



Advocate General Hogan: a third State may have legal standing in an action for annulment of restrictive measures adopted by the Council against that State

The General Court erred in law in so far as it held that the action was inadmissible for want of standing on the part of the Bolivarian Republic of Venezuela

On 13 November 2017, the Council of the European Union adopted Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela. On 6 February 2018, the Bolivarian Republic of Venezuela brought an action before the General Court for annulment against the Regulation, in so far as its provisions concern it. In its judgment of 20 September 2019¹, the General Court held that the Bolivarian Republic of Venezuela had not demonstrated that it was directly concerned by the measures within the meaning of the fourth paragraph of Article 263 TFEU. It followed, therefore, that the Bolivarian Republic of Venezuela lacked the necessary standing to maintain its annulment action and the proceedings were accordingly held by the General Court to be inadmissible on that basis. The present case concerns an appeal brought on 28 November 2019 by the Bolivarian Republic of Venezuela (the appellant) against the judgment of the General Court.

In today's Opinion, Advocate General Gerard Hogan proposes that the Court of Justice should rule that **the General Court erred in law in so far as it held that the present proceedings were inadmissible for want of standing on the part of the appellant for the purposes of the fourth paragraph of Article 263 TFEU**. He further suggests that the present proceedings should be remitted to the General Court so that it can proceed to adjudicate on all remaining admissibility issues arising in the annulment proceedings brought by the Bolivarian Republic of Venezuela and on the substance of its action.

The Court, by decision dated 7 July 2020, decided to request the appellant, the Council, the European Commission and the Member States to adopt a position in writing on whether a third State is to be regarded as a legal person within the meaning of the fourth paragraph of Article 263 TFEU. Written observations on this question were submitted by the appellant, the Council, the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, the Kingdom of Sweden and the Commission.

Prior to examining the question of direct concern, Advocate General Hogan begins by examining the question of whether the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU.

Advocate General Hogan notes that it is clear that the issue of *locus standi* of the appellant raises not only the general question of whether the concept of 'legal person' pursuant to the fourth paragraph of Article 263 TFEU includes third States, but it also concerns the narrower question of whether the Court has jurisdiction to rule in an action for annulment of restrictive measures brought by a third State. In this regard, Advocate General Hogan refers to settled case-law² and finds that

¹ Judgment of 20 September 2019, *Venezuela v Council* (Case [T-65/18](#)).

² Judgment of 28 March 2017, *Rosneft* (Case [C-72/15](#)), see also Press Release No [34/17](#).

EU Courts have jurisdiction to rule on the validity of restrictive measures adopted pursuant to Article 215 TFEU provided that the applicant complies with the criteria laid down in Article 263 TFEU.

On whether the appellant is a legal person

Having looked at International law precedents on the matter, the Advocate General notes that the established State practice is that the traditional principles of comity accorded to all sovereign States ensure that, save in the case of actual hostilities, such States are permitted to sue in the courts of another sovereign. He finds that it is appropriate that the Union's judicature should follow the established public international law practice and the associated principle of judicial comity, which would also be followed by the individual courts of the Member States in the event that they had adopted restrictive measures of this kind in their own right. That practice and that principle accordingly requires that the Courts of the Union should be open to challenges brought by other sovereign States in their capacity as legal persons.

The Advocate General then examines existing precedents before the EU Courts and finds that, while the Court has never ruled directly on this point, the existing case-law of the General Court and the Court of Justice on standing would nonetheless all tend to suggest that the appellant is a legal person for the purposes of the fourth paragraph of Article 263 TFEU. He adds that, as the General Court stated in its order of 10 September 2020, *Cambodia and CRF v Commission*³, the provisions of the fourth paragraph of Article 263 TFEU must be given a purposive interpretation and to exclude third States from the judicial protection granted under that article would run counter to its objective. In addition, respect for the rule of law and the principle of effective judicial protection also argues in favor of a ruling that the appellant is a 'legal person' for the purposes of the fourth paragraph of Article 263 TFEU. He further concludes that allowing a third State access to the EU Courts pursuant to those conditions, far from placing the EU at a disadvantage either internally or externally, ensures above all that the rule of law is adhered to.

Advocate General Hogan therefore considers that the appellant must be regarded as a legal person pursuant to Article 263 TFEU, its status as a third State notwithstanding.

On the question of Direct Concern

Advocate General Hogan notes that the condition according to which a natural or legal person must be directly affected by the decision forming the subject matter of the action, as provided for in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely that the measure at issue, first, must directly affect the legal situation of the individual and, secondly, it must leave no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules.

In this respect, he finds that it is clear from the judgment under appeal that the General Court only examined the first of the two cumulative criteria and found, in effect, that the contested provisions did not directly affect the legal situation of the appellant. He notes that, according to the General Court, the contested provisions at most are likely to have indirect effects on the appellant as the prohibitions imposed on natural persons who are nationals of a Member State and on legal persons constituted under the law of one of them could have the effect of limiting the sources from which the appellant can obtain the goods and services subject to those prohibitions. Advocate General Hogan observes that the General Court's analysis is simply at odds with the reality of the restrictive measures in question. Those measures were especially aimed at and were designed to affect the Bolivarian Republic of Venezuela.

The Advocate General explains the latter assertion on the basis, firstly, that the prohibitions contained in the contested provisions specifically identify and target the appellant and various emanations of that State and, secondly, that the fact that those prohibitions are limited to the

³ Order of 10 September 2020, *Cambodia and CRF v Commission* ([T-246/19](#))

territory of the Union and that the contested provisions do not impose prohibitions on the appellant *per se* does not mean that the contested provisions do not directly affect the appellant's legal situation.

Advocate General Hogan adds that the Court has repeatedly stated that, given its significant negative impact on the freedoms and fundamental rights of the person or of the entity concerned, any inclusion in a list of persons or entities subject to restrictive measures, whether based on Article 215 TFEU or on Article 291(2) TFEU, allows that person or entity access to the Courts of the European Union, in that it is similar, in that respect, to an individual decision, in accordance with the fourth paragraph of Article 263 TFEU.

Advocate General Hogan finds that the *Almaz-Antey* judgment⁴, cited by the appellant, should be applied by analogy in the present case. In his view, the contested provisions prevent the appellant from purchasing certain specified goods and services from certain defined EU operators and thus directly affects the appellant's legal rights and interests.

Finally Advocate General Hogan remarks that the approach to direct concern advocated in this Opinion in respect of the appellant does not create any new rule or 'legal avenue' which automatically grants standing to third States in actions for annulment under Article 263 TFEU in respect of restrictive measures. Rather, what is being proposed is that the Court follow its existing case-law and merely adapt it to this novel action. Furthermore, the rules on standing laid down in Article 263 TFEU, and in particular the fourth paragraph thereof, are based on the objective criteria which have been laid down in that Treaty and interpreted by the EU Courts, rather than on the existence or absence of any reciprocal arrangements on standing between the EU and third States.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may, under certain conditions, be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

⁴ Judgment of 13 September 2018, *Almaz-Antey Air and Space Defence v Council* ([T-515/15](#))