleblowers Directive), C-147/23

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Article 258 TFEU – Protection of persons who report breaches of Union law – Directive (EU) 2019/1937 – Failure to transpose and notify the transposition measures – Article 260(3) TFEU – Application for the imposition of a lump sum and a daily penalty payment – Criteria for establishing the amount of the sanction – Automatic application of a coefficient for seriousness – Determination of the capacity to pay of the Member State – Demographic criterion

Having found that the Republic of Poland has failed to fulfil its obligations under EU law by failing to transpose the 'Whistleblowers Directive' [68] and to notify the measures for its transposition, the Court examines the method applied by the Commission to determine the amount of the financial penalties.

Since measures transposing the Whistleblowers Directive had not been notified to the European Commission, that institution sent a letter of formal notice to the Republic of Poland on 17 January 2022 and addressed a reasoned opinion to that Member State on 15 July 2022, in which it asked the Republic of Poland to comply with its obligations within a period of two months. In its written responses, that Member State stated that the transposition measures would be published in the Polish Official Journal in January 2023, and then in August 2023.

In that context, the Commission asks the Court, first, to declare that the Republic of Poland has failed to fulfil its obligations to adopt the provisions necessary to transpose the Whistleblowers Directive and to notify them to the Commission and, second, to impose on it in that regard financial penalties in the amounts determined on the basis of the guidelines contained in the 2023 Communication. [1]

Findings of the Court

In the first place, with regard to whether a failure to fulfil obligations exists, the Court finds that, assuming that the Republic of Poland is of the view that the COVID-19 pandemic and the influx of refugees as a result of the aggression against Ukraine by Russia constitute a case of force majeure which prevented the Whistleblowers Directive from being transposed within the prescribed period, that Member State cites those events as justification for the delay in transposing that directive for the first time at the response stage. In addition, while those circumstances are beyond the control of the Republic of Poland and both abnormal and unforeseeable, the fact remains that it fell to that Member State to act with all due diligence by informing the Commission in good time of the difficulties it faced. Moreover, it is established that that Member State had still not proceeded with the transposition of the Whistleblowers Directive at the end of the written part of this procedure, that is to say, almost one year after the period laid down in the reasoned opinion had expired and over a year and a half after the expiry of the deadline for transposition provided for in that directive.

Thus, the failure to fulfil obligations cannot be justified by those circumstances, which can have had only an indirect impact on the process to transpose the Whistleblowers Directive.

---

68 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17) ('the Whistleblowers Directive').

In the second place, as regards the question whether the imposition of financial penalties is appropriate, the Court takes the view that, in the present case, both a lump sum and a daily penalty payment must be imposed.

With regard to the imposition of a lump sum payment, it observes that the fact that no provisions necessary for the transposition of the Whistleblowers Directive have been notified indicates that if the future repetition of similar infringements is to be prevented, such a dissuasive measure must be adopted. As for the daily penalty payment, taking into account the fact that the Republic of Poland's failure to fulfil its obligations continued up to the time of the Court's examination of the facts, the imposition on that Member State of a daily penalty payment is an appropriate financial means by which to ensure that it puts a prompt end to the failure established. However, the Court considers that it is appropriate to impose a penalty payment only in so far as the failure persists at the date of delivery of the judgment in this case.

In the third place, as regards the method of determining the amount of the financial penalties, the Court explains, in connection with the factor relating to the seriousness of the failure established, that the amount of the penalties imposed on a Member State must be appropriate to the circumstances and proportionate to the failure to fulfil obligations. The automatic application of the same coefficient for seriousness in all cases in which a directive is not fully transposed necessarily precludes the imposition of proportionate penalties.

In particular, by presuming that a failure to comply with the obligation to notify the transposition measures for a directive must be regarded as being of the same degree of seriousness regardless of the directive concerned, the Commission is unable to tailor the financial penalties according to the consequences of the failure to comply with that obligation on private and public interests, as provided for in the 2023 Communication. In that regard, that institution cannot rely on the principle of the equality of Member States to justify the automatic application of a single coefficient for seriousness, because it is quite clear that the consequences of Member States failing to comply with their obligations for the private and public interests concerned may vary not only from one Member State to another, but also depending on the normative content of the untransposed directive.

Accordingly, the Commission cannot discharge its obligation to assess, on a case-by-case basis, the consequences of the failure established for private and public interests. In the present case, the failure to comply with the obligation to transpose the Whistleblowers Directive is particularly serious because that directive is a crucial instrument of EU law, in that it is intended to protect persons who report breaches of EU law. In addition, the failure to transpose its provisions necessarily undermines compliance with EU law and its uniform and effective application.

As regards the capacity to pay, the Court observes that the method of calculating the 'n' factor, the criterion which reflects the deterrent effect of the penalty and is determined in the 2023 Communication for each Member State, primarily takes into account the GDP of the Member State concerned. Nevertheless, that method is based on the presumption that there is a correlation between the size of a Member State's population and its capacity to pay, which is not necessarily the case. Accordingly, taking into account a demographic criterion breaks the link between the 'n' factor and the actual capacity to pay of the Member State concerned, which may result in the determination of an 'n' factor that does not necessarily reflect that capacity.

Whilst taking account of a demographic criterion to fix the 'n' factor, with a view to determining the capacity to pay of the Member State concerned, does allow a certain gap to be maintained between the 'n' factors of the Member States, that objective cannot justify that Member State's capacity to pay being determined according to criteria which do not reflect that capacity.

Therefore, when determining the capacity to pay of the Member State concerned, a demographic criterion cannot be taken into account in accordance with the detailed rules laid down in the 2023 Communication as part of the method of calculating the 'n' factor.

In the fourth and final place, taking into consideration those clarifications, the Court fixes, in the present case, the amounts of the lump sum and the daily penalty payment.

In that context, it points out that the particularly serious nature of the failure established is heightened by the fact that, at the end of the written part of the procedure, the Republic of Poland had still not adopted the provisions necessary to transpose the Whistleblowers Directive.

In addition, despite the fact that there are certain provisions scattered throughout the Polish legal order which the Republic of Poland alleges are compatible with some of the requirements under the Whistleblowers Directive, the lack of clear and specific rules concerning the protection of persons who report breaches of EU law is a barrier to the effective protection of those persons and can therefore call into question the uniform and effective application of EU law in the areas covered by that directive.

The Court also observes that, in view of the fact that the Republic of Poland failed to adopt, within the period that it had announced, the provisions necessary to comply with the Whistleblowers Directive, its cooperation with the Commission during the pre-litigation procedure cannot be taken into account as a mitigating circumstance.

Thus, the Court takes the view that, in order effectively to prevent a repeat of infringements similar to that resulting from the infringement of the obligation to transpose the Whistleblowers Directive in the future, a lump sum must be imposed, the amount of which must be fixed at EUR 7 000 000. In the event that the failure established in that judgment were to persist on the date of delivery of that judgment, the Court orders the Republic of Poland to pay to the Commission, as from that date and until that Member State has put an end to that failure, a daily penalty payment in the amount of EUR 40 000.

2. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Grand Chamber), 30 April 2024, Procura della Repubblica presso il Tribunale di Bolzano, C-178/22

Link to the full text of the judgment

Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Confidentiality of communications – Providers of electronic communications services – Directive 2002/58/EC – Article 15(1) – Articles 7, 8, 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union – Access to those data requested by a national authority having competence to prosecute offences of aggravated theft – Definition of the concept of 'serious offence' the prosecution of which is capable of justifying serious interference with fundamental rights – Competence of the Member States – Principle of proportionality – Scope of prior review by a court of the requests to access the data retained by providers of electronic communications services

Following a request for a preliminary ruling from the Giudice delle indagini preliminari presso il Tribunale di Bolzano (judge in charge of preliminary investigations at the District Court, Bolzano, Italy), the Grand Chamber of the Court of Justice clarifies who is responsible for defining the concept of 'serious offence' for the purposes of applying Article 15(1) of the 'Privacy and Electronic Communications' Directive. [69] The Court also rules on the scope of the national court's prior review of requests for access to the data retained by providers of electronic communications services.

Following two thefts of mobile telephones, the Procura della Repubblica presso il Tribunale di Bolzano (Public Prosecutor's Office at the District Court, Bolzano, Italy) brought two sets of criminal

69 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ("'the Privacy and Electronic Communications Directive').

proceedings against unknown perpetrators for the commission of offences of aggravated theft. In order to identify the perpetrators of those thefts, that public prosecutor's office requested, on the basis of a provision of national law, [70] from the referring court, authorisation to obtain from all the telephone companies the telephone records of the stolen telephones.

Since the referring court was uncertain whether that national provision – which provides that the maximum term of imprisonment of at least three years in respect of which an offence is punishable may justify the disclosure of telephone records to the public authorities – is compatible with the 'Privacy and Electronic Communications' Directive, read in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), it has referred a question to the Court of Justice on the interpretation of that directive.

Findings of the Court

In the first place, as regards the nature of the interference with the fundamental rights to privacy and the protection of personal data, [71] caused by access to telephone records, the Court finds that that interference is likely to be classified as serious and that, consequently, such access may be granted only in the context of combating serious crime. The Court notes that for the purposes of assessing the existence of a serious interference with those fundamental rights, the fact that the data to which the access was requested may not be the data of the owners of the mobile telephones at issue, but the data of the persons who used those telephones after their alleged theft, is irrelevant. Indeed, it is apparent from the 'Privacy and Electronic Communications' Directive [72] that the obligation of principle to ensure the confidentiality of the electronic communications and the related traffic data effected covers communications made by the users of the public communications network. That directive defines the concept of 'user' as meaning any natural person using a publicly available electronic communications service, without necessarily having subscribed to that service.

In the second place, as regards the definition of the concept of 'serious offence', the Court recalls that, in so far as the European Union has not legislated in that field, criminal legislation and the rules of criminal procedure fall within the competence of the Member States. They must, however, exercise that competence in line with EU law

In that regard, the Court notes that the definition of criminal offences, mitigating and aggravating circumstances and penalties reflects both social realities and legal traditions, which vary not only between the Member States but also over time. However, those realities and traditions are of undoubted importance in determining serious offences.

Consequently, in view of the division of competences between the European Union and the Member States and the considerable differences between the national legal systems in the area of criminal law, it is for the Member States to define 'serious offences'.

However, the Court points out that that definition of 'serious offences' must comply with the requirements arising from the 'Privacy and Electronic Communications' Directive, [73] read in the light of the Charter. [74] It follows that the Member States cannot distort the concept of 'serious offence' and, by

---

Namely, Article 132(3) of the decreto legislativo n. 196 – Codice in materia di protezione dei dati personali, recante disposizioni per l'adeguamento dell'ordinamento nazionale al regolamento (UE) n. 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE (Legislative Decree No 196 establishing the Personal Data Protection Code, laying down provisions for the adaptation of national law to 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) of 30 June 2003 (Ordinary Supplement to GURI No 174 of 29 July 2003), in the version applicable to the dispute in the main proceedings.

Guaranteed in Articles 7 and 8 of the Charter.

72 Article 5(1) of the 'Privacy and Electronic Communications' Directive.

73 Article 15(1) of the 'Privacy and Electronic Communications' Directive.

74 Articles 7, 8, 11 and Article 52(1) of the Charter.

extension, that of ‘serious crime’, by including within it offences which are manifestly not serious offences, in the light of the societal conditions prevailing in the Member State concerned. It is in particular in order to ascertain that there is no such distortion that it is essential that, where there is the risk of a serious interference with fundamental rights, the national authorities’ access to the retained data be subject to a prior review carried out either by a court or by an independent administrative body.

In the third and last place, in order to assess whether the definition of ‘serious offences’ resulting from the national provision is not too broad, the Court notes, first, that a definition according to which ‘serious offences’, for the prosecution of which access to data may be granted, are those for which the maximum term of imprisonment is at least equal to a period determined by law, is based on an objective criterion.

Secondly, the Court nonetheless emphasises that the definition given, in national law, of ‘serious offences’ must not be so broad that access to those data becomes the rule rather than the exception. Thus, that definition cannot cover the vast majority of criminal offences, which would be the case if the minimum period were set at an excessively low level. However, a minimum period fixed by reference to a maximum term of imprisonment of three years does not appear, in that regard, to be excessively low.

That said, since the definition of ‘serious offences’ is established by reference not to a minimum penalty but to a maximum penalty, the Court does not rule out that access to data, constituting a serious interference with fundamental rights, may be requested for the purposes of prosecuting offences which do not, in actual fact, constitute serious crime.

Nonetheless, setting a minimum period above which the maximum term of imprisonment for an offence justifies the classification of that offence as a serious offence is not necessarily contrary to the principle of proportionality.

This seems to be the case of the national provision at issue, since that provision appears to cover, inter alia, cases in which access cannot be classified as a serious interference, because that access does not relate to a set of data liable to allow precise conclusions to be drawn concerning the private lives of the persons concerned.

In addition, the court or independent administrative body, acting in the context of a prior review, must be entitled to refuse or restrict that access where it finds that the interference with fundamental rights is serious even though it is clear that the offence at issue does not actually constitute serious crime.

Indeed, the court or body entrusted with carrying out the review must be able to strike a fair balance between, on the one hand, the legitimate interests relating to the needs of the criminal investigation and, on the other hand, the rights to privacy and protection of personal data.

In particular, that court or body must be able to exclude such access where it is sought in the context of proceedings for an offence which is manifestly not a serious offence.

The Court concludes from this that the ‘Privacy and Electronic Communications’ Directive, read in the light of the Charter, does not preclude a national provision which requires a national court to authorise access to a set of traffic or location data, if it is requested for the purposes of investigating criminal offences punishable by a maximum term of imprisonment of at least three years, on condition, however, that that court is entitled to refuse such access if it is requested in the context of an investigation into an offence which is manifestly not a serious offence, in the light of the societal conditions prevailing in the Member State concerned.

Judgment of the Court of Justice (Full Court), 30 April 2024, La Quadrature du Net and Others (Personal data and action to combat counterfeiting), C-470/21

Link to the full text of the judgment

Reference for a preliminary ruling – Processing of personal data and the protection of privacy in the electronic communications sector – Directive 2002/58/EC – Confidentiality of electronic communications – Protection – Article 5 and Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 11 and Article 52(1) – National legislation aimed at combating, through action by a public authority, counterfeiting offences committed on the internet – 'Graduated response' procedure – Upstream collection by rightholder organisations of IP addresses used for activities infringing copyright or related rights – Downstream access by the public authority responsible for the protection of copyright and related rights to data relating to the civil identity associated with those IP addresses retained by providers of electronic communications services – Automated processing – Requirement of prior review by a court or an independent administrative body – Substantive and procedural conditions – Safeguards against the risks of abuse and against any unlawful access to or use of those data

In recent years, the Court of Justice has been called upon, on several occasions, to rule on the retention of and access to personal data in the field of electronic communications and has consequently established an extensive body of case-law in this area. [75] Ruling on a preliminary ruling from the Conseil d'État (Council of State, France), the Court, sitting as the full Court, develops that case-law by providing clarifications concerning (i) the conditions under which the general retention of IP addresses by providers of electronic communications services cannot be regarded as entailing a serious interference with the rights to respect for private life, to the protection of personal data and to freedom of expression guaranteed by the Charter [76] and (ii) the possibility, for a public authority, to access certain personal data retained in accordance with those conditions, in the context of combating infringements of intellectual property rights committed online.

In the present case, four associations submitted a request to the Premier ministre (Prime Minister, France) seeking the repeal of the decree relating to the automated processing of personal data. [77] As that request was not acted upon, those associations brought an action before the Conseil d'État (Council of State) seeking the annulment of that implicit rejection decision. In their view, that decree and the provisions which constitute its legal basis [78] infringe EU law.

Under French law, the Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (High Authority for the dissemination of works and the protection of rights on the internet) ('Hadopi') is authorised – in order to be able to identify those responsible for infringements of

---

75 See, inter alia, judgments of 21 December 2016, Tele2 Sverige et Watson and Others (C-203/15 and C-698/15, EU:C:2016:970); of 2 October 2018, Ministerio Fiscal (C-207/16, EU:C:2018:788); of 6 October 2020, La Quadrature du Net and Others (C-511/18, C-512/18 and C-520/18, EU:C:2020:791); of 2 March 2021, Prokuratuur (Conditions of access to data relating to electronic communications) (C-746/18, EU:C:2021:152); of 17 June 2021, M.I.C.M. (C-597/19, EU:C:2021:492); and of 5 April 2022, Commissioner of An Garda Síochána and Others (C-140/20, EU:C:2022:258).

76 Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

77 Décret nº 2010-236, du 5 mars 2010, relatif au traitement automatisé de données à caractère personnel autorisé par l'article L. 331-29 du code de la propriété intellectuelle dénommé « Système de gestion des mesures pour la protection des œuvres sur internet » (Decree No 2010-236 of 5 March 2010 on the automated personal data processing system authorised by Article L. 331-29 of the code de la propriété intellectuelle (Intellectual Property Code), known as the 'System for the management of measures for the protection of works on the internet' (JORF No 56 of 7 March 2010, text No 19), as amended by décret nº 2017-924, du 6 mai 2017, relatif à la gestion des droits d'auteur et des droits voisins par un organisme de gestion de droits et modifiant le code de la propriété intellectuelle (Decree No 2017-924 of 6 May 2017 on the management of copyright and related rights by a rights management organisation and amending the Intellectual Property Code) (JORF No 109 of 10 May 2017, text No 176).

78 In particular, the third to fifth paragraphs of Article L. 331-21 of the Intellectual Property Code.

copyright or related rights committed online – to access certain data that providers of electronic communications services are required to retain. Those data relate to the civil identity of a person concerned associated with his or her IP address previously collected by rightholder organisations. Once the holder of the IP address used for activities constituting such infringements is identified, Hadopi follows the 'graduated response' procedure. Specifically, it is empowered to send that person two recommendations, which are similar to warnings, and, if the activities persist, a letter notifying him or her that those activities are subject to criminal prosecution. Finally, it is entitled to refer the matter to the public prosecution service with a view to the prosecution of that person. [79]

In that context, the Conseil d'État (Council of State) referred questions to the Court concerning the interpretation of the ePrivacy Directive, read in the light of the Charter. [80]

Findings of the Court

In the first place, as regards the retention of data relating to civil identity and the associated IP addresses, the Court states that the general and indiscriminate retention of IP addresses does not necessarily constitute, in every case, a serious interference with the rights to respect for private life, protection of personal data and freedom of expression guaranteed by the Charter.

The obligation to ensure such retention may be justified by the objective of combating criminal offences in general, where it is genuinely ruled out that that retention could give rise to serious interferences with the private life of the person concerned due to the possibility of drawing precise conclusions about that person by, inter alia, linking those IP addresses with a set of traffic or location data.

Accordingly, a Member State which intends to impose such an obligation on providers of electronic communications services must ensure that the arrangements for the retention of those data are such as to rule out the possibility that precise conclusions could be drawn about the private lives of the persons concerned.

The Court specifies that, to that end, the retention arrangements must relate to the very manner in which the retention is structured; in essence, that retention must be organised in such a way as to guarantee a genuinely watertight separation of the different categories of data retained. Accordingly, the national rules relating to those arrangements must ensure that each category of data, including data relating to civil identity and IP addresses, is kept completely separate from other categories of retained data and that that separation is genuinely watertight, by means of a secure and reliable computer system. In addition, in so far as those rules provide for the possibility of linking the retained IP addresses with the civil identity of the person concerned for the purpose of combating infringements, they must permit such linking only through the use of an effective technical process which does not undermine the effectiveness of the watertight separation of those categories of data. The reliability of that separation must be subject to regular review by a third-party public authority. In so far as the applicable national legislation provides for such strict requirements, the interference resulting from that retention of IP addresses cannot be categorised as 'serious'.

Consequently, the Court concludes that, in the presence of a legislative framework ensuring that no combination of data will allow precise conclusions to be drawn about the private life of the persons whose data are retained, the ePrivacy Directive, read in the light of the Charter, does not preclude a Member State from imposing an obligation to retain IP addresses, in a general and indiscriminate

---

79 With effect from 1 January 2022, Hadopi was merged with the Conseil supérieur de l'audiovisuel (Higher Council for the audiovisual sector) (CSA), another independent public authority, to form the Autorité de régulation de la communication audiovisuelle et numérique (Authority for the Regulation of Audiovisual and Digital Communications) (ARCOM). The graduated response procedure has, however, remained essentially unchanged.

80 Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('the ePrivacy Directive'), read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter.

manner, for a period not exceeding what is strictly necessary, for the purposes of combating criminal offences in general.

In the second place, as regards access to data relating to the civil identity associated with IP addresses, the Court holds that the ePrivacy Directive, read in the light of the Charter, does not preclude, in principle, national legislation which allows a public authority to access those data retained by providers of electronic communications services separately and in a genuinely watertight manner, for the sole purpose of enabling that authority to identify the holders of those addresses suspected of being responsible for infringements of copyright and related rights on the internet and to take measures against them. In that case, the national legislation must prohibit the officials having such access (i) from disclosing in any form whatsoever information concerning the content of the files consulted by those holders except for the sole purpose of referring the matter to the public prosecution service, (ii) from tracking in any way the clickstream of those holders and (iii) from using those IP addresses for purposes other than the adoption of those measures.

In that context, the Court notes inter alia that, even though the freedom of expression and the confidentiality of personal data are primary considerations, those fundamental rights are nevertheless not absolute. In balancing the rights and interests at issue, those fundamental rights must yield on occasion to other fundamental rights or public-interest imperatives, such as the maintenance of public order and the prevention of crime or the protection of the rights and freedoms of others. This is, in particular, the case where the weight given to those primary considerations is such as to hinder the effectiveness of a criminal investigation, in particular by making it impossible or excessively difficult to identify effectively the perpetrator of a criminal offence and to impose a penalty on him or her.

In the same context, the Court also refers to its case-law according to which, as regards the combating of criminal offences infringing copyright or related rights committed online, the fact that accessing IP addresses may be the only means of investigation enabling the person concerned to be identified tends to show that the retention of and access to those addresses is strictly necessary for the attainment of the objective pursued and therefore meets the requirement of proportionality. Moreover, not to allow such access would carry a real risk of systemic impunity for criminal offences committed online or the commission or preparation of which is facilitated by the specific characteristics of the internet. The existence of such a risk constitutes a relevant factor for the purposes of assessing, when balancing the various rights and interests in question, whether an interference with the rights to respect for private life, protection of personal data and freedom of expression is a proportionate measure in the light of the objective of combating criminal offences.

In the third place, ruling on whether access by the public authority to data relating to the civil identity associated with an IP address must be subject to a prior review by a court or an independent administrative body, the Court considers that the requirement of such prior review applies where, within the framework of national legislation, that access carries the risk of a serious interference with the fundamental rights of the person concerned in that it could allow that public authority to draw precise conclusions about the private life of that person and, as the case may be, to establish a detailed profile of that person. Conversely, that requirement of prior review is not intended to apply where the interference with fundamental rights cannot be classified as serious.

In that regard, the Court states that, where a retention framework which ensures a watertight separation of the various categories of retained data is put in place, access by the public authority to the data relating to the civil identity associated with the IP addresses is not, in principle, subject to the requirement of a prior review. Such access for the sole purpose of identifying the holder of an IP address does not, as a general rule, constitute a serious interference with the abovementioned rights.

However, the Court does not rule out the possibility that, in atypical situations, there is a risk that, in the context of a procedure such as the graduated response procedure at issue in the main proceedings, the public authority may be able to draw precise conclusions about the private life of the person concerned, in particular where that person engages in activities infringing copyright or related rights on peer-to-peer networks repeatedly, or on a large scale, in connection with protected works of particular types, revealing potentially sensitive information about aspects of that person's private life.

In the present case, an IP address holder may be particularly exposed to such a risk when the public authority must decide whether or not to refer the matter to the public prosecution service with a view

to the prosecution of that person. The intensity of the infringement of the right to respect for private life is likely to increase as the graduated response procedure, which is a sequential process, progresses through its various stages. The access of the competent authority to all of the data relating to the person concerned collected during the various stages of that procedure may enable precise conclusions to be drawn about the private life of that person. Accordingly, the national legislation must provide for a prior review which must take place before the public authority can link the civil identity data and such a set of data, and before sending a notification letter declaring that that person has engaged in conduct subject to criminal prosecution. That review must, moreover, preserve the effectiveness of the graduated response procedure by making it possible, in particular, to identify cases where the unlawful conduct in question has been again repeated. To that end, that procedure must be organised and structured in such a way that the civil identity data of a person associated with IP addresses previously collected on the internet cannot automatically be linked, by the persons responsible for the examination of the facts within the competent public authority, with information which the latter already has and which could enable precise conclusions to be drawn about the private life of that person.

Furthermore, as regards the object of the prior review, the Court notes that, where the person concerned is suspected of having committed an offence which falls within the scope of criminal offences in general, the court or independent administrative body responsible for that review must refuse access where that access would allow the public authority to draw precise conclusions about the private life of that person. However, even access allowing such precise conclusions to be drawn should be authorised in cases where the person concerned is suspected of having committed an offence considered by the Member State concerned to undermine a fundamental interest of society and which thus constitutes a serious crime.

The Court also states that a prior review may in no case be entirely automated since, in the case of a criminal investigation, such a review requires that a balance be struck between, on the one hand, the legitimate interests relating to combating crime and, on the other hand, respect for private life and protection of personal data. That balancing requires the intervention of a natural person, all the more so where the automatic nature and large scale of the data processing in question poses privacy risks.

Thus, the Court concludes that the possibility, for the persons responsible for examining the facts within that public authority, of linking such data relating to the civil identity of a person associated with an IP address with files containing information that reveals the title of protected works the making available of which on the internet justified the collection of IP addresses by rightholder organisations is subject, in cases where the same person again repeats an activity infringing copyright or related rights, to review by a court or an independent administrative body. That review cannot be entirely automated and must take place before any such linking, as such linking is capable, in such circumstances, of enabling precise conclusions to be drawn about the private life of the person whose IP address has been used for activities that may infringe copyright or related rights.

In the fourth and last place, the Court notes that the data processing system used by the public authority must be subject, at regular intervals, to a review by an independent body acting as a third party in relation to that public authority. The purpose of that control is to verify the integrity of the system, including the effective safeguards against the risks of abusive or unlawful access to or use of those data, and its effectiveness and reliability in detecting potential offending conduct.

In that context, the Court observes that, in the present case, the automated processing of personal data carried out by the public authority on the basis of the information relating to instances of counterfeiting detected by the rightholder organisations is likely to involve a certain number of false positives and, above all, the risk that a potentially very significant amount of personal data may be misused by third parties for unlawful or abusive purposes, which explains the need for such a review.

In addition, it adds that that processing must comply with the specific rules for the protection of personal data laid down by Directive 2016/680. [81] In the present case, even if the public authority does not have decision-making powers of its own in the context of the 'graduated response' procedure, it must be classified as a 'public authority' involved in the prevention and detection of criminal offences and therefore falls within the scope of that directive. Thus, the persons involved in such a procedure must enjoy a set of substantive and procedural safeguards referred to in Directive 2016/680; it is for the referring court to ascertain whether the national legislation provides for those safeguards.

3. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS

Judgment of the Court (Grand Chamber) of 30 April 2024, M.N. (EncroChat), C-670/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2014/41/EU – European Investigation Order (EIO) in criminal matters – Obtaining of evidence already in the possession of the competent authorities of the executing State – Conditions for issuing an EIO – Encrypted telecommunications service – EncroChat – Need for the decision of a judge – Use of evidence obtained in breach of EU law

In a reference from the Landgericht Berlin (Regional Court, Berlin, Germany) for a preliminary ruling, the Grand Chamber of the Court of Justice rules on the conditions under which a public prosecutor may issue a European Investigation Order (EIO) in criminal matters where the issuing authority of a Member State wishes to secure the transmission of intercepted telecommunications data already in the possession of another Member State. It also clarifies the consequences, so far as the use of the data is concerned, of a breach of the relevant EU legislation.

In the context of an investigation carried out by the French authorities, it appeared that accused persons were using mobile phones encrypted through the 'EncroChat' service in order to commit offences primarily related to drug trafficking. That service enabled encrypted communication, via a server in France, that could not be intercepted by conventional investigative means.

In the spring of 2020, with the authorisation of a French court, a piece of Trojan software developed by a French-Dutch investigation team was uploaded to that server and, from there, installed on the mobile phones of users in 122 countries, including approximately 4 600 users in Germany.

At a conference organised by Eurojust [82] in March 2020, the representatives of the French and Netherlands authorities informed the authorities of other Member States of their planned interception of data, including data from mobile phones located outside French territory. The representatives of the Bundeskriminalamt (Federal Criminal Police Office, Germany; 'the BKA') and of the Generalstaatsanwaltschaft Frankfurt am Main (Public Prosecutor's Office, Frankfurt am Main, Germany; 'the Frankfurt Public Prosecutor's Office') signalled their interest in the data of the German users.

---

81 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

82 European Union Agency for Criminal Justice Cooperation.

Between June 2020 and July 2021, in proceedings brought against X, the Frankfurt Public Prosecutor's Office issued EIOs for the purpose of requesting authorisation from the French authorities to use the data collected by them without restriction in criminal proceedings. It justified its request by explaining that the BKA had been informed by Europol that a large number of very serious criminal offences were being committed in Germany with the aid of mobile phones equipped with the 'EncroChat' service, and that as yet unidentified persons were suspected of planning and committing such offences in Germany using encrypted communications. A French court authorised the transmission and use in judicial proceedings of the data intercepted from German users.

The Frankfurt Public Prosecutor's Office subsequently reassigned the investigations, inter alia, in respect of M.N., to local public prosecutor's offices. In one of the criminal proceedings brought before it, the referring court queries the lawfulness of those EIOs in the light of Directive 2014/41 [83] and the consequences of a possible infringement of EU law for the use, in those proceedings, of the intercepted data. It therefore decided to refer questions to the Court of Justice for a preliminary ruling.

Findings of the Court

In the first place, the Court notes that the concept of 'issuing authority', within the meaning of Directive 2014/41, is not limited to judges. In fact the public prosecutor is included, in Article 2(c)(i) of that directive, among the authorities which are understood to be an 'issuing authority', subject to the sole condition that they should have competence in the case concerned. Accordingly, in so far as, under the law of the issuing State, a public prosecutor is competent, in a purely domestic situation in that State, to order an investigative measure for the transmission of evidence already in the possession of the competent national authorities, that public prosecutor is covered by the concept of 'issuing authority' for the purposes of issuing an EIO for the transmission of evidence that is already in the possession of the competent authorities of the executing State.

In the second place, it follows from Article 6(1) of Directive 2014/41 that an EIO for the transmission of evidence acquired, such as that at issue in the main proceedings, which is already in the possession of the competent authorities of the executing State, must satisfy all the conditions that may be laid down by the national law of the issuing State for the transmission of such evidence in a purely domestic situation in that State.

However, while Article 6(1)(b) of Directive 2014/41 seeks to ensure that the rules and guarantees provided for by the national law of the issuing State are not circumvented, it does not require – including in a situation such as that at issue in the main proceedings, where the data in question were gathered by the competent authorities of the executing State on the territory of the issuing State and in its interest – that the issuing of an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State should be subject to the same substantive conditions as those that apply, in the issuing State, in relation to the gathering of that evidence.

Moreover, in the light of the principle of mutual recognition of judgments and judicial decisions underpinning judicial cooperation in criminal matters, to which Directive 2014/41 relates, the issuing authority is not authorised to review the lawfulness of the separate procedure by which the executing Member State gathered the evidence already in the possession of that Member State and whose transmission is sought by the issuing authority.

The Court also makes clear that, first, Article 6(1)(a) of Directive 2014/41 does not require that the issuing of such an EIO is necessarily subject to the existence, at the time when that EIO is issued, of a suspicion, based on specific facts, of a serious offence in respect of each person concerned, if no such requirement arises under the national law of the issuing State for the transmission of evidence between national public prosecutor's offices. Secondly, that provision does not, moreover, preclude

---

83 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1).

an EIO from being issued where the integrity of the intercepted data cannot be verified at that stage because of the confidentiality of the technology underpinning the interception, provided that the right to a fair trial is guaranteed in the subsequent criminal proceedings. Indeed, the integrity of the evidence transmitted can, in principle, be assessed only when the competent authorities actually have the evidence in question at their disposal.

In the third place, the Court notes that the infiltration of terminal devices for the purpose of gathering traffic, location and communication data of an internet-based communication service constitutes an 'interception of telecommunications', within the meaning of Article 31(1) of Directive 2014/41, which must be notified to the authority designated for that purpose by the Member State on whose territory the subject of the interception is located. Should the intercepting Member State not be in a position to identify the competent authority of the notified Member State, that notification may be submitted to any authority of the notified Member State that the intercepting Member State considers appropriate for that purpose.

Under Article 31(3) of Directive 2014/41, the competent authority of the notified Member State may then, if the interception would not be authorised in a similar domestic case, indicate that the interception may not be carried out or is to be terminated, or that any material already intercepted may not be used, or may only be used under conditions which it is to specify. Article 31 of Directive 2014/41 is thus intended not only to guarantee respect for the sovereignty of the notified Member State but also to protect the rights of persons affected by such an interception of telecommunications.

Finally, the Court points out that it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment in criminal proceedings of information and evidence obtained in a manner contrary to EU law.

However, Article 14(7) of Directive 2014/41 requires Member States to ensure, without prejudice to the application of national procedural rules, that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. Consequently, if a court takes the view that a party is not in a position to comment effectively on such a piece of evidence that is likely to have a preponderant influence on the findings of fact, that court must find an infringement of the right to a fair trial and disregard that evidence.

4. ENVIRONMENT: FRAMEWORK FOR EU ACTION IN THE FIELD OF WATER POLICY

Judgment of the Court of Justice (Second Chamber), 25 April 2024, Sweetman, C- 301/22

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Directive 2000/60/EC – Framework for EU action in the field of water policy – Article 4(1)(a) – Environmental objectives relating to surface water – Obligation of the Member States not to authorise a project which may cause a deterioration of the status of a surface water body – Article 5 and Annex II – Characterisation of surface water body types – Article 8 and Annex V – Classification of surface water status – Article 11 – Programme of measures – Project for the abstraction of water from a lake with a surface area below 0.5 km²

Ruling on a request for a preliminary ruling from the High Court (Ireland), the Court of Justice clarifies Member States' environmental obligations under Directive 2000/60 [84] in relation to small lakes situated in their territories.

In July 2018 An Bord Pleanála (Planning Board, Ireland) granted consent for a development project seeking to abstract freshwater from a lake with an area of 0.083 km² situated in County Galway (Ireland).

By judgment of 15 January 2021, the High Court set aside that decision granting consent on the ground that the Environmental Protection Agency ('the EPA') had failed to assign an ecological status to the lake in question, as required by Directive 2000/60.

After that judgment had been delivered, a party to the proceedings before the High Court sought the view of the EPA. In response, the EPA's view was that the lake in question did not constitute a water body falling within Directive 2000/60.

Taking the view that the EPA's position had the potential to affect the outcome of the case, the High Court decided to reopen the case and to put questions to the Court of Justice concerning Member States' obligations under Directive 2000/60 regarding the characterisation and classification of the status of small lakes and regarding the conditions for authorising a project which potentially affects a small lake which has not been characterised nor has its status been classified under that directive.

Findings of the Court

As regards, in the first place, the obligation of the Member States to characterise lakes and classify their ecological status, the Court recalls that, in order to ensure the preservation or restoration of good status of surface water, Directive 2000/60 lays down a series of provisions establishing a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures, on the basis of the specific features and characteristics of the bodies of water identified in their territories.

As regards, more specifically, the Member States' obligation to characterise lakes within their territory, Article 5 of Directive 2000/60 requires an analysis of the characteristics of each river basin district to be undertaken, according to the technical specifications set out in Annex II to that directive. It is clear from the wording of that annex that the obligation to establish type-specific reference conditions for

84 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

surface water body types which it lays down does not relate to lakes with a surface area below 0.5 km².

Since Member States are not required to characterise, under Article 5 of, and Annex II to, Directive 2000/60, lakes with a surface area below 0.5 km², it follows logically that they are also not obliged to classify the ecological status of such lakes, in accordance with Article 8 of, and Annex V to, that directive. That interpretation is supported in particular by a combined reading of Annexes II and V to Directive 2000/60.

Nevertheless, those observations do not prevent the Member States which consider it appropriate to make certain types of lakes with a surface area below 0.5 km² subject to the characterisation and classification requirements laid down in Directive 2000/60.

In the second place, as regards national authorities' obligations when authorising a project which potentially affects a small lake which has not been characterised or had its ecological status classified, the Court notes that the obligations to prevent deterioration and to enhance bodies of surface water, laid down in Article 4 of Directive 2000/60, do not cover lakes whose surface area is below 0.5 km² and which have not been grouped together by the Member States for the purposes of characterisation under that directive in accordance with the option provided for in Annex II thereto.

It would be incompatible with the scheme of Directive 2000/60, and in particular with the complex nature of the process established by that directive, if the binding nature of the environmental objectives specified in Article 4(1) of that directive were also to concern bodies of surface water which did not, and were not required to, undergo a characterisation or classification, since the rationale of characterisation or classification is, however, to enable the data which is necessary to achieve those objectives to be obtained.

That being so, since the lake at issue in the main proceedings is linked to the Kilkieran Bay and Islands Special Area of Conservation by a direct tidal connection, the Court points out that, in accordance with Article 4 of Directive 2000/60, unless a derogation is granted, the competent authority of a Member State is required to refuse to grant consent for a project where its effects on a lake with a surface area below 0.5 km² may cause a deterioration of the status of another surface water body which has been or ought to have been the subject of a characterisation under Directive 2000/60, or where it may compromise the attainment of good surface water status or of good ecological potential and good chemical status of such other surface water body.

Furthermore, it is also for the competent authority to ascertain whether the achievement of the project in question is compatible with the measures implemented pursuant to the programme established, in accordance with Article 11 of Directive 2000/60, for the river basin district concerned, in order to achieve the objectives of that directive. It follows from the wording of that provision that the scope of a programme of measures is not limited solely to surface water body 'types' characterised in the implementation of Article 5 of, and Annex II to, Directive 2000/60.

In particular, Article 11(3)(c) of Directive 2000/60 provides that the 'basic measures', which must be included in each programme of measures and constitute the minimum requirements to be complied with, must include measures to promote an efficient and sustainable water use so as to avoid compromising the achievement of the objectives specified in Article 4 of that directive.

In view of the fact that the quality of a small surface water element can affect the quality of another larger element, protection of waters falling within surface water bodies which, like the lake at issue in the main proceedings, have not been and did not have to be characterised under Directive 2000/60 may prove necessary in that context. For the same reason, it may prove to be necessary to apply controls over the abstraction of water to those small sized surface water bodies, as referred to in Article 11(3)(e) of Directive 2000/60 and point (viii) of Part B of Annex VI thereto.

Nota bene:

The résumés of the following cases are currently being finalised and will be published in a future issue of the Monthly Case-Law Digest:

- Judgment of the Court of Justice (Second Chamber), 30 May 2024, Expedia, C-663/22
- Judgment of the Court of Justice (First Chamber), 30 May 2024, Finanzamt Köln-Süd (Voluntary assessment requested by a partially taxable person), C-627/22
- Judgment of the General Court (Sixth Chamber), 8 May 2021, France v Commission, T-555/22
- Judgment of the General Court (Ninth Chamber), 29 May 2024, Belavia v Council, T-116/22
- Judgment of the General Court (Eighth Chamber, Extended Composition), 29 May 2024, Portigon v SRB, T-360/21
- Judgment of the General Court (Eighth Chamber, Extended Composition), 29 May 2024, Hypo Vorarlberg Bank v SRB (Contributions ex ante 2022), T-395/22