COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

MONTHLY CASE-LAW DIGEST
July 2021

I. VALUES OF THE UNION

Judgment of the Court (Grand Chamber) of 15 July 2021,
Commission v Poland (Régime disciplinaire des juges), C-791/19

Link to the complete text of the judgment

Failure of a Member State to fulfil obligations – Disciplinary regime applicable to judges – Rule of law – Independence of judges – Effective legal protection in the fields covered by Union law – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Disciplinary offences resulting from the content of judicial decisions – Independent disciplinary courts or tribunals established by law – Respect for reasonable time and the rights of the defence in disciplinary proceedings – Article 267 TFEU – Restriction of the right of national courts to submit requests for a preliminary ruling to the Court of Justice and of their obligation to do so

In 2017, Poland adopted a new disciplinary regime concerning judges of the Sąd Najwyższy (Supreme Court, Poland) and judges of the ordinary courts. In the context of that legislative reform, a new chamber, the Izba Dyscyplinarna ('the Disciplinary Chamber'), was established within the Supreme Court. That chamber was made responsible, inter alia, for hearing disciplinary cases relating to judges of the Supreme Court and, on appeal, those relating to judges of the ordinary courts.

Taking the view that, by adopting that new disciplinary regime, Poland had failed to fulfil its obligations under EU law, [1] the European Commission brought an action for failure to fulfil obligations before the Court of Justice. The Commission submits, in particular, that that disciplinary regime guarantees neither the independence nor the impartiality of the Disciplinary Chamber, which is made up exclusively of judges selected by the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS'), a body which has 23 of its 25 members appointed by the political authorities.

In the judgment delivered in that case, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations brought by the Commission. First, the Court finds that the new disciplinary regime for judges undermines their independence. Second, that regime does not enable the judges concerned to comply, acting with complete independence, with their obligations under the preliminary ruling mechanism.

Findings of the Court

First, the Court finds that Poland has failed to fulfil its obligations, under the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The Court recalls that, according to its settled case-law, the second subparagraph of Article 19(1) TEU and the requirement that judges be independent deriving from that provision mean that the disciplinary regime applicable to judges of the national courts which come within their judicial systems in the fields covered by EU law must provide the necessary guarantees in order to prevent any risk of such a regime being used as a system of political control of the content of judicial decisions, which presupposes, inter alia, rules which define the forms of conduct amounting to disciplinary offences, which provide for the intervention of an independent body in accordance with a

[1] The Commission considered that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU – which lays down the obligation, for the Member States, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law – and under the second and third paragraphs of Article 267 TFEU – which gives certain national courts the discretion (second paragraph) to make a reference for a preliminary ruling, and places others under the obligation (third paragraph) to do so.

procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the decisions of disciplinary bodies.

However, according to the Court, Poland has, in the first place, failed to guarantee the independence and impartiality of the Disciplinary Chamber and has thereby undermined the independence of judges by failing to ensure that disciplinary proceedings brought against them will be reviewed by a body offering such guarantees. In accordance with the principle of the separation of powers, the independence of the judiciary must be ensured in relation to the legislature and the executive. Nevertheless, under the 2017 legislative reform, the process for appointing judges to the Supreme Court and, in particular, for appointing the members of the Disciplinary Chamber of the Supreme Court is essentially determined by the KRS – a body which has been significantly reorganised by the Polish executive and legislature. The Court also notes that the Disciplinary Chamber is to be made up exclusively of new judges selected by the KRS who were not already sitting within the Supreme Court and who will benefit from, inter alia, a very high level of remuneration and a particularly high degree of organisational, functional and financial autonomy in comparison with the conditions prevailing in the other judicial chambers of that court. All of those factors are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that disciplinary body to the direct or indirect influence of the Polish legislature and executive, as well as its neutrality with respect to the interests before it.

The Court notes, in the second place, while taking into account, in that regard, the fact that the independence and impartiality of the Disciplinary Chamber are thus not guaranteed, that Poland has allowed the content of judicial decisions to be classified as a disciplinary offence as regards judges of the ordinary courts. Recalling the need to avoid the disciplinary regime being used in order to exert political control over judicial decisions or to exert pressure on judges, the Court notes that, in the present case, the new disciplinary regime for judges, which does not meet the requirements of clarity and precision as regards the forms of conduct likely to trigger the liability of judges, also undermines the independence of those judges.

In the third place, Poland has also failed to guarantee that disciplinary cases brought against judges of the ordinary courts will be examined within a reasonable time, thereby once again undermining the independence of those judges. According to the new disciplinary regime, a judge who has been the subject of disciplinary proceedings closed by a final ruling may once again be subject to such proceedings in the same case, such that that judge permanently remains under the potential threat of such proceedings. In addition, the new procedural rules applicable to disciplinary proceedings concerning judges are liable to restrict the rights of defence of accused judges. Under those new rules, actions relating to the appointment of a judge's defence counsel and the taking up of the defence by that counsel do not suspend the proceedings, not to mention the fact that the proceedings may continue despite the justified absence of the judge or his or her defence counsel. Moreover, the new procedural rules referred to above may, especially where, as in the present case, they are applied in the context of a disciplinary regime displaying the shortcomings already noted above, increase the risk of the disciplinary regime being used as a system of political control of the content of judicial decisions.

In the fourth place, the Court finds that, by conferring on the President of the Disciplinary Chamber referred to above the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in disciplinary cases relating to judges of the ordinary courts, Poland has failed to guarantee that such cases will be examined by a tribunal 'established by law' as is also required by the second subparagraph of Article 19(1) TEU.

Second, the Court finds that, by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU. The provisions of national legislation from which it follows that national judges may be exposed to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot be accepted, because they undermine the effective exercise by the national judges concerned of the discretion or the obligation, provided by those provisions, to make a reference for a preliminary ruling to the Court of Justice, as well as the system of

cooperation between the national courts and the Court of Justice thus established by the Treaties in order to secure uniformity in the interpretation of EU law and to ensure the full effect of that law.

II. FUNDAMENTAL RIGHTS

Judgment of the Court (Grand Chamber) of 15 July 2021, WABE, C-804/18 and C-341/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Prohibition of discrimination on the grounds of religion or belief – Internal rule of a private undertaking prohibiting the wearing of any visible political, philosophical or religious sign or the wearing of conspicuous, large-sized political, philosophical or religious signs in the workplace – Direct or indirect discrimination – Proportionality – Balancing the freedom of religion and other fundamental rights – Legitimacy of the policy of neutrality adopted by the employer – Need to establish economic loss suffered by the employer

IX and MJ, who are employed in companies governed by German law as a special needs carer and a sales assistant and cashier respectively, wore an Islamic headscarf at their respective workplaces.

Taking the view that the wearing of such a headscarf did not correspond to the policy of political, philosophical and religious neutrality pursued with regard to parents, children and third parties, IX's employer, WABE eV ('WABE') asked her to remove that headscarf and, following her refusal, temporarily suspended her from her duties on two occasions and gave her a warning. MJ's employer, MH Müller Handels GmbH ('MH'), following MJ's refusal to remove that headscarf at her workplace, first transferred her to another post in which she could wear that headscarf and then, after sending her home, instructed her to attend her workplace without conspicuous, large-sized signs of any political, philosophical or religious beliefs.

IX brought an action before the Arbeitsgericht Hamburg (Hamburg Labour Court, Germany) seeking an order that WABE remove from her personal file the warnings concerning the wearing of the Islamic headscarf. As for MJ, she brought an action before the national courts seeking a declaration that MH's instruction was invalid and compensation for the damage suffered. MJ's action before those courts was upheld and MH subsequently brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany).

In that context, the two courts decided to refer questions to the Court of Justice concerning the interpretation of Directive 2000/78. [2] The Court was asked, inter alia, whether an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, constitutes, with regard to workers who observe certain clothing rules based on religious precepts, direct or indirect discrimination on the grounds of religion or belief; in what circumstances a difference of treatment indirectly based on religion or belief resulting from that rule may be justified and what elements must be taken into consideration in examining the appropriateness of such a difference of treatment.

---

2 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).

In its judgment, delivered by the Grand Chamber, the Court explains inter alia the circumstances in which a difference of treatment indirectly based on religion or belief, resulting from such an internal rule, may be justified.

Assessment of the Court

The Court examines, first, in connection with Case C-804/18, whether an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, constitutes, with regard to workers who observe certain dress codes based on religious precepts, direct discrimination on grounds of religion or belief, prohibited by Directive 2000/78. [3]

In that respect, the Court notes that the wearing of signs or clothing to manifest religion or belief is covered by the 'freedom of thought, conscience and religion'. [4] In addition, for the purposes of the application of Directive 2000/78, the terms 'religion' and 'belief' must be analysed as two facets of the same single ground of discrimination.

Furthermore, the Court recalls its case-law according to which such a rule does not constitute direct discrimination provided that it covers any manifestation of such beliefs without distinction and treats all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, to dress neutrally, which precludes the wearing of such signs. The Court considers that that finding is not called into question by the fact that some workers observe religious precepts requiring certain clothing to be worn. Although a rule such as that referred to above is indeed capable of causing particular inconvenience for such workers, that has no bearing on the finding that that rule, reflecting a policy of neutrality on the part of the undertaking, does not, in principle, establish a difference in treatment between workers based on a criterion that is inextricably linked to religion or belief.

In the present case, the rule at issue appears to have been applied in a general and undifferentiated way, since the employer concerned also required an employee wearing a religious cross to remove that sign. The Court concludes that, in those circumstances, a rule such as that at issue in the main proceedings does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief.

The Court examines, secondly, whether a difference of treatment indirectly based on religion or belief, [5] arising from such an internal rule, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes. It answers that question in the affirmative, while identifying the elements on which that conclusion is based.

In that regard, the Court notes, first of all, that an employer's desire to display, in relations with customers, a policy of political, philosophical or religious neutrality may be regarded as a legitimate aim. The Court states, however, that that mere desire is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a *genuine need* on the part of that employer. The relevant elements for identifying such a need are, inter alia, the rights and legitimate wishes of customers or users and, more specifically, as regards education, parents' wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children.

---

3 Article 1 and Article 2(2)(a) of Directive 2000/78.

4 Protected by Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter').

5 Within the meaning of Article 2(2)(b) of Directive 2000/78, which prohibits any indirect discrimination on the grounds of, inter alia, religion or belief, unless the provision, criterion or practice from which it derives is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In assessing whether such a need exists, particular relevance should be attached to the fact that the employer has adduced evidence that, in the absence of such a policy of neutrality, its freedom to conduct a business [6] would be undermined, in that, given the nature of its activities or the context in which they are carried out, it would suffer adverse consequences.

The Court then states that that difference in treatment must be appropriate for the purpose of ensuring that that policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner. Lastly, the prohibition on wearing any visible sign of political, philosophical or religious beliefs in the workplace must be limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

Thirdly, the Court examines, in connection with Case C-341/19, whether indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting the wearing of visible signs of political, philosophical or religious beliefs in the workplace, with the aim of ensuring a policy of neutrality within that undertaking, can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs or whether a prohibition limited to conspicuous, large-sized signs is permissible, provided that is implemented consistently and systematically.

It points out, in that regard, that such a limited prohibition is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering. Thus, where the criterion of wearing conspicuous, large-sized signs of the aforementioned beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition on wearing those signs based on that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, which would amount to direct discrimination, which cannot be justified.

Should direct discrimination not be found to exist, the Court observes that a difference of treatment such as that at issue in the main proceedings would, if it results in a particular disadvantage for persons adhering to a particular religion or belief, constitute indirect discrimination which can be justified only if the prohibition covers all visible forms of expression of political, philosophical or religious beliefs. It notes, in that regard, that a policy of neutrality within an undertaking may constitute a legitimate objective and must meet a genuine need on the part of the undertaking, such as the prevention of social conflicts or the presentation of a neutral image of the employer vis-à-vis customers, in order to justify objectively a difference in treatment indirectly based on religion or belief. Such a policy can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued.

Finally, the Court holds that national provisions protecting the freedom of religion may be taken into account, as more favourable provisions, [7] in examining the appropriateness of a difference of treatment indirectly based on religion or belief. In that regard, it notes, in the first place, that, when examining whether the restriction resulting from a measure intended to ensure the application of a policy of political, philosophical and religious neutrality is appropriate, within the meaning of Article 2(2)(b)(i) of Directive 2000/78, account must be taken of the various rights and freedoms in question and that it is for the national courts, having regard to all the material in the file in question, to take into account the interests involved in the case and to limit the restrictions on the freedoms

---

6 Recognised in Article 16 of the Charter of Fundamental Rights.

7 Within the meaning of Article 8(1) of Directive 2000/78, which refers to provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive. That would be the case, for example, of national provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of Directive 2000/78.

concerned to what is strictly necessary. That ensures that, when several fundamental rights and principles enshrined in the Treaties are at issue, the assessment of observance of the principle of proportionality is carried out in accordance with the need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them. It notes, in the second place, that, by not itself carrying out, in Directive 2000/78, the necessary reconciliation between the freedom of thought, conscience and religion and the legitimate aims that may be invoked in order to justify unequal treatment, and by leaving it to the Member States and their courts to achieve that reconciliation, the EU legislature allowed account to be taken of the specific context of each Member State and allowed each Member State a margin of discretion in achieving that reconciliation.

III. INSTITUTIONAL PROVISIONS : ACCESS TO DOCUMENTS

Judgment of the General Court (Fifth Chamber, Extended Composition) of 14 July 2021, Public.Resource.Org et Right to Know v Commission, T-185/19

Link to the complete text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Harmonised standards – Documents concerning four harmonised standards approved by CEN – Refusal to grant access – Exception related to the protection of a third party's commercial interests – Protection stemming from copyright

Public.Resource.Org, Inc. and Right to Know CLG, the applicants, are non-profit organisations whose main focus is to make the law freely accessible to all citizens. On 25 September 2018, they made a request to the European Commission for access to four harmonised standards adopted by the European Committee for Standardisation (CEN) concerning, in particular, the safety of toys. [8]

The Commission refused to grant the request for access on the ground that those standards were protected by copyright. The refusal was based on the first indent of Article 4(2) of Regulation No 1049/2001, [9] pursuant to which access to a document must be refused where disclosure would undermine the protection of the commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.

The General Court dismisses the action brought by the applicants and clarifies the scope of the review to be carried out by the EU institutions in order to find that there is an effect on commercial interests stemming from copyright protection for requested documents.

8 The standards concerned are EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and EN 12472:2005 + A1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items'.

9 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).

The Court's assessment

In the first place, the Court finds that the applicants have an interest in obtaining disclosure of the requested harmonised standards. In that regard, it reiterates that a person who is refused access to a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access. Furthermore, the Court states that the possibility of consulting the requested harmonised standards on site in certain libraries does not affect the applicants' interest in bringing proceedings since, by that consultation, they do not obtain full satisfaction in the light of the objective which they pursue, which is to obtain freely available access to those standards without charge. As regards paid access to those standards, the Court finds that it also does not correspond to the objective pursued by the applicants.

In the second place, the Court holds that the Commission complied with the scope of the review required of it when applying the exception relating to the protection stemming from copyright.

First of all, the Court states that ultimate responsibility for the proper application of Regulation No 1049/2001 lies with the institution to which the request for access is addressed. In that regard, it observes that if that institution considers that it is clear that access to a document emanating from a third party must be refused because of copyright protection, it must refuse access to the applicant without even having to consult the third party from whom the document emanates.

Next, the Court notes that copyright remains largely governed by national law and that the extent of the protection conferred by copyright is governed exclusively by the laws of the country where protection is claimed. It then states that it is for the authority which has received a request for access to documents from a third party, where there is a claim for copyright protection for those documents, inter alia, to identify objective and consistent evidence such as to confirm the existence of the copyright claimed by the third party concerned. Such a review corresponds in fact to the requirements inherent in the division of competences between the European Union and the Member States in the field of copyright.

Lastly, the Court observes that in the present case the Commission based its finding on the existence of copyright protection for the requested harmonised standards on objective and consistent evidence such as to support the existence of the copyright claimed by CEN for those standards. In addition, it finds that the Commission did not err in finding that the necessary threshold of originality to be covered by copyright protection had been met for the harmonised standards in question.

In the third place, the Court finds that there was no overriding public interest justifying the disclosure of the requested harmonised standards. In that regard, the Court points out that the onus is on the party arguing for the existence of an overriding public interest to rely on specific circumstances to justify the disclosure of the documents concerned. The applicants put forward a generic ground that harmonised standards form part of 'EU law' which should be freely accessible to the public without charge, without explaining in what respect such considerations ought to prevail over the protection of the commercial interests of CEN or its national members. Accordingly, the Court endorses the Commission's assessment that the public interest in ensuring the functioning of the European standardisation system prevails over the guarantee of freely available access to the harmonised standards without charge. In addition, it points out that the applicants do not explain why those standards should be subject to the requirement of publication and accessibility attached to a 'law', inasmuch as such standards are not mandatory and produce the legal effects attached to them solely with regard to the persons concerned.

IV. CITIZENSHIP OF THE UNION : NON-DISCRIMINATION BASED ON NATIONALITY

Judgment of the Court (Grand Chamber) of 15 July 2021,
The Department for Communities in Northern Ireland, C-709/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – National of a Member State without an activity residing in the territory of another Member State on the basis of national law – First paragraph of Article 18 TFEU – Non-discrimination based on nationality – Directive 2004/38/EC – Article 7 – Conditions for obtaining a right of residence for more than three months – Article 24 – Social assistance – Concept – Equal treatment – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland – Transition period – National provision excluding Union citizens with a right of residence for a fixed period under national law from social assistance – Charter of Fundamental Rights of the European Union – Articles 1, 7 and 24

CG, who has dual Croatian and Dutch nationality, has lived in the United Kingdom since 2018, without carrying out any economic activity. She lived there with her partner, a Dutch national, and their two children before moving to a women's refuge. CG has no resources at all.

On 4 June 2020, the Home Office (United Kingdom) granted her a temporary right of residence in the United Kingdom, on the basis of a new British scheme applicable to Union citizens residing in that country, established in the context of the withdrawal of the United Kingdom from the European Union. The grant of such a right of residence is not subject to any condition as to resources.

On 8 June 2020, CG lodged an application for the social assistance benefit, known as Universal Credit, with the Department for Communities in Northern Ireland. That application was refused, on the ground that the Universal Credit Regulations exclude Union citizens with a right of residence granted on the basis of the new scheme from the category of potential beneficiaries of Universal Credit.

CG challenged that refusal before the Appeal Tribunal (Northern Ireland), alleging, inter alia, a difference in treatment between Union citizens residing legally in the United Kingdom and British nationals. That court decided to refer a question to the Court about the potential incompatibility of the British Universal Credit Regulations with the prohibition of discrimination on grounds of nationality, laid down in the first paragraph of Article 18 TFEU.

The Court, sitting as the Grand Chamber, finds that the British legislation is compatible with the principle of equal treatment laid down by Article 24 of Directive 2004/38, [10] while requiring the competent national authorities to confirm that a refusal to grant social assistance based on that legislation does not expose the Union citizen and her children to an actual and current risk of violation of their fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union.

---

[10] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

Findings of the Court

Since the question of the referring court was referred before the end of the transition period, that is to say, before 31 December 2020, the Court has jurisdiction to give a preliminary ruling on that request, pursuant to Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. [11]

The Court specifies, first, the provisions of EU law applicable in the present case and concludes that the question whether CG faces discrimination on the grounds of nationality must be assessed in the light of Article 24 of Directive 2004/38, and not of Article 18 TFEU, since the first of those articles gives specific expression to the principle of non-discrimination on the grounds of nationality enshrined among others in the second, in relation to Union citizens who exercise their right to move and to reside within the territory of the Member States.

After finding that the Universal Credit at issue must be categorised as social assistance, within the meaning of that directive, the Court notes that access to those benefits is reserved for Union citizens who meet the requirements set out in Directive 2004/38. In that regard, the Court recalls that, by virtue of Article 7 of that directive, the obligation for an economically inactive Union citizen to have sufficient resources constitutes a requirement in order for the latter to enjoy a right of residence for longer than three months but less than five years.

The Court then confirms its case-law to the effect that a Member State has the possibility, pursuant to that article, of refusing to grant social benefits to economically inactive Union citizens who, like CG, exercise their right to freedom of movement and do not have sufficient resources to claim a right of residence under that directive. It states that, in the context of the specific examination of the economic situation of each person concerned, the benefits claimed are not taken into account in order to determine whether the person in question has sufficient resources.

The Court stresses, moreover, that Directive 2004/38 does not prevent the Member States from establishing more favourable rules than those laid down by that directive, in accordance with Article 37 thereof. A right of residence granted on the basis of national law alone, as is the case in the dispute in the main proceedings, cannot be regarded in any way as being granted 'on the basis of' that directive.

Nevertheless, CG made use of her fundamental freedom to move and to reside in the territory of the Member States, laid down by the Treaty, with the result that her situation falls within the scope of EU law, even though her right to reside derives from UK law, which has established more favourable rules than those laid down by Directive 2004/38. The Court holds that, where they grant a right of residence such as that at issue in the main proceedings, without relying on the conditions and limitations in respect of that right laid down by Directive 2004/38, the authorities of the host Member State implement the provisions of the FEU Treaty on Union citizenship, which is destined to be the fundamental status of nationals of the Member States.

In accordance with Article 51(1) of the Charter of Fundamental Rights, those authorities are thus obliged, when examining an application for social assistance such as that made by CG, to comply with the provisions of that Charter, in particular Articles 1 (human dignity), 7 (respect for private and family life) and 24 (rights of the child). In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and her children are actually entitled to benefit.

---

11 OJ 2020 L 29, p. 7.

V. FREEDOM OF MOVEMENT : FREEDOM OF ESTABLISHMENT

Judgment of the Court (Fourth Chamber) of 8 July 2021, VAS Shipping, C-71/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Articles 49 and 54 TFEU – Freedom of establishment – National legislation requiring third-country nationals employed on a vessel flying the flag of a Member State to hold a work permit in that Member State – Exemption covering vessels that call at the Member State's port no more than 25 times in a one-year period – Restriction – Article 79(5) TFEU – National legislation aimed at fixing the volumes of admission of third-country nationals coming from third countries to the territory of the Member State concerned in order to seek work, whether employed or self-employed

VAS Shipping, a company established in Denmark and owned by a Swedish company, is the managing owner of four part-owned companies established in Sweden. They registered four vessels in Denmark in order to pursue their maritime transport activities there. Under Danish law, VAS Shipping has authority over all legal transactions normally involved in that activity.

In 2018, a Danish court ordered VAS Shipping to pay a fine for having employed, on board those four vessels flying the Danish flag, third-country national seafarers who did not hold a Danish work permit and were not exempt from the requirement to have that permit. It is only when vessels enter Danish ports on no more than 25 occasions in one year that third-country nationals working on board those vessels are exempt from the requirement to hold a work permit in Denmark. In the present case, the four vessels called at Danish ports more than 25 times from August 2010 to August 2011. According to that court, although the requirement of a work permit laid down by the national legislation constitutes a restriction on the freedom of establishment within the meaning of Article 49 TFEU, that requirement is, however, justified and proportionate in order to avoid disturbances on the national labour market.

Hearing the appeal brought by VAS Shipping, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to refer a question to the Court of Justice asking whether Danish legislation that requires third-country nationals employed on a vessel flying the Danish flag and owned by a company established in another Member State to have a work permit in Denmark, unless the vessel concerned has called at ports in Denmark no more than 25 times in one year, is compatible with the freedom of establishment.

In its judgment, the Court defines the scope of the obligations of the Member States in respect of the freedom of establishment, in the light of the right which they enjoy under Article 79(5) TFEU to determine volumes of admission of third-country nationals coming to their territory in order to seek work, whether employed or self-employed.

Findings of the Court

As a preliminary point, the Court notes that the situation at issue in the main proceedings falls within the scope of the freedom of establishment enshrined in Article 49 TFEU. The Court notes, in that regard, that that freedom confers, in accordance with Article 54 TFEU, on companies lawfully established in a Member State, the right to exercise their activity in another Member State through a subsidiary, a branch or an agency, including through the acquisition of a holding in the capital of a company established in that other Member State that allows it to exert a definite influence on that company and to determine its activities. Furthermore, as regards the registration of a vessel, the Court points out that it cannot be separated from the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes a fixed establishment in the Member State of registration.

It is in the light of the above clarifications that the Court examines whether the national legislation concerned is liable to constitute a restriction on the freedom of establishment.

In that regard, the Court notes, first of all, that, under Article 79(5) TFEU, Member States retain the right to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, the flag State of a vessel being, in that context, the State in which a third-country national working on board that vessel is employed.

Relying on that provision, the Court considers, next, that the requirement for third-country nationals employed in the territory of a Member State, including on a vessel registered in that State, to have a work permit is a measure intended to regulate access to work and to residence of those nationals on the national territory. Therefore, the Member State concerned is entitled to provide that those third-country nationals must obtain a work permit, providing also, where appropriate, for exceptions from that requirement. Accordingly, the Court holds that the national legislation at issue, applicable without distinction to all vessels flying the flag of the Member State concerned, which lays down an obligation for all third-country nationals employed as crew members of such vessels to have a work permit, and which exempts from that obligation only crew members of such vessels who, in the course of a year, call at the ports of that Member State no more than 25 times, does not constitute a restriction on the freedom of establishment within the meaning of the first paragraph of Article 49 TFEU.

Lastly, the Court observes that such legislation may, admittedly, disadvantage companies established in a first Member State which then establish themselves in a second Member State in order to operate a vessel flying the flag of that second Member State, as compared to companies which operate, in the second Member State, vessels flying the flag of another Member State and whose legislation does not impose a similar obligation. However, such adverse consequences stem from possible differences in the application, by the Member States, of the right provided for in Article 79(5) TFEU, enabling those states to determine volumes of admission of third-country nationals seeking work in their territory, which is a right that they are expressly granted.

VI. COMPETITION : STATE AID

Judgment of the Court (Fourth Chamber) of 15 July 2021,
Deutsche Lufthansa v Commission, C-453/19 P

Link to the complete text of the judgment

Appeal – State aid – Aid for airports and airlines – Decision classifying the measures in favour of Frankfurt Hahn airport as State aid compatible with the internal market and finding no State aid in favour of airlines using that airport – Inadmissibility of an action for annulment – Fourth paragraph of Article 263 TFEU – Natural or legal person not directly and individually concerned by the decision at issue – Effective judicial protection

Frankfurt Hahn airport is located in Germany, in Land Rheinland-Pfalz ('the *Land*'), 115 km from Frankfurt Main airport. In 2001, in 2002 and between 2004 and 2009, Flughafen Frankfurt/Main GmbH ('Fraport') – the company operating Frankfurt Main airport – the *Land* and Land Hesse (Germany) participated in increases in the capital of Frankfurt Hahn airport.

From 1997 to 2004, the *Land* also paid direct grants to Frankfurt Hahn airport, inter alia in order to finance security checks. In 2001 and 2006, the *Land* approved the schedules of airport charges for Frankfurt Hahn airport. In 1999, 2002 and 2005, Frankfurt Hahn airport concluded individual agreements with the low-cost airline Ryanair concerning the airport charges payable by Ryanair.

By decision of 1 October 2014 [12] ('the decision at issue'), the European Commission found that the capital increases in 2001 and 2004 in favour of Frankfurt Hahn airport and the direct grants by the *Land* constituted State aid compatible with the internal market. As regards the agreements concluded with Ryanair and the schedules of airport charges for Frankfurt Hahn airport, the Commission found that those measures did not constitute State aid.

Deutsche Lufthansa AG ('the appellant'), an airline established in Germany whose main airport base is that of Frankfurt-am-Main, brought an action for annulment of that decision before the General Court, which dismissed it as inadmissible under the fourth paragraph of Article 263 TFEU. [13] Pursuant to that provision, any natural or legal person may, under the conditions laid down in the first and second paragraphs of Article 263 TFEU, institute proceedings against an act addressed to that person ('the first situation') or which is of direct and individual concern to them ('the second situation'), and against a regulatory act which is of direct concern to them and does not entail implementing measures ('the third situation'). After stating that the decision at issue was not addressed to the appellant, the General Court held that the appellant had failed to demonstrate that that decision, which could not be classified as a regulatory act, was capable of being of direct and individual concern to it.

The appellant brought an appeal against that judgment of the General Court before the Court of Justice, and that appeal has also been dismissed. In its judgment, the Court of Justice considers the conditions governing the admissibility of an action for annulment brought by a natural or legal person against a decision concerning State aid which has been adopted by the Commission and is not addressed to that person.

---

12 Commission Decision (EU) 2016/789 of 1 October 2014 on the State aid SA.21121 (C29/08) (ex NN 54/07) implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair (OJ 2016 L 134, p. 46).

13 Judgment of 12 April 2019, *Deutsche Lufthansa* v *Commission* (T-492/15, EU:T:2019:252).

Findings of the Court

In support of its appeal, the appellant contended, in particular, that, in holding that it was not individually concerned by the decision at issue, the General Court had infringed the fourth paragraph of Article 263 TFEU.

In the appellant's submission, the General Court erred in law by inferring that it was not individually concerned from an alleged failure of the aid covered by the decision at issue to have a substantial effect on its market position, whereas individual concern results directly from its status as a person intended to benefit from procedural guarantees in the formal investigation procedure in respect of that aid.

In that regard, the Court of Justice points out that individual concern within the meaning of the fourth paragraph of Article 263 TFEU is examined in the light of the criterion, relied upon by the appellant, relating to the protection of procedural rights only where the Commission declares aid compatible with the internal market without initiating the formal investigation procedure under Article 108(2) TFEU. In such a case, the persons intended to benefit from the procedural guarantees envisaged by that article may secure compliance therewith only if they are able to challenge that decision before the EU judicature.

Since the decision at issue was adopted after a formal investigation procedure under Article 108(2) TFEU, the mere fact that the appellant played an active role in that procedure is not sufficient for it to be held individually concerned by the decision bringing that procedure to an end. Thus, the appellant should have demonstrated that the decision at issue affected it by reason of certain attributes which were peculiar to it or by reason of circumstances in which it was differentiated from all other persons and, by virtue of those factors, distinguished it individually just as in the case of the person addressed. In addition to the undertaking in receipt of aid, competing undertakings have been recognised as being individually concerned by a Commission decision terminating the formal investigation procedure where they have played an active role in that procedure, provided that their position on the market is substantially affected by the aid which is the subject of the decision at issue.

As regards a substantial effect on its market position, the Court rejects, furthermore, the appellant's argument that the burden of proof borne by it in that regard should have been relaxed since the Commission had concluded that there was no State aid. In accordance with settled case-law, the requirement of a substantial effect on the market is applicable in the same way both where the Commission concludes that the measures examined do not constitute aid and where they are so classified.

The Court finds, on the other hand, that the General Court erred in law in refusing to consider certain arguments put forward by the appellant for the purpose of demonstrating that there was a substantial adverse effect on its market position, on the ground that it had not provided more information as to the size or geographical scope of the market on which it considered that it had been substantially affected. It is apparent from the case-law of the Court of Justice that the substantial effect on an undertaking's competitive position results not from a detailed analysis of the various competitive relationships on the market at issue, allowing the extent of the effect on its competitive position to be established specifically, but, in principle, from a prima facie finding that the grant of the measure covered by the Commission's decision leads to a substantial effect on that position. In holding that information relating to the size and structure of the markets on which the appellant's competitive position was said to be affected and to the competitors present on those markets was necessary in order to define the market or markets in the light of which the condition regarding a substantial effect on the competitive position had to be assessed, the General Court went beyond the requirements resulting from that case-law. However, in the light of the other grounds supporting the General Court's conclusion that the appellant's market position was not substantially affected, the Court of Justice rules that that error of law committed by the General Court is not such as to vitiate its conclusions as to the admissibility of the appellant's action.

Finally, the Court of Justice confirms that the General Court was right in holding that the condition of admissibility that the applicant must be directly concerned by the act at issue is identical in the second and the third situations referred to in the fourth paragraph of Article 263 TFEU. The Court of Justice recalls, furthermore, that that condition always requires two cumulative criteria to be met, namely, first, the act must directly affect the legal situation of the person at issue and, second, it must

leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 July 2021, Ryanair and Laudamotion v Commission (Austrian Airlines; Covid-19), T-677/20

Link to the complete text of the judgment

State aid – Austrian air transport market – Aid granted by Austria to an airline amid the COVID-19 pandemic – Subordinated loan in favour of Austrian Airlines – Decision not to raise any objections – Aide previously granted to the beneficiary's parent company – Aid intended to make good the damage caused by an exceptional occurrence – Freedom of establishment – Freedom to provide services – Equal treatment – Obligation to state reasons

In June 2020, the Republic of Austria notified the European Commission of an individual aid measure in favour of the company Austrian Airlines AG ('AUA'). The aid notified, in the form of a subordinated loan convertible into a subsidy for EUR 150 million ('the measure at issue'), was intended to compensate AUA for the damage resulting from the cancellation or rescheduling of its flights due to the imposition of travel restrictions and other containment measures amid the COVID-19 pandemic.

AUA is part of the Lufthansa group, headed by the parent company Deutsche Lufthansa AG ('DLH'). Between March and June 2020, the Commission had already approved various aid measures in favour of undertakings in the Lufthansa group, in particular, (1) a State guarantee from the Federal Republic of Germany of 80% on a loan of EUR 3 billion in favour of DLH, granted under a German aid scheme designed to support undertakings in all economic sectors in need of liquidity for their activities in Germany ('the German loan'), [14] (2) a State guarantee from the Republic of Austria of 90% on a loan of EUR 300 million granted by a consortium of commercial banks in favour of AUA, granted under an Austrian aid scheme intended to support the economy during the current COVID-19 pandemic ('the Austrian loan'), [15] and (3) individual aid of EUR 6 billion granted by the Federal Republic of Germany in favour of DLH. The latter aid measure had been authorised by Commission Decision of 25 June 2020 ('the Lufthansa decision'). [16]

By decision of 6 July 2020, the Commission found that the measure at issue constituted State aid within the meaning of Article 107(1) TFEU, which is nevertheless compatible with the internal market under Article 107(2)(b) TFEU [17] ('the contested decision'). Under that last provision, aid to make good damage caused by natural disasters or exceptional occurrences is compatible with the internal market.

The airlines Ryanair and Laudamotion brought an action for the annulment of the contested decision, which is, however, dismissed by the Tenth Chamber (Extended Composition) of the General Court. In its judgment, the Court provides clarification on the application of Article 107(2)(b) TFEU to individual aid adopted with a view to responding to the consequences of the COVID-19 pandemic, where that

14 Authorised by decision of 22 March 2020, SA.56714 (2020/N) – Germany – COVID-19 measures.

15 Authorised by decision of 17 April 2020, SA.56981 (2020/N) – Austria – Austrian guarantee scheme on bridge loans under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended by decision of 9 June 2020 SA.57520 (2020/N) – Austria – Austrian anti-crisis measures – COVID-19: Guarantees for large undertakings on the basis of the Guarantee Law of 1977 by Austria Wirtschaftsservice GmbH (aws) – Amendment to the scheme SA.56981 (2020/N).

16 Decision of 25 June 2020, SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa.

17 Decision C(2020) 4684 final on State aid SA.57539 (2020/N) – Austria – COVID-19 – Aid to Austrian Airlines.

aid forms part of a series of measures adopted in favour of the beneficiary of the aid and the group of undertakings to which it belongs. [18]

Findings of the Court

In support of their actions for annulment, Ryanair and Laudamotion claimed, inter alia, that the Commission did not examine all the aid measures granted to the airlines in the Lufthansa group, or the relationship between them.

In that regard, the Court finds, first of all, that the Commission had stated that the measure at issue formed part of a financial envelope in favour of AUA totalling EUR 600 million, which, in addition to the measure at issue, was made up of a contribution of EUR 150 million in equity from the parent company, DLH ('DLH's equity injection'), and the Austrian loan of EUR 300 million. The Commission had also pointed out that, in accordance with its Lufthansa decision, the aid of EUR 6 billion granted by the Federal Republic of Germany to DLH could be used by DLH to support the other airlines in the Lufthansa group which were not in financial difficulties as at 31 December 2019, including AUA.

The Court observes, next, that in the Lufthansa decision, adopted two weeks before the contested decision and which constitutes a contextual factor to be taken into consideration in the present case, the Commission had already taken into account all the aid measures granted to the airlines forming part of the Lufthansa group, including AUA, and the relationship between them. In that regard, the Court emphasises that, in the Lufthansa decision, all the additional aid measures granted or proposed in favour of the airlines in the Lufthansa group had been considered to be limited to the minimum necessary to restore the capital structure of the Lufthansa group and to ensure its viability.

The Court also observes that, since the support granted by other States to the airlines in the Lufthansa group was deducted, as the case may be, either from the amount of aid which is the subject of the Lufthansa decision or from the German loan, the Commission had ruled out any risk of overcompensation in that decision. Under a deduction mechanism, applicable to all the measures adopted in favour of that group, the overall aid granted by the Federal Republic of Germany to the entire Lufthansa group was reduced by the aid granted by other States to a particular company in that group, so that the overall amount received by the group remained the same.

Lastly, as regards DLH's equity injection, the Court confirms that, even if the amount of that injection were to come from the aid which is the subject of the Lufthansa decision, it would, in any event, constitute aid already authorised under that decision.

In the light of all those observations, the Court confirms that, contrary to what Ryanair and Laudamotion claimed, the Commission not only examined all the aid measures granted to the airlines of the Lufthansa group but also the relationship between them.

In view of the deduction mechanism applicable to all the measures adopted in favour of the Lufthansa group, the Court further concludes that there is no real risk that the measure at issue, granted to AUA, could also benefit other airlines in the Lufthansa group.

The Court also rejects the argument that there was a risk that AUA might benefit from DLH's support going beyond the equity injection of EUR 150 million. In that regard, the Court observes, first, that any hypothetical transfer of additional liquidity from DLH to AUA would in any event originate in an aid measure already approved by the Commission, in particular the aid authorised by the Lufthansa decision. It points out, secondly, that the German loan and the aid which is the subject of the Lufthansa decision are based on Article 107(3)(b) TFEU, so that they are not supposed to cover the same eligible costs as those covered by the measure at issue, which, for its part, is based on

---

[18] It should be noted that, in its judgments of 14 April 2021, *Ryanair* v *Commission (SAS, Danemark; Covid-19)* (T-378/20, EU:T:2021:194) and *Ryanair* v *Commission (SAS, Sweden; Covid-19)* (T-379/20, EU:T:2021:195), and in its judgment of 9 June 2021, *Ryanair* v *Commission (Condor; Covid-19)* (T-665/20, EU:T:2021:344), the Court examined the application of Article 107(2)(b) TFEU to three separate individual aid measures adopted in order to respond to the consequences of the COVID-19 pandemic.

Article 107(2)(b) TFEU. In any event, the deduction mechanism introduced also makes it possible to avoid the risk of overcompensation in that context.

Next, the Court states that, in so far as the difference in treatment established by the measure at issue between AUA and the other airlines operating in Austria may amount to discrimination, it was justified in the circumstances of the present case. In particular, in view of the essential role played by AUA for Austria's airline services, the difference in treatment in its favour is appropriate for the purpose of remedying the damage suffered by that company as a result of the travel restrictions and other containment measures amid the COVID-19 pandemic and does not go beyond what is necessary to achieve that objective.

As regards compliance with the principles of freedom to provide services and freedom of establishment, the Court notes that the freedom to provide services does not apply as such in the field of transport, which is subject to a special legal regime. In that context, the Court states that, in any event, the applicants have not established how the exclusive nature of the measure at issue is such as to deter them from establishing themselves in Austria or from providing services from and to that country.

Nor, according to the Court, did the Commission err in its assessment of the proportionality of the aid, in particular in calculating the damage to be compensated and the amount of aid. As regards the calculation of the damage to be made good, the Commission had correctly taken into account damage which occurred in a period before AUA's fleet was immobilised, since that damage had been caused by cancellations and rescheduling required by the Austrian Government. The Commission had, moreover, correctly calculated the avoided costs which had to be excluded from the assessment of the damage caused to AUA by the pandemic. Furthermore, the Commission was not required to take account of the damage suffered by other airlines in its calculation of that damage. Finally, as regards the calculation of the amount of aid, the Court confirms that the Commission did not fail to take account of all the aid measures likely to benefit the Lufthansa group when assessing the proportionality of the measure at issue.

VIII. APPROXIMATION OF LAWS : INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Fifth Chamber, Extended Composition) of 7 July 2021, Ardagh Metal Beverage Holdings v EUIPO (Combinaison de sons à l'ouverture d'une canette de boisson gazeuse), T-668/19

EU trade mark – Application for an EU trade mark consisting of a combination of sounds on opening a can of soft drink – Absolute ground for refusal – No distinctive character – Article 7(1)(b) of Regulation (EU) 2017/1001 – Article 95(1) of Regulation 2017/1001

Ardagh Metal Beverage Holdings GmbH & Co. KG filed an application for registration of a sound sign as an EU trade mark with the European Union Intellectual Property Office (EUIPO). That sign, submitted as an audio file, recalls the sound made by a drinks can being opened, followed by a silence of approximately one second and a fizzing sound lasting approximately nine seconds. Registration was sought in respect of various drinks and metal containers for storage or transport.

EUIPO rejected the application for registration on the ground that the mark applied for was not distinctive.

In its judgment, the General Court dismisses the action brought by Ardagh Metal Beverage Holdings and gives a ruling for the first time on the registration of a sound mark submitted in audio format. It clarifies the criteria for assessing the distinctive character of sound marks and the perception of those marks in general by consumers.

Findings of the Court

First of all, the Court recalls that the criteria for assessing the distinctive character [19] of sound marks are not different to those applicable to the other categories of marks and a sound mark must have a certain resonance which enables the target consumer to perceive it as a trade mark and not as a functional element or as an indicator without any inherent characteristics. [20] Thus, the consumer of the goods or services in question must, by the perception alone of the mark, without its being combined with other elements such as, inter alia, word or figurative elements, or even another mark, be able to associate it with their commercial origin.

Next, in so far as EUIPO applied by analogy the case-law [21] according to which only a mark which departs significantly from the norm or customs of the sector is not devoid of distinctive character, the Court emphasises that that case-law was developed in respect of three-dimensional marks consisting in the shape of the product itself or of its packaging, whereas there are norms or customs of the sector relating to that shape. In such circumstances, the consumer concerned, who is accustomed to seeing one or several shapes corresponding to the norm or customs of the sector will not perceive the three-dimensional mark as an indication of the commercial origin of the goods if its shape is identical or similar to the usual shape or shapes. The Court adds that that case-law does not establish any new criteria for assessing the distinctive character of a mark, but merely specifies that, in the context of the application of those criteria, the perception of the average consumer is not necessarily the same in the case of a three-dimensional mark as in the case of a word, figurative or sound mark, which consists of a sign independent of the exterior appearance or shape of the goods. Consequently, the Court holds that that case-law relating to three-dimensional marks cannot, in principle, be applied

---

19 Within the meaning of Article 7(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

20 Judgment of 13 September 2016, *Globo Comunicação e Participações* v *EUIPO (Sound mark)* (T-408/15, EU:T:2016:468, paragraphs 41 and 45).

21 See, inter alia, judgment of 7 October 2004, *Mag Instrument* v *OHIM* (C-136/02 P, EU:C:2004:592, paragraph 31).

to sound marks. However, even though EUIPO incorrectly applied that case-law, the Court states that that error is not such as to vitiate the reasoning set out in the contested decision, which is also based on another ground.

Regarding that other ground, based on the perception of the mark applied for by the relevant public as being a functional element of the goods in question, the Court observes, first, that the sound produced by the opening of a can will indeed be considered, having regard to the type of goods, to be a purely technical and functional element. The opening of a can or bottle is inherent to a technical solution connected to the handling of drinks in order to consume them, and such a sound will therefore not be perceived as an indication of the commercial origin of those goods. Second, the relevant public immediately associates the sound of fizzing bubbles with drinks. In addition, the Court observes that the sound elements and the silence of approximately one second, taken as a whole, do not have any inherent characteristic which would make it possible for them to be perceived by that public as being an indication of the commercial origin of the goods. Those elements are not resonant enough to distinguish themselves from comparable sounds in the field of drinks. Therefore, the Court confirms EUIPO's findings relating to the lack of distinctive character of the mark applied for.

Last, the Court refutes EUIPO's finding that it is unusual on the market for drinks and their packaging to indicate the commercial origin of a product using sounds alone on the ground that those goods are silent until they are consumed. The Court points out that most goods are silent in themselves and produce a sound only when they are consumed. Thus, the mere fact that a sound is made only on consumption does not mean that the use of sounds to indicate the commercial origin of a product on a specific market is still unusual. The Court explains nonetheless that any error on EUIPO's part in that regard does not lead to the annulment of the contested decision, because it did not have a decisive influence on the operative part of that decision.

Judgment of the General Court (Fifth Chamber) of 14 July 2021,
Cole Haan v EUIPO - Samsøe & Samsøe Holding (Ø), T-399/20

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Application for EU figurative mark Ø – Earlier international figurative mark φ – Relative ground for refusal – Likelihood of confusion – Similarity of the signs – Article 8(1)(b) of Regulation (EU) 2017/1001

Cole Haan LLC, the applicant, filed an application for registration of the figurative sign 'Ø' as an EU trade mark with the European Union Intellectual Property Office (EUIPO), inter alia in respect of travel bags and clothing. Samsøe & Samsøe Holding A/S filed a notice of opposition to registration of the mark applied for. That opposition was based on the international registration designating the European Union of the figurative mark 'φ'. The Opposition Division of EUIPO upheld that opposition and refused the registration at issue on the ground that there is a likelihood of confusion. By decision of 15 April 2020, the Board of Appeal of EUIPO dismissed the appeal brought by the applicant against the Opposition Division's decision.

In its judgment, the General Court dismisses the action brought against the decision of the Board of Appeal of EUIPO and develops its case-law concerning the assessment of the likelihood of confusion, holding that knowledge of the existence of a letter of the alphabet which does not exist in the languages understood by the relevant public cannot be assumed and that it is difficult to establish with certainty how that public will pronounce such a letter.

Findings of the Court

The Court upholds EUIPO's assessment that there is a likelihood of confusion on the part of the relevant public, namely the French-speaking public, pursuant to Article 8(1)(b) of Regulation 2017/1001. [22]

As regards the visual, phonetic and conceptual comparison of the marks concerned, the Court finds, first of all, that those marks are visually similar to a high degree. In that regard, it points out that the mark applied for is a representation of the letter 'Ø', which is part of the alphabet used in Danish, whereas the earlier mark is a representation of the Greek letter 'φ' or the letter 'Ф', from the Cyrillic alphabet, used, inter alia, in Bulgarian. None of those letters is used in French, which is spoken by the relevant public, the majority of which have no command of Danish, Bulgarian or Greek, which explains the high degree of visual similarity.

Next, the Court upholds EUIPO's conclusion that a phonetic comparison of the marks concerned is not possible having regard to the perception of the relevant public. From the point of view of the French public, the letters 'Ø', 'Ф' and 'φ' belong to foreign languages and the Court points out that, according to case-law, [23] knowledge of a foreign language cannot, in general, be assumed. The correct pronunciation of the letters of the alphabet in a foreign language and knowledge of the existence of a letter of the alphabet specific to that language likewise cannot be presumed. As regards the pronunciation of letters which do not exist in the languages understood by the relevant public, the Court applies its case-law according to which it is difficult to establish with certainty how the average consumer will pronounce a word from a foreign language in his own language. [24] According to that case-law, it is far from certain that the word will be recognised as being foreign and even if it is, it may not be pronounced correctly in the same manner as in the original language. In the assessment of the likelihood of confusion, it will also still be necessary to establish that a majority of the relevant public is able to pronounce the word in question correctly. In the present case, the applicant has adduced no evidence establishing that the relevant public would verbalise the marks at issue, let alone how.

Lastly, a conceptual comparison of the marks concerned is likewise not possible. In that regard, the Court finds that the applicant produced no evidence capable of demonstrating, first, that the relevant French-speaking public would identify the mark applied for as a representation of a letter used in Danish and the earlier mark as representing a letter used in Greek and Bulgarian, second, that that public would understand the mark applied for as meaning 'island' in Danish, third, that the mark applied for would be understood as designating the number 0, the assertions submitted in that regard being irrelevant, or, fourth, as designating the diameter of an object. Furthermore, the Court rejects as inadmissible the evidence produced for the first time before it.

---

22 Regulation (EU) 2017/2001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

23 Judgment of 13 September 2010, *Inditex* v *OHIM – Marín Díaz de Cerio (OFTEN)* (T-292/08, EU:T:2010:399, paragraph 83).

24 Judgment of 1 February 2005, *SPAG* v *OHIM – Dann and Backer (HOOLIGAN)* (T-57/03, EU:T:2005:29, paragraph 58).

Judgment of the General Court (Fifth Chamber) of 14 July 2021,
Guerlain v EUIPO (Shape of an oblong, tapered and cylindrical lipstick), T-488/20

EU trade mark – Application for registration of a three-dimensional EU trade mark – Shape of an oblong, tapered and cylindrical lipstick – Absolute ground for refusal – Distinctive character – Article 7(1)(b) of Regulation (EU) 2017/1001

Guerlain applied to the European Union Intellectual Property Office (EUIPO) for registration of a three-dimensional EU trade mark in respect of lipsticks. It is a three-dimensional sign consisting in the shape of a lipstick, represented as follows:

The EUIPO Examiner found that the mark applied for lacked distinctive character [25] and dismissed the application for registration. The Board of Appeal upheld that decision, finding that the mark did not depart sufficiently from the norms and customs of the sector.

The General Court annuls the decision of the Board of Appeal. It finds that the mark applied for has distinctive character because it departs significantly from the norm and customs of the lipstick sector.

Findings of the General Court

In the first place, the General Court recalls that the assessment of whether it has distinctive character is not based on the originality or the lack of use of the mark applied for in the field to which the goods and services concerned belong. A three-dimensional mark consisting in the shape of the product must necessarily depart significantly from the norm or customs of the sector concerned. Accordingly, the mere novelty of that shape is not sufficient in order to conclude that there is distinctiveness. However, the fact that a sector is characterised by a wide variety of product shapes does not mean that a new possible shape will necessarily be perceived as one of them.

In the second place, according to the General Court, the fact that goods have a high-quality design does not necessarily mean that a mark consisting in the three-dimensional shape of those goods makes it possible for them to be distinguished from the goods of other undertakings. It notes that taking into account the aesthetic aspect of the mark applied for does not amount to an assessment of

25 The distinctive character of a mark, within the meaning of Article 7(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1) means that this mark enables the product in respect of which registration is sought to be identified as originating from a particular undertaking and thus enables that product to be distinguished from those of other undertakings.

the attractiveness of the product in question but is done with the aim of determining whether that product is capable of generating an objective and uncommon visual effect in the perception of the relevant public.

In the third place and lastly, whilst taking into account the images taken into consideration by the Board of Appeal as constituting the norm and customs of the sector concerned, the General Court finds that the shape in question is uncommon for a lipstick and differs from any other shape existing on the market. It observes, first of all, that that that shape is reminiscent of that of a boat hull or a baby carriage. Such a shape differs significantly from the images taken into consideration by the Board of Appeal, most of which represented cylindrical and parallelepiped lipsticks. Next, the presence of the small oval embossed shape is unusual and contributes to the uncommon appearance of the mark applied for. Lastly, the fact that the lipstick represented by that mark cannot be placed upright reinforces the uncommon visual aspect of its shape.

Consequently, the General Court finds that the relevant public will be surprised by this easily memorable shape and will perceive it as departing significantly from the norm and customs of the lipstick sector and capable of indicating the origin of the goods concerned. Accordingly, the mark applied for has distinctive character, which permits it to be registered.

IX. ECONOMIC AND MONETARY POLICY

Judgment of the Court (Grand Chamber) of 15 July 2021,
Commission v Landesbank Baden-Württemberg and SRB, C-584/20 P and C-621/20 P

Link to the complete text of the judgment

Appeal – Banking union – Single Resolution Mechanism (SRM) – Single Resolution Fund (SRF) – Calculation of the 2017 *ex ante* contributions – Authentication of a decision of the Single Resolution Board (SRB) – Obligation to state reasons – Confidential data – Legality of Delegated Regulation (EU) 2015/63

On 11 April 2017, the Single Resolution Board (SRB) adopted, in connection with the financing of the Single Resolution Fund (SRF), a decision fixing the amount of the *ex ante* contributions due to the SRF by each credit institution for 2017. [26] Those institutions included Landesbank Baden-Württemberg, a German credit institution.

In an action for annulment brought by Landesbank Baden-Württemberg, the General Court annulled the decision at issue in so far as it concerned that institution. [27] It took the view that that decision did not satisfy the requirement of authentication and, in the interests of the sound administration of justice, found, moreover, that that decision had been taken by the SRB in breach of the obligation to state reasons. In that regard, it held, inter alia, that the decision at issue barely contained any information for calculating the *ex ante* contribution to the SRF and that the annex thereto did not contain sufficient information to verify the accuracy of that contribution.

26 Decision of the Executive Session of the SRB of 11 April 2017 on the calculation of the 2017 ex ante contributions to the Single Resolution Fund (SRB/ES/SRF/2017/05) ('the decision at issue').

27 Judgment of 23 September 2020, Landesbank Baden-Württemberg v SRB (T-411/17, EU:T:2020:435).

Following appeals brought by the Commission (Case C-584/20 P) and by the SRB (Case C-621/20 P), the Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court. Giving final judgment in the matter, it annuls the decision at issue as far as it concerns Landesbank Baden-Württemberg on the ground that the statement of reasons was inadequate, but adopts a different approach from that of the General Court concerning the scope of the requirement to state the reasons for such a decision.

Findings of the Court

In the first place, the Court of Justice concludes that the General Court infringed the principle of *audi alteram partem* in so far as it did not give the SRB the opportunity effectively to state its position on the plea, raised by the General Court of its own motion, alleging a lack of sufficient evidence of the authentication of the decision at issue.

In that regard, it states that, in order to ensure effective compliance with the principle of *audi alteram partem*, the parties must first be invited to submit their observations on a plea which an EU Court is considering raising of its own motion in circumstances which allow them to respond appropriately and effectively to that plea including, where necessary, by producing any evidence to that court which is necessary for it to rule in full cognisance on that plea It was therefore for the General Court to inform the parties that it was considering whether to base its decision on that plea alleging a lack of sufficient evidence of the authentication of the decision at issue and to invite them, as a result, to submit to it the arguments which they deemed appropriate for it to rule on that plea. In the present case, neither before nor at the hearing did the General Court give the SRB the opportunity to respond appropriately and effectively to that plea, in particular by adducing evidence relating to the authentication of the decision at issue.

Having thus found that the General Court had infringed the principle of *audi alteram partem*, the Court of Justice held that the SRB ensured, to the requisite standard, the authentication of the decision at issue in its entirety, both as regards its body and annex, in particular by using the computer software 'ARES'.

In the second place, the Court of Justice rules on the SRB's obligation to state reasons for the adoption of a decision such as the decision at issue.

First of all, it observes that the General Court did not correctly interpret the scope of that obligation in so far as it found that the SRB was required to include in the statement of reasons for the decision at issue information enabling Landesbank Baden-Württemberg to verify the accuracy of the calculation of its 2017 *ex ante* contribution to the SRF, irrespective of whether the confidentiality of some of those figures could affect that obligation.

First, the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator need not necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money. Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, as a general principle of EU law, not to disclose to the competitors of a private operator confidential information which that operator has provided.

In view of the logic of the system for financing the SRF and of the method for calculating *ex ante* contributions to the SRF, based, inter alia, on the use of confidential data relating to the financial situation of the institutions concerned by that calculation, the obligation to state reasons for the decision at issue must be balanced against the SRB's obligation to respect the business secrets of those institutions. However, the obligation to respect professional secrecy cannot be given so wide an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essence. For that purpose, giving reasons for a decision requiring a private operator to pay a sum of money without providing it with all the information needed to verify the exact calculation of the amount of that sum of money does not necessarily undermine, in every case, the substance of the obligation to state reasons.

Thus, the Court concludes that, in the present case, the obligation to state reasons is fulfilled where the persons concerned by a decision fixing *ex ante* contributions to the SRF, while not being sent professionally confidential data, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the

purposes of calculating their *ex ante* contribution to the SRF, relative to the situation of all the other financial institutions concerned.

Next, the Court of Justice does not uphold the General Court's finding that the infringement of the SRB's obligation to state reasons stemmed, for the part of the calculation of the *ex ante* contributions to the SRF relating to the adjustment according to the risk profile of the establishments concerned, from the illegality of certain provisions of Delegated Regulation 2015/63. [28]

After setting out the mechanism for adjusting the *ex ante* contributions to the SRF according to the risk profile, ensured in essence by allocating the establishments concerned on the basis of certain values to 'bins', which ultimately makes it possible to determine the adjustment multiplier according to the risk profile, the Court states that the SRB may, without infringing its obligation to respect business secrets, disclose the limit values of each 'bin' and the related indicators. Such disclosure is intended to enable the financial institution concerned to satisfy itself, inter alia, that the profile attributed to it during the discretisation of the indicators in fact corresponds to its economic situation, that that discretisation was calculated consistently with the methodology set out in Delegated Regulation 2015/63 on the basis of plausible data and that all the risk factors were taken into account.

Furthermore, the other stages of the methodology for calculating *ex ante* contributions to the SRF are based on aggregate data from the institutions concerned, which may be disclosed in collective form without infringing the SRB's obligation to respect business confidentiality.

The Court therefore concludes that Delegated Regulation 2015/63 does not prevent the SRB from disclosing, in collective and anonymised form, sufficient information to enable an institution to understand how its individual situation was taken into account in the calculation of its *ex ante* contribution to the SRF relative to the situation of all the other institutions concerned. It is true that a statement of reasons based on the disclosure of relevant information, in collective and anonymised form, does not enable every institution to detect systematically any error made by the SRB in the collection and aggregation of the relevant data. However, it is sufficient to enable that institution to satisfy itself that the information which it provided to the competent authorities was indeed included in the calculation of its *ex ante* contribution to the SRF, in accordance with the relevant rules of EU law, to identify, on the basis of its general knowledge of the financial sector, any use of implausible or manifestly incorrect information, and to determine whether it is worthwhile to bring an action for the annulment of a decision of the SRB fixing its *ex ante* contribution to the SRF. The Court states, however, that that approach concerning the statement of reasons for a decision such as the decision at issue does not affect the power of the EU Courts, for the purpose of carrying out an effective judicial review in accordance with the requirements of Article 47 of the Charter, to request that the SRB produce data capable of justifying calculations the accuracy of which has been challenged before them, by ensuring, where necessary, the confidentiality of those data.

Lastly, the Court holds that the decision at issue does not contain an adequate statement of reasons since the information which it provided and that available on the SRB's website at the date of the decision covered only part of the relevant information that the SRB could have provided without compromising business confidentiality. In particular, neither the annex to that decision nor the SRB's website contained data on the limit values of each 'bin' and the values of the corresponding indicators. Consequently, the decision at issue is annulled in so far as it concerns Landesbank Baden-Württemberg.

28 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). In the judgment under appeal, the General Court made a declaration of illegality in respect of Articles 4 to 7 and 9 of and Annex I to that regulation, concerning the method for calculating ex ante contributions to the SRF.

X. SOCIAL POLICY

1. EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

Judgment of the Court (Second Chamber) of 15 July 2021, Tartu Vangla, C-795/19

Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Prohibition of discrimination on grounds of disability – Article 2(2)(a) – Article 4(1) – Article 5 – National legislation laying down requirements in respect of the hearing acuity of prison officers – Failure to meet the standards of sound perception required – Absolute bar to remaining in employment

For almost 15 years, XX was employed as a prison officer by Tartu Prison (Estonia).

During that period, Regulation No 12 of the Government of the Republic of Estonia on health requirements and medical checks for prison officers and on the form and content of medical certificates entered into force. That regulation prescribes, inter alia, minimum standards of sound perception applicable to those officers and provides that impaired hearing falling below those standards constitutes an absolute medical impediment to the exercise of the duties of a prison officer. In addition, that regulation does not permit the use of corrective aids during the assessment of whether the hearing acuity requirements are met.

On 28 June 2017 the Governor of Tartu Prison dismissed XX following the issue of a medical certificate showing that XX's hearing acuity did not meet the minimum standards of sound perception prescribed in Regulation No 12.

XX brought an action before the Tartu Halduskohus (Administrative Court, Tartu, Estonia), arguing that that regulation constituted discrimination on grounds of disability contrary to, inter alia, the põhiseadus (Constitution). Following the dismissal of that action, the Tartu Ringkonnakohus (Court of Appeal, Tartu, Estonia), by judgment of 11 April 2019, upheld XX's appeal and declared that the decision to dismiss him was unlawful. That court also decided to initiate the procedure for reviewing the constitutionality of the provisions of that regulation before the referring court, the Riigikohus (Supreme Court, Estonia). Noting that the obligation to treat persons who have a disability in the same way as other persons in a comparable situation and without discrimination results not only from the Constitution but also from EU law, that court decided to refer a question to the Court of Justice as to whether the provisions of Directive 2000/78 [29] preclude such national legislation.

Findings of the Court

After finding that Regulation No 12 falls within the scope of that directive and amounts to a difference in treatment directly based on disability, the Court examines whether that difference is capable of being justified pursuant to Article 4(1) of Directive 2000/78, according to which Member States may provide that a difference of treatment which is based on a characteristic related to that ground shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. In so far as it allows a derogation from the principle of non-discrimination, the Court recalls that that provision must be interpreted strictly.

---

29 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).

The Court notes, in particular, that the requirement to be capable of hearing correctly and, therefore, of meeting a particular standard of hearing acuity follows from the nature of the duties of a prison officer, as described by the referring court, and holds that, by reason of the nature of those duties and of the context in which they are carried out, the fact that his or her hearing acuity must satisfy minimum standards of sound perception may be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) of Directive 2000/78.

As Regulation No 12 seeks to preserve the safety of persons and the public order, the Court finds that that regulation pursues legitimate objectives. The Court next examines whether the requirement that it lays down – namely that a prison officer's hearing acuity must meet minimum standards of sound perception, without the use of corrective aids being permitted during the assessment of whether those standards are met, and where failure to meet those standards constitutes an absolute medical impediment to the exercise of his or her duties, resulting in their termination – is appropriate for attaining those objectives and does not go beyond what is necessary to attain them.

As to the appropriateness of that requirement, the Court recalls that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. The Court observes, however, that the regulation permits a prison officer to use corrective devices during an assessment as to whether the standards that it lays down in respect of visual acuity are met, whereas that possibility is excluded in respect of hearing acuity.

As regards the necessity of that requirement, the Court recalls that the failure to meet the standards prescribed by Regulation No 12 is an absolute bar to the exercise of a prison officer's duties, as those standards apply to all prison officers, without any possibility of exemption. In addition, that regulation does not permit an individual assessment of an officer's capacity to fulfil the essential duties of that profession notwithstanding the hearing impairment with which he or she presents.

The Court also recalls the employer's obligation under Article 5 of Directive 2000/78 to take appropriate measures, in accordance with the needs arising in a specific case, to enable a person with a disability to have access to and participate in employment, unless such measures would impose a disproportionate burden on that employer. In that regard, the Court observes that Regulation No 12 did not allow XX's employer to conduct, prior to his dismissal, checks in order to consider measures such as use of a hearing aid, exemption, for him, from the obligation of performing tasks requiring him to meet the minimum standards of sound perception prescribed, or assignment to a post which does not require those standards to be reached; and that no indication is provided as to the possible disproportionate nature of the resulting burden.

That regulation thus appears to have imposed a requirement that goes beyond what is necessary to attain the objectives pursued.

The Court concludes that Article 2(2)(a), Article 4(1) and Article 5 of Directive 2000/78 preclude national legislation which imposes an absolute bar to a prison officer remaining in employment when his or her hearing acuity does not meet the minimum standards of sound perception prescribed by that legislation, without allowing it to be ascertained whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures within the meaning of that Article 5.

2. ORGANISATION OF WORKING TIME

Judgment of the Court (Grand Chamber) of 15 July 2021, Ministrstvo za obrambo, C-742/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Members of the armed forces – Applicability of EU law – Article 4(2) TEU – Directive 2003/88/EC – Scope – Article 1(3) – Directive 89/391/EEC – Article 2(2) – Military activities – Concept of 'working time' – Stand-by period – Dispute concerning the remuneration of a worker

Between February 2014 and July 2015, B. K., a non-commissioned officer in the Slovenian army, performed uninterrupted 'guard duty' for seven days per month. While performing that service, which included both periods during which B. K. was required to carry out actual surveillance activity and periods during which he was required only to remain available to his superiors, he was contactable and present at all times at the barracks where he was posted.

The Ministry of Defence took the view that, for each of those days of 'guard duty', only eight hours constituted working time; it paid B. K. the corresponding ordinary salary in respect of those hours and, in respect of the other hours, paid him only a stand-by duty allowance amounting to 20% of his basic salary.

The action brought by B. K., in which he claimed that he should be paid, as overtime, for the hours during which, in the course of his 'guard duty', he had not actually performed any activity for his employer, but had been obliged to remain available to his superiors, was dismissed at first instance and on appeal.

In that context, the Vrhovno sodišče (Supreme Court, Slovenia), hearing an appeal on a point of law, decided to refer questions to the Court concerning the applicability of Directive 2003/88, [30] which lays down minimum requirements concerning, inter alia, the duration of working time for security activity carried out by a member of military personnel in peacetime and, as the case may be, on the issue of whether 'stand-by periods' during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, must be regarded as working time, within the meaning of Article 2 of that directive, for the purposes of determining the remuneration payable to him or her in respect of that period.

Findings of the Court

In its Grand Chamber judgment, the Court provides guidance, in the first place, on the instances in which security activity carried out by a member of military personnel is excluded from the scope of Directive 2003/88.

In doing so, the Court notes, at the outset, that Article 4(2) TEU, which provides that national security is to remain the sole responsibility of each Member State, [31] does not have the effect of excluding the organisation of the working time of military personnel from the scope of EU law.

In that regard, the Court notes that the principal tasks of the armed forces of the Member States, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State which the European Union must respect.

---

30 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

31 According to the wording of that same provision, the European Union is to respect the essential functions of the State, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

However, it points out that it does not follow from the above that decisions taken by the Member States on the organisation of their armed forces fall entirely outside the scope of EU law, in particular where the harmonised rules at issue relate to the organisation of working time.

Although it does not therefore result from the respect which the European Union must have for the essential functions of the State that the organisation of the working time of military personnel entirely escapes the application of EU law, the fact remains that Article 4(2) TEU requires that the application to military personnel of the rules of EU law relating to the organisation of working time must not hinder the proper performance of those essential functions. EU law must take into consideration the specific features which each Member State imposes on the functioning of its armed forces which result, inter alia, from the particular international responsibilities assumed by that Member State, from the conflicts or threats with which it is confronted, or from the geopolitical context in which that State evolves.

Turning then to the question of who is covered by Directive 2003/88, the Court notes that the concept of 'worker' is defined by reference to the essential feature of an employment relationship, namely the fact that a person performs services for and under the direction of another person in return for which he or she receives remuneration. As this was the case for B. K. during the relevant period, that directive was applicable to his situation.

Lastly, as regards the matters covered by Directive 2003/88, which is defined by reference to Article 2 of Directive 89/391, [32] the Court points out that that directive is to apply to 'all sectors of activity, both public and private', [33] apart from where characteristics peculiar to certain specific public service activities, such as the armed forces, inevitably conflict with it. [34]

In that regard, the Court finds that Article 2 of Directive 89/391 cannot be interpreted as meaning that all members of the armed forces of the Member States are permanently excluded from the scope of Directive 2003/88. Such an exclusion does not cover whole sectors of the public service, but rather only certain categories of activity in those sectors, by reason of their specific nature. With respect, specifically, to activities carried out by military personnel, the Court finds, inter alia, that those activities connected to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, do not, as such, have particularities which make it impossible to plan working time in a manner compliant with the requirements laid down in Directive 2003/88, at least provided that those activities are not carried out in the context of a military operation, including the period of preparation immediately preceding such an operation.

However, the Court finds that that directive does not apply to the activities of military personnel and, in particular, to their security activities where those activities take place in the course of initial or operational training or in the course of operations involving a military commitment by the armed forces, whether they are deployed, permanently or on a temporary basis, within the borders of the relevant Member State or outside of those borders. Furthermore, Directive 2003/88 equally does not apply to military activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive. That is also the case where it appears that the military activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed, or where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military

---

32 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

33 Article 2(1) of Directive 89/391.

34 First subparagraph of Article 2(2) of Directive 89/391.

operations. It is for the referring court to determine whether the security activity performed by B. K. is covered by one of those situations. If not, then that activity will have to be deemed to fall within the scope of Directive 2003/88.

In the second place, the Court finds that, assuming that Directive 2003/88 applies in the present case, a stand-by period imposed on a member of military personnel which involves him or her being continually present at his or her place of work must be regarded as being working time where that place of work is separate from his or her residence. However, since the way in which workers are remunerated for the period of stand-by time is covered by national law and not by Directive 2003/88, the latter does not preclude a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than a stand-by period during which he or she performs actual work. working there, being remunerated differently from a period of on-call duty during which he performs actual work.

3. COORDINATION OF SOCIAL SECURITY SYSTEMS

Judgment of the Court (Grand Chamber) of 15 July 2021, A (Soins de santé publics), C-535/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Freedom of movement for persons – Citizenship of the Union – Regulation (EC) No 883/2004 – Article 3(1)(a) – Sickness benefits – Concept – Article 4 and Article 11(3)(e) – Directive 2004/38/EC – Article 7(1)(b) – Right of residence for more than three months – Condition of having comprehensive sickness insurance cover – Article 24 – Equal treatment – Economically inactive national of a Member State residing legally in the territory of another Member State – Refusal by the host Member State to affiliate that person to its public sickness insurance system

A, an Italian national married to a Latvian national, left Italy and settled in Latvia to live with his wife and their two infant children.

Shortly after arriving in Latvia on 22 January 2016, he applied to the Latvijas Nacionālais Veselības dienests (National Health Service, Latvia) to become affiliated to the Latvian social security system. His request was refused by decision of 17 February 2016, which was confirmed by the Ministry of Health on the ground that A was not included within any of the categories of recipients of medical care financed by the State since he was neither employed nor self-employed in Latvia.

His action against the refusal decision of the Latvian authorities having been dismissed, A brought an appeal before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), which also delivered a judgment unfavourable to him.

It was in that context that the Augstākā tiesa (Senāts) (Supreme Court, Latvia), hearing an appeal brought by A, decided to ask the Court of Justice about the compatibility of the dismissal by the Latvian authorities of A's request with EU law in the areas of citizenship and social security.

In its judgment, pronounced by the Grand Chamber, the Court confirms the right of economically inactive Union citizens residing in a Member State other than their Member State of origin to be affiliated to the public sickness insurance system of the host Member State in order to obtain medical care financed by that State. The Court explains, however, that EU law does not impose the obligation of affiliation free of charge to that system.

Findings of the Court

First, the Court reviews the applicability of Regulation No 883/2004 to the provision of medical care such as that at issue in the main proceedings. It concludes that benefits financed by the State and granted without any individual and discretionary assessment of personal needs, to persons falling within the categories of recipients defined by national legislation, constitute 'sickness benefits' within the meaning of Article 3(1)(a) of Regulation No 883/2004. [35] Those benefits accordingly fall within the scope of that regulation, not being 'social and medical assistance' excluded from that scope of application. [36]

Second, the Court examines, in essence, whether Article 11(3)(e) of Regulation No 883/2004 and Article 7(1)(b) of Directive 2004/38 [37] preclude national legislation which excludes from the right to be affiliated to the public sickness insurance system of the host Member State, in order to obtain medical care financed by that State, economically inactive Union citizens who are nationals of another Member State and who fall, by virtue of Article 11(3)(e) of that regulation, within the scope of the legislation of the host Member State and who are exercising their right of residence in the territory of that State under Article 7(1)(b) of that directive.

In that regard, the Court states, first, that, in the context of the system of conflict rules established by Regulation No 883/2004, [38] for determining the national legislation applicable to the receipt of the social security benefits, economically inactive persons are, in principle, covered by the legislation of the Member State in which they reside.

It notes, next, that, when they lay down the conditions establishing the right to become a member of a social security scheme, the Member States are under an obligation to comply with the provisions of EU law in force. In particular, the conflict rules laid down by Regulation No 883/2004 are mandatory for the Member States, they cannot determine to what extent their own legislation or that of another Member State is applicable.

Accordingly, a Member State cannot, under its national legislation, refuse to affiliate to its public sickness insurance scheme a Union citizen who, under Article 11(3)(e) of Regulation No 883/2004, on the determination of the legislation applicable, comes under the legislation of that Member State.

Finally, the Court examines the effect on the social security scheme of the host Member State of the provisions of Directive 2004/38, in particular Article 7(1)(b). It follows from the latter provision that, throughout the period of residence in the territory of the host Member State of more than three months and less than five years, economically inactive Union citizens must in particular have comprehensive sickness insurance cover for themselves and their family members so as not to become an unreasonable burden on the public finances of that Member State.

As regards the relationship between that condition for residence in accordance with Directive 2004/38 and the obligation of affiliation under Regulation No 883/2004, the Court states that the host Member State of an economically inactive Union citizen may provide that access to that system is not free of charge in order to prevent that citizen from becoming an unreasonable burden on the public finances of that Member State.

---

35 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43).

36 In accordance with Article 3(5)(a) of Regulation No 883/2004.

37 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77 and corrigendum OJ 2004 L 229, p.35).

38 Article 11(3)(e) of Regulation No 883/2004.

The Court considers that the host Member State is entitled to make the affiliation to its public sickness insurance scheme of an economically inactive Union citizen residing in its territory on the basis of Article 7(1)(b) of Directive 2004/38 subject to conditions, such as the conclusion or maintenance by that citizen of comprehensive private sickness insurance, enabling the reimbursement to that Member State of the health expenses which it incurred for that citizen's benefit, or the payment, by that citizen, of a contribution to that Member State's public sickness insurance scheme. It is nevertheless for the host Member State to ensure that the principle of proportionality is observed in that context and, therefore, that it is not excessively difficult for that citizen to comply with such conditions.

The Court concludes that Article 11(3)(e) of Regulation No 883/2004, read in the light of Article 7(1)(b) of Directive 2004/38, precludes national legislation which excludes from the right to be affiliated to the public sickness insurance system of the host Member State, in order to obtain medical care financed by that State, economically inactive Union citizens who are nationals of another Member State and who fall, by virtue of that regulation, within the scope of the legislation of the host Member State and who are exercising their right of residence in the territory of that Member State under that directive.

Those provisions, by contrast, do not preclude the affiliation of such Union citizens to that system from not being free of charge in order to prevent those citizens from becoming an unreasonable burden on the public finances of the host Member State.

XI. ENERGY

Judgment of the Court (Grand Chamber) of 15 July 2021, Germany v Poland, C-848/19 P

Link to the complete text of the judgment

Appeal – Article 194(1) TFEU – Principle of energy solidarity – Directive 2009/73/EC – Internal market in natural gas – Article 36(1) – Decision of the European Commission on review of the exemption of the OPAL pipeline from the requirements on third-party access and tariff regulation following a request by the German regulatory authority – Action for annulment

The Baltic Sea Pipeline Connector ('the OPAL pipeline') is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, which transports gas from Russia into Europe, circumventing the 'traditional' transit countries such as Poland, Slovakia and Ukraine. In 2009, the European Commission had approved, subject to conditions, the decision of the German Federal Network Agency to exempt the OPAL pipeline from the rules under Directive 2003/55 [39] (later replaced by Directive 2009/73 [40]) on third-party access to the gas pipeline network [41] and on tariff regulation. [42] As Gazprom, the dominant undertaking on the market for the supply of gas, had never complied with one of the conditions imposed by the Commission, it was able to operate the OPAL pipeline only up to 50% of its capacity since it was put into service in 2011.

In 2016, at the request in particular of Gazprom, the German Federal Network Agency notified the Commission of its intention to vary certain provisions of the exemption granted in 2009. In essence, the variation proposed was to enable the OPAL pipeline to be operated at its full capacity, on condition that at least 50% of that capacity would be sold by way of auction. By decision of 28 October 2016, the Commission approved that variation subject to certain conditions [43] ('the decision at issue').

Taking the view that the decision at issue threatened the security of Poland's gas supply because of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported through the States of the central European region, including Poland, via pipelines competing with OPAL, the Republic of Poland brought an action for annulment of that decision before the General Court. The General Court upheld the action and annulled the decision at issue for breach of the principle of energy solidarity laid down in Article 194(1) TFEU. [44] According to the General Court, the Commission should have examined the impact of the variation of the regime governing the operation of the OPAL pipeline on Poland's security of supply and energy policy.

In the appeal brought by the Federal Republic of Germany, the Grand Chamber of the Court of Justice upholds the judgment of the General Court, ruling on the nature and scope of the principle of energy solidarity.

---

39 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

40 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

41 Article 18 of Directive 2003/55 and Article 32 of Directive 2009/73.

42 Article 25(2) to (4) of Directive 2003/55.

43 Commission Decision C(2016) 6950 final of 28 October 2016 on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation granted under Directive 2003/55.

44 Judgment of 10 September 2019, *Poland* v *Commission* (T-883/16, EU:T:2019:567).

Findings of the Court

The Court recalls, in the first place, that, according to Article 194(1) TFEU, European Union policy on energy is to aim, in a spirit of solidarity between the Member States, to ensure the functioning of the energy market and security of energy supply in the European Union, and to promote energy efficiency and energy saving, the development of new and renewable forms of energy and the interconnection of energy networks.

In that regard, the Court notes that the principle of solidarity is a fundamental principle of EU law, which is mentioned in several provisions of the EU and FEU Treaties and which finds specific expression, in the field of energy, in Article 194(1) TFEU. That principle is closely linked to the principle of sincere cooperation, [45] which requires the European Union and the Member States, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In so far as the principle of solidarity forms the basis of all of the objectives of the European Union's energy policy, it cannot be ruled out that that principle produces binding legal effects. On the contrary, the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union having an obligation of solidarity towards the Member States and the Member States having the same obligation between themselves and with regard to the common interest of the European Union.

The Court concludes that, contrary to the arguments advanced by the Federal Republic of Germany, the legality of any act of the EU institutions falling within the European Union's policy on energy must be assessed in the light of the principle of energy solidarity, even if there is no express reference to that principle in the secondary legislation applicable, in this case, Directive 2009/73. [46] It is apparent, therefore, from the principle of energy solidarity in conjunction with the principle of sincere cooperation that, when adopting a decision amending an exemption regime that is taken pursuant to Directive 2009/73, [47] the Commission is required to examine the possible risks for security of gas supply on the markets of the Member States.

In the second place, the Court states that the wording of Article 194 TFEU does not restrict the application of the principle of energy solidarity to the situations involving terrorist attacks or natural or man-made disasters referred to in Article 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU extends to any action falling within the European Union's energy policy.

Thus, the duty, for the EU institutions and the Member States, to take the principle of energy solidarity into account when adopting acts relating to the internal market in natural gas, ensuring in particular security of energy supply in the European Union, entails the adoption of measures to deal with emergencies as well as of preventive measures. The European Union and the Member States must, in the exercise of their respective competences in that field, balance the energy interests involved, avoiding the adoption of measures that might affect the interests of stakeholders liable to be affected, as regards security of supply, its economic and political viability and the diversification of sources of supply, and must do so in order to take account of their interdependence and de facto solidarity.

Thus, the Court of Justice confirms that the General Court did not err in law in ruling that the decision at issue should be annulled for breach of the principle of energy solidarity.

---

45 Article 4(3) TEU.

46 Article 36(1) of Directive 2009/73.

47 Article 36 of Directive 2009/73.

XII. COMMON COMMERCIAL POLICY

Judgment of the General Court (Seventh Chamber) of 14 July 2021, Interpipe Niko Tube and Interpipe Nizhnedneprovsky Tube Rolling Plant v Commission, T-716/19

Link to the complete text of the judgment

Dumping – Imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine – Interim review – Calculation of the normal value – Selling, general and administrative costs – Sales between related companies – Ordinary course of trade – Single economic entity – Article 2(3), (4) and (6) of Regulation (EU) 2016/1036 – Export price – Adjustment – Functions similar to those of an agent working on a commission basis – Article 2(10)(i) of Regulation 2016/1036 – Manifest error of assessment – Methodology different from that used in a previous investigation – Article 11(9) of Regulation 2016/1036 – Legitimate expectations – Rights of the defence

In 2019, following an interim review of the dumping measures applied to certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine ('the products concerned'), the European Commission adopted Implementing Regulation 2019/1295 [48] ('the contested regulation'), fixing at 8.1% the rate of the anti-dumping duty applicable to two companies incorporated under Ukrainian law, Interpipe Niko Tube LLC and Interpipe Nizhnedneprovsky Tube Rolling Plant OJSC ('the applicants'). They manufacture the products concerned and sell them either directly or through a related trader established in Ukraine, LLC Interpipe Ukraine ('IPU'), which resells them to independent customers. Exports to the European Union of the products concerned manufactured by the applicants take place through the intermediary of a related trader established in Switzerland, Interpipe Europe SA ('IPE'), and a related importer established in Germany, Interpipe Central Trade GmbH ('IPCT').

The applicants brought an action for annulment of Implementing Regulation 2019/1295, which was however dismissed by the General Court. In its judgment, the Court provides clarification on the calculation of the normal value of the product concerned when the exporting producer sells that product on its domestic market by carrying out transactions in two stages, the first of which is internal to the single economic entity to which that exporting producer belongs. The Court also examines the role of the existence of parallel sales channels for the purposes of applying an adjustment, for differences in commissions paid in respect of the sales under consideration, [49] in the context of the fair comparison between the export price and the normal value. In that regard, it rules on the distinction between the application of such an adjustment and a change in the method used in the investigation resulting in the imposition of the duty reviewed. [50]

Findings of the Court

Since the Commission took into account, in calculating the normal value of the products concerned, the selling, general and administrative costs ('the SG&A costs') relating to the sales made by the applicants to the related trader IPU, so that IPU could resell them to independent customers established in Ukraine, the Court notes, as a preliminary point, that the cost of production, understood as the sum of the cost of manufacturing the product and the SG&A costs, is taken into

48 Commission Implementing Regulation (EU) 2019/1295 of 1 August 2019 amending Implementing Regulation (EU) 2018/1469 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine (OJ 2019 L 204, p. 22).

49 Adjustment under Article 2(10)(i) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21) ('the basic regulation').

50 Change of method for the purposes of Article 11(9) of the basic regulation.

account by the Commission, first, in the context of Article 2(4) of the basic regulation, in order to assess whether domestic sales can be considered to have taken place in the ordinary course of trade ('the OCT test') and, furthermore, in the context of the construction of the normal value under Article 2(3) of that regulation, where domestic sales could not be taken into account. In that regard, the Court observes that the relevant costs in both cases must be the same in order to avoid treating exporting producers for no reason differently according to whether they sell certain product types exclusively abroad or in their own country as well.

Next, the Court finds that, under the first sentence of Article 2(6) of the basic regulation, the SG&A costs are determined on the basis of data relating to sales made in the ordinary course of trade. That article makes no distinction according to whether the SG&A costs are used to construct the normal value in accordance with Article 2(3) or any other provision of that regulation. Furthermore, since it is common ground that the SG&A costs used to construct the normal value on the basis of Article 2(3) of the basic regulation are the same as those applied for the purposes of the OCT test provided for in Article 2(4) of that regulation, those costs must be determined in accordance with the first sentence of Article 2(6) of that regulation.

In the present case, the applicants sold their products in Ukraine both in the form of direct sales – made by themselves to independent domestic customers – and indirect sales, by selling the product concerned to IPU (first stage), which in turn resold it to independent domestic customers (second stage). Even though the first sentence of Article 2(6) of the basic regulation does not refer specifically to the case of transactions such as indirect sales, where there are sales involving several companies within the same group before the product at issue is purchased by a third party, the EU institutions must rely on the prices paid by the first independent buyer to related sales companies, given that those prices could be regarded as being those of the first sale of the product made in the ordinary course of trade.

As regards the SG&A costs, the Court points out, moreover, that all the expenses incurred by the distribution companies controlled by the manufacturer, and likewise those incurred by the manufacturer, must be included in the normal value. The addition, in the present case, of the SG&A costs relating to the two stages of an indirect sale and the taking into account only of the price charged in the second stage, for the purposes of the OCT test, is consistent with the basic regulation. It may be presumed that the prices charged by IPU to independent buyers for products which it purchased from the applicants include, first, the prices which IPU itself paid to the applicants and which are deemed to reflect the costs of manufacturing the products, the SG&A costs incurred by the applicants when selling those products to IPU and, possibly, a profit for the applicants and, secondly, the SG&A costs incurred by IPU when selling those products to independent buyers, together, as the case may be, with a profit. By contrast, it cannot be presumed that the SG&A costs incurred by IPU in connection with the sale to independent buyers include the SG&A costs incurred by the applicants during the first stage of the indirect sale, between them and IPU.

Next, the Court rejects the complaints alleging that the Commission, when calculating the export price for the purposes of the proceeding resulting in the adoption of the contested regulation, wrongly applied a downward adjustment, pursuant to Article 2(10)(i) of the basic regulation, to the prices charged by IPE for sales of the product concerned to first independent customers in the European Union. After confirming the Commission's analysis that IPE could no longer be classified as an internal sales department, as in the past, the Court observes that the application of an adjustment on the basis of factors which had not been examined previously cannot be regarded as a change in the method of calculation for the purposes of Article 11(9) of the basic regulation, but as a consequence of the finding that the conditions required for such an adjustment are met. Moreover, even if it were by mistake that the Commission failed, during the previous reviews, to examine certain factors or to draw the legal conclusions from them, it cannot be required to repeat the same error when adopting the contested regulation, merely in order not to infringe Article 11(9) of the basic regulation. In any event, even if the Commission had changed the method for the purposes of Article 11(9) of the basic regulation, the Court observes that changes in the structure of a group and in the organisation of its export sales to the European Union represent a change in circumstances such as to warrant a change of method for the purposes of that provision.

Lastly, as regards the complaints alleging infringement of the right to be heard, the Court recalls that that right extends to all the factual and legal material which forms the basis of the decision-making

act, but not to the final position which the authority intends to adopt. The Commission's observations, received by the applicants after the adoption of the contested regulation, did not contain factual or legal material of which they had not previously been aware and on which they were unable to express their views. They constituted the basis of the Commission's final position on the question of the SG&A costs at issue, so that no infringement of the rights of the defence could be established in that regard.

XIII. COMMON FOREIGN AND SECURITY POLICY

Judgment of the General Court (Seventh Chamber) of 14 July 2021, Benavides Torres v Council, T-35/19

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures taken in view of the situation in Venezuela – Freezing of funds – Lists of persons, entities and bodies subject to the freezing of funds and economic resources – Retention of the applicant's name on the lists – Error of assessment

The Council of the European Union adopted, on 13 November 2017, Decision (CFSP) 2017/2074 and Regulation (EU) 2017/2063 [51] concerning restrictive measures in view of the situation in Venezuela, characterised by the continuing deterioration of democracy, the rule of law and human rights. Those acts provided for, inter alia, the freezing of funds and economic resources belonging to persons held responsible for serious violations of human rights or undermining democracy or the rule of law. The applicant, Mr Benavides Torres, had been included, on 22 January 2018, [52] on the lists of persons and entities subject to those measures on the grounds that, first, he held the position of Chief of the Capital District Government, second, he had been the General Commander of the Bolivarian National Guard (BNG), third, that he had been involved in the repression of civil society and democratic opposition in Venezuela and was responsible for serious human rights violations committed by the BNG under his command and, fourth, his actions and policies as General Commander of the BNG had undermined the rule of law in Venezuela.

Following the adoption of Decision (CFSP) 2018/1656 and Regulation (EU) 2018/1653, [53] by which the Council had extended his inclusion on the lists at issue, relying on the same reasons against him, the applicant brought an action for annulment of those acts. He complained that the Council had committed a manifest error of assessment by failing to take into consideration the change in his situation after 4 January 2018, as he no longer held any role within the political or military authorities of Venezuela and no longer had any relationship with them. He submitted that his former roles could

---

51 Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 60) and Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21).

52 Council Decision (CFSP) 2018/90 of 22 January 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 16 I, p. 14), and Council Implementing Regulation (EU) 2018/88 of 22 January 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 16 I, p. 6).

53 Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10), and Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1).

not justify the retention of his name on the lists at issue. The General Court dismisses the action, holding that the retention of the restrictive measures in respect of the applicant is justified.

Findings of the Court

In the first place, the Court observes that the reference, in the grounds of the contested acts, to specific situations involving the BNG under the applicant's command cannot be considered to be of no relevance solely because that conduct dates from the more or less remote past. That interpretation is borne out, according to the Court, by the second paragraph of Article 13 of Decision 2017/2074, as amended by Decision 2018/1656.

In the second place, the Court recalls that restrictive measures are of a precautionary and, by definition, provisional nature, the validity of which always depends on whether the factual and legal circumstances which led to their adoption continue to apply and on the need to persist with them in order to achieve their objective, which it is for the Council to assess in the course of its periodic review of those measures by conducting an updated assessment of the situation and by appraising the impact of such measures. In the present case, the Court notes that the applicant no longer held the positions of General Commander of the BNG and Chief of the Capital District Government at the time when the contested acts were adopted. Given that no change in the regime in power in Venezuela had taken place, the Court finds that it was therefore relevant for the Council to examine, at that date, the connections between the applicant and the government in power. It holds that it is apparent from the case file that the retention of the applicant's name on the lists at issue was justified by the same evidence relied on in support of the initial inclusion of his name, whereas a considerable period of time, exceeding 10 months, passed between the applicant's ceasing to hold his position of Chief of the Capital District Government and the adoption of the contested acts. In that regard, the Court observes that, in the context of the updated assessment it was required to conduct in the course of the review of the restrictive measures at issue, the Council did not establish or even claim that it was impossible for it to obtain the information relating to the applicant's ceasing to hold his position of Chief of the Capital District Government.

That being said, the Court recalls that the person on whom the restrictive measures are imposed is in the best position to inform the Council of any change in his or her specific situation. In the present case, although the Council had specifically invited the applicant's representative, by email of 3 April 2018, in accordance with Article 8 of Decision 2017/2074, to submit observations in the context of the annual review by the Council of the restrictive measures at issue by 1 September 2018, and the applicant must be deemed to have known that the Council had to take a decision on whether the restrictive measures were to be maintained by 14 November 2018 at the latest, the applicant informed the Council of the change in his situation only on 30 October 2018, that is, a few days before the contested acts were adopted.

In addition, the Court states that, first, there was no change in the regime in power in Venezuela between the time when the applicant was General Commander of the BNG and Chief of the Capital District Government and the time when he no longer held those positions and, second, it is not apparent from the case file that the applicant took the decision to cease holding his various public roles in response to the undermining of the rule of law and democracy in Venezuela, in order to distance himself from such actions. In those circumstances, in the absence of evidence to the contrary, the Court holds that the Council was entitled to consider that, on the date when the contested acts were adopted, the applicant remained connected to the regime in power in Venezuela, which had not changed in relation to the time when, in the context of his position as General Commander of the BNG, he had undermined democracy and the rule of law in Venezuela.

Last, the Court highlights that the foregoing considerations cannot be regarded as meaning that a presumption or reversal of the burden of proof to the applicant's detriment has been established. Their significance is simply that the reference, in the grounds of the contested acts, to posts formerly occupied by the applicant, discloses that the Council considered that, in the absence of evidence capable of calling into question that proposition, he remained connected to the regime in power in Venezuela.

Judgment of the General Court (Seventh Chamber) of 14 July 2021, Cabello Rondón v Council, T-248/18

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures taken with regard to the situation in Venezuela – Freezing of funds – Lists of persons, entities and bodies covered by the freezing of funds and economic resources – Inclusion of the applicant's name on the lists – Retention of the applicant's name on the lists – Obligation to state reasons – Rights of the defence – Principle of sound administration – Right to effective judicial protection – Error of assessment – Freedom of expression

The Council of the European Union adopted, on 13 November 2017, Decision (CFSP) 2017/2074 and Regulation (EU) 2017/2063 [54] concerning restrictive measures in view of the situation in Venezuela characterised by the continuing deterioration of democracy, the rule of law and human rights. Those acts provide, inter alia, for the freezing of funds and economic resources belonging to persons whose actions, policies or activities otherwise undermine democracy or the rule of law in Venezuela. By Decision (CFSP) 2018/90 and Implementing Regulation 2018/88 of 22 January 2018, [55] the Council included the applicant, Mr Cabello Rondòn, on the lists of persons and entities covered by those acts due to his involvement, as a member of the Constituent Assembly and as the First Vice-President of the United Socialist Party, in undermining democracy and the rule of law in Venezuela, including by using the media to publicly attack and threaten other media and civil society. The applicant lodged, on 16 April 2018, an action for the annulment of those acts and then modified his application so that it also covered Decision 2018/1656 and Implementing Regulation 2018/1653 [56] by which the Council had extended the restrictive measures adopted against him by updating, in the grounds justifying those measures, the reference to the role of the applicant, who had become the President of the Constituent Assembly.

The General Court dismisses the applicant's action, holding, inter alia, that the restrictive measures to which he was subject do not infringe his freedom of expression.

Findings of the Court

At the outset, the Court recalls that, in accordance with Articles 21 and 23 TEU, respect for fundamental rights, including the freedom of expression and to information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter') and, by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), is required of all actions of the European Union. In that regard, the Court states that, while the ECHR is not a legal instrument which has been formally incorporated into the EU legal order, the fundamental rights that it recognises form part of EU law, by virtue of Article 6(3) TEU, as general principles. In addition, it follows from Article 52(3) of the Charter that the rights it contains, which correspond to rights guaranteed by the ECHR, have the same meaning and scope as those laid down by the ECHR.

Against that background, the Court recalls that the European Court of Human Rights ('the ECtHR') has already held that the freedom of expression is one of the essential foundations of a democratic

---

54 Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p.60) and Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21).

55 Council Decision (CFSP) 2018/90 of 22 January 2018, amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 16 I, p. 14), and against Council Implementing Regulation (EU) 2018/88 of 22 January 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 16 I, p. 6).

56 Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10), and against Council Implementing Regulation (EU) 2018/1653 of 6 November 2018, implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1).

society. Attaching particular weight to the role played by journalists as 'watchdogs' of democracy, the ECtHR recommends 'the greatest care' when it is necessary to assess the validity of restrictions on their freedom of expression. It nevertheless finds, a fortiori in the case of audiovisual media, that their right to impart information on issues of general interest is protected on condition that they act in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism. Furthermore, according to the ECtHR, the ECHR allows little scope for restrictions on the freedom of expression in political debate or on issues of general interest. The principles that it upholds call for strong protection, except in situations where political debate degenerates into a call for violence, hated or intolerance.

However, the Court observes that, by contrast with those cases in which the ECtHR developed its case-law, the applicant does not rely on the freedom of expression as a defence against the Venezuelan State, but in order to protect himself against the restrictive measures, which are of a precautionary, rather than penal, nature, which the Council adopted against him.

In the first place, as regards the applicant's status as a journalist, the Court stresses that his weekly television programme, which is the sole evidence of his status as a journalist, appears to be an extension of his political activities. It observes that his media interventions, on which the Council relied in order to justify the contested acts, disclose, inter alia, his political acts. The Court recalls in that regard that it follows from the case-law of the ECtHR that the principles relating to journalists' good faith and ethical duties apply equally to other persons who engage in public debate. However, the applicant used the media freely in order to publicly threaten and intimidate the political opposition, other media and civil society. Therefore, the Court finds that the acts of the applicant examined by the Council in its file constitute an incitement to violence, hatred and intolerance such that those acts cannot benefit from the enhanced freedom of expression which protects, in principle, statements made in a political context. Therefore, the Court rejects the applicant's arguments based on his role as a journalist and relying on the freedom of expression that journalists enjoy.

In the second place, after recalling that 'everyone' enjoys freedom of expression, the Court observes that the restrictive measures at issue may lead to restrictions on the applicant's freedom of expression. The Court notes however that the freedom of expression does not constitute an unfettered prerogative and that its exercise may, under certain conditions, be limited. A restriction on the freedom of expression is permitted only if it is provided for by law, intended to achieve an objective of general interest and is not excessive. The Court finds that those conditions are fulfilled in the present case and therefore holds that the restrictive measures at issue do not infringe the applicant's freedom of expression.

XIV. JUDGMENTS PREVIOUSLY DELIVERED

1. LITIGATION OF THE UNION : ACTION FOR ANNULMENT

Judgment of the General Court (Fourth Chamber, Extended Composition) of 3 February 2021, Moi v Parliament, T-17/19

Institutional law – European Parliament – Psychological harassment – Decisions of the President of the Parliament finding that two accredited parliamentary assistants suffered harassment and imposing on a Member of Parliament the penalty of forfeiture of entitlement to the daily subsistence allowance for a period of 12 days – Rules 11 and 166 of the Rules of Procedure of the Parliament – Internal appeal – Decision of the Bureau of the Parliament confirming the penalty – Rule 167 of the Rules of Procedure of the Parliament – Action for annulment – Time limit for bringing an action – Admissibility – Rights of the defence – Non-contractual liability

The applicant was a Member of the European Parliament from 2014 to 2019. In November 2017, after submitting a request for assistance, [57] claiming problems with their working environment, two of her accredited parliamentary assistants lodged a harassment complaint with the Parliament's advisory committee responsible for those matters. [58]

By two separate letters of 2 October 2018, the President of the Parliament, after considering the opinion of the advisory committee and the applicant's comments, adopted, first, the decision finding that the two complainants had suffered harassment and, second, the decision imposing on the applicant, as a penalty for her conduct towards the two complainants, the forfeiture of entitlement to the daily subsistence allowance for a period of 12 days.

On 16 October 2018, the applicant lodged an internal appeal [59] with the Bureau of the Parliament against the penalty decision of the President. By decision of 12 November 2018, delivered on 14 November 2018 in plenary sitting and notified that same day, the Bureau of the Parliament confirmed the penalty decision of the President. On 11 January 2019, the applicant brought an action for annulment against the decisions of the President concerning both the harassment and the penalty, against the decision of the Bureau of the Parliament, as well as an action for damages.

By its judgment, the General Court, sitting in extended composition, annuls those three decisions and dismisses the applicant's action as to the remainder, in particular her action for damages. The Court thus clarifies the case-law in relation to, first, the relationship between the right to be heard and the rights of the defence and, second, the evidence which must be established in order to obtain an annulment following the finding of a breach of the rights of the defence. Furthermore, the Court provides clarifications on the limits of the application of the rule 'of correspondence' [60] between the complaint and the application.

---

57 Under Article 24 of the Staff Regulations of Officials of the European Union ('the Staff Regulations').

58 The committee dealing with harassment complaints between accredited parliamentary assistants and Members of Parliament and its prevention at the workplace was established by Article 1(1) of the internal rules of the European Parliament of 14 April 2014, as amended on 6 July 2015.

59 Under Rule 167 of the Rules of Procedure of the Parliament.

60 That rule requires, failing which it will be deemed to be inadmissible, that a plea or head of claim submitted before the EU Courts must already have been raised in the pre-litigation procedure or must be closely linked to criticism made in the same context.

Findings of the Court

Examining, in the first place, the admissibility of the application for annulment, in so far as it concerns the penalty decision of the President, the Court considers that the adoption of the decision of the Bureau of the Parliament does not prevent the applicant from bringing an action against the penalty decision of the President even though that decision was the subject of an internal appeal under Rule 167 of the Rules of Procedure. [61] Furthermore, the Court considers that the applicant could seek annulment of the penalty decision of the President no later than the date of expiry of the period for bringing proceedings calculated from the date of notification of the decision of the Bureau of the Parliament. In the present case, the Court considers that the application cannot be regarded as out of time and is, therefore, admissible.

Examining, in the second place, the admissibility of the application for annulment, in so far as it concerns the harassment decision of the President, the Court considers that the right to an effective remedy and the principle of the sound administration of justice, taken together, require here that the question of the lawfulness of decisions constituting one and the same dispute be brought before the EU Court at the same time, namely, in the present case, the decision finding that harassment had occurred and the decision, which is dependent on it, ruling on the penalty which such conduct should attract. Thus, since the harassment decision of the President was inextricably linked to the penalty decision, the time limit for bringing an action for annulment against both the former and the latter decision did not start to run until the date of notification of the decision of the Bureau of the Parliament adopted following the internal appeal. Similarly, the Court considers that that application cannot be regarded as being out of time and is, therefore, also admissible.

In relation to the admissibility of the first plea in law alleging breach of the principle of respect for the rights of the defence, the Court, first, takes care to recall that the applicant's action is based on Article 263 TFEU, not on Article 270 TFEU, which concerns any dispute between the European Union and its servants. The rule of correspondence was developed in the context of proceedings brought on the basis of the latter provision and in connection with the mandatory prior complaint procedure established by the Staff Regulations. To date, neither the Court of Justice nor the General Court has extended that rule to cover actions brought on the basis of Article 263 TFEU which were preceded by an administrative stage. Accordingly, the Court considers that the rule of correspondence is not applicable to a dispute such as that brought before it by the applicant and, consequently, the first plea in law cannot be declared inadmissible on the ground that the breach of the principle of respect for the rights of the defence was not alleged before the Bureau of the Parliament in the internal appeal.

As to the merits of the first plea in law, the Court takes care to recall that the rights of the defence include the right to be heard and the right to have access to the file and are among the fundamental rights forming an integral part of the European Union legal order and enshrined in the Charter of Fundamental Rights of the European Union. Thus, the Court emphasises that the general principle of respect for the rights of the defence applies in the present case as the procedure initiated against the applicant is liable to culminate, and indeed culminated, in the imposition of a penalty on a Member of Parliament for harassment. In a procedure intended to determine whether harassment has occurred, that principle means that, with due regard to any requirements of confidentiality, the person against whom allegations have been made must, prior to the adoption of the decision adversely affecting him or her, receive all documents in the file, both inculpatory and exculpatory, concerning that harassment and be able to state his or her views on them. In the present case, the Court notes that, during the procedure which resulted in the finding of harassment and the imposition of the penalty, while the applicant was informed of the content of the complaints of the two accredited parliamentary assistants, she had no access to either the statements made by them before the

---

61 Judgments of 21 February 2018, *LL* v *Parliament* (C-326/16 P, EU:C:2018:83, paragraphs 34 to 37), and of 19 September 2018, *Selimovic* v *Parliament* (T-61/17, not published, EU:T:2018:565, paragraph 45).

advisory committee or the documents in the file, particularly the full content of the emails and text messages, even though those different items of information were taken into consideration in order to conclude that harassment had occurred and to impose a penalty on the applicant. Consequently, the Court considers that the general principle of respect for the rights of the defence of the applicant was breached in the present case.

Focusing on the consequences of the breach of that principle, the Court recalls that a breach of the rights of the defence results in the annulment of the decision taken at the end of a procedure only if, had it not been for such an irregularity, the outcome of the procedure might have been different. [62] That requirement is satisfied where, having not had access to the documents which should have been disclosed in accordance with respect for the rights of the defence, the applicant was not able effectively to submit his or her observations and was thus deprived of even a slight chance of being better able to defend him or herself. In such a case, failure to disclose documents in the file which the authorities have relied on inevitably affects, in the light of the protection to be afforded to the rights of the defence, the lawfulness of the measures adopted at the end of a procedure liable to affect the applicant adversely. In the present case, the Court considers that, since the applicant did not have access to the full content of the file, she was deprived of the chance of being better able to defend herself and that that irregularity inevitably affected the content of the decisions taken on the existence of harassment and on the penalty.

Consequently, the Court considers that the three decisions in question must be annulled for breach of the general principle of respect for the rights of the defence.

2. COMMON COMMERCIAL POLICY

Judgment of the General Court (Fourth Chamber, Extended Composition) of 19 May 2021, China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others v Commission, T-254/18

Link to the complete text of the judgment

Dumping – Imports of certain cast iron articles originating in China – Definitive anti-dumping duty – Action for annulment – Admissibility – Association – Standing to bring proceedings – Interest in bringing proceedings – Injury determination – Calculation of the import volume – Macroeconomic and microeconomic indicators – Sampling – Calculation of the EU industry's cost of production – Prices charged intra-group – Causal link – Attribution and non-attribution analysis – No assessment of injury by segment – Assessment of the significance of undercutting – Confidential treatment of information – Rights of the defence – PCN-by-PCN methodology – Product comparability – Calculation of the normal value – Analogue country – Adjustment for VAT – Determination of the selling, general and administrative costs and profit

Following a complaint lodged with the European Commission by certain European Union producers, the Commission adopted, following an investigation opened on 10 December 2016, Implementing Regulation 2017/1480, [63] imposing a provisional anti-dumping duty on imports of certain cast iron

---

62 Judgments of 4 April 2019, *OZ* v *EIB*, C-558/17 P, EU:C:2019:289, paragraphs 76 to 78), and of 25 June 2020, *HF* v *Parliament* (C-570/18 P, EU:C:2020:490, paragraph 73).

63 Commission Implementing Regulation (EU) 2017/1480 of 16 August 2017 imposing a provisional anti-dumping duty on imports of certain cast iron articles originating in the People's Republic of China, (OJ 2017 L 211, p. 14).

articles originating in the People's Republic of China ('the product concerned'). By contrast, the Commission provisionally found no dumping in respect of imports of identical products originating in the Republic of India. Following the anti-dumping proceeding, the Commission adopted Implementing Regulation 2018/140 [64] imposing a definitive anti-dumping duty on the products concerned originating in the People's Republic of China and terminating the investigation on imports of the same products originating in India.

The China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('CCCME'), an association governed by Chinese law, whose members include Chinese exporting producers of the product concerned and other Chinese exporting producers, brought an action seeking the annulment of Implementing Regulation 2018/140.

In its dismissal of this action, the General Court sets out the admissibility conditions for an action for annulment brought by an association on behalf of its members. It clarifies, additionally, the procedures for an association to gain access to certain information gathered by the Commission during the anti-dumping investigation and provides further details on the assessment of the various indicators of injury caused to the EU industry as well as the Commission's ability to adjust the normal value of the price, as determined by applying the analogue country method.

Findings of the Court

As regards the admissibility of the action for annulment brought by the CCCME, the General Court observes, first of all, that an association's ability to act on behalf of its members is based on the significant advantage afforded by that method of proceeding, by obviating the institution of numerous separate actions against the same acts by the members of the association representing their interests. In order for that advantage to materialise, it is necessary and sufficient, first, that the association in question acts on behalf of its members and, second, that the powers conferred on it in its articles of association permit actions to be initiated. Since those two requirements are fulfilled in the present case, the General Court rejects the argument put forward by the Commission that a third admissibility condition, linked to the representativeness of the association in question, for the purposes of the legal tradition common to the Member States, ought to have been acknowledged by the Court of Justice in its judgment in *Council* v *Growth Energy and Renewable Fuels Association.* [65] Furthermore, the CCCME need not have a mandate or specific authority established by the members whose interests it defends in order to be recognised as having standing to bring proceedings before the EU Courts.

As regards the first admissibility condition, which provides that the CCCME must act on behalf of its members, the Court also rejects the Commission's argument that only a representation covering the entire procedure, including the administrative stage, permits an association to bring an action on behalf of its members. In the light of the arguments which could be relied upon by the CCCME in support of the action for annulment, the Court points out, in addition, that an association whose tasks under its statutes include defending the interests of its members can put forward any plea capable of calling into question the lawfulness of trade defence measures adopted in their regard.

In terms of substance, the Court rejects, in particular, the plea alleging that the Commission refused to disclose to the CCCME information relevant to the determination of dumping and of injury, such as the details of the calculation of the normal value, dumping margins, the effects of Chinese imports on prices, injury and the injury elimination level. While recalling that the requirement to respect confidential information cannot deprive the rights of defence of their substance, the Court notes that

---

64 Commission Implementing Regulation (EU) 2018/140 of 29 January 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cast iron articles originating in the People's Republic of China and terminating the investigation on imports of certain cast iron articles originating in India (OJ 2018 L 25, p. 6).

65 Judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155).

the basic regulation [66] provides for a system of guarantees pursuing two objectives, namely, first, to allow interested parties effectively to defend their interests and, second, to preserve the confidentiality of the information gathered during the investigation. In order to place the two objectives in relation to one another, the basic regulation requires, on the one hand, that a non-confidential summary which is in sufficient detail to permit interested parties to gain a reasonable understanding of the substance of that information be communicated by the party requesting confidentiality of the information communicated, [67] and on the other hand, that general information, in particular the reasons on which decisions taken under the basic regulation are based be disclosed by the institutions. [68] In the present case, since all the calculations requested by the CCCME are confidential and merit protection, the Court observes that, in the light of the information that was communicated to it, that association was placed in a position to provide information appropriate to its defence.

As regards the calculation of the import volume, the Court holds, in addition, that the Commission did not make a manifest error of assessment in limiting its assessment to data from Eurostat's database. In that regard, although adjustments had to be made to resolve certain difficulties, the Court states that the reliability of the data used by the Commission can be called into question only by evidence capable of casting specific doubt on the credibility of the method or data used by that institution. Providing alternative figures, such as figures obtained on the basis of data from the customs authorities of the countries from which the contested imports derived, is not sufficient for the applicant's claim to be successful. Furthermore, the Court recalls that the Commission enjoys a broad discretion in analysing data, including data provided by Eurostat.

As to the need to carry out an assessment by segment of the injury caused to the EU industry in order to evaluate the various injury indicators, the Court makes clear that such an assessment may be justified where the products covered by the investigation are not interchangeable and where one or more segments are more likely to be concerned than others by the dumped imports. The fact that products belong to different ranges is, however, not sufficient to establish, in itself, that they are not interchangeable and therefore that an assessment by segment may be undertaken, since products belonging to different ranges can have identical functions or satisfy the same needs. Furthermore, the Court notes the lack of evidence concerning any specific and distinct needs of customers satisfied by each of those product categories. As to whether eastern Europe can be segmented from the rest of the European Union, on account of the alleged fact that the competitive conditions in that part of the European Union are less developed, the Court highlights that it was not demonstrated that circumstances of that kind justify, in the present case, the injury caused to the western European industry being assessed separately from that caused to the eastern European industry.

The Court also rejects the complaint alleging errors in the assessment of under-cutting of import prices compared to prices for like products of the EU industry. In that regard, the applicants complain, first, that the Commission's sample was not representative and, second, that the Commission failed to take account of certain product types sold by the sampled EU producers, there being no comparable imported product type. The Court finds, first of all that the basic regulation permits the Commission to base its investigation, in large-scale cases, on a given number of parties by using a sampling method. [69] In the present case, since the Commission compiled the sample in accordance with the procedures set out in the basic regulation, undercutting in relation to prices observed in the sales of the sampled EU producers must be regarded as representative for the entire EU industry. The Court

---

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

67 Article 19(2) of the basic regulation.

68 Article 19(4) of the basic regulation.

69 Article 17 of the basic regulation.

also makes clear that an assessment of each product type sold by the sampled EU producers is not required in cases, such as the present, where the product concerned covers a variety of product types which continue to be interchangeable. That principle has, moreover, also been confirmed by the Appellate Body of the World Trade Organisation (WTO), [70] which has stated that the investigating authority was not required to establish the existence of undercutting for each of the product types under investigation or with respect to the entire range of goods making up the domestic like product. In those circumstances, the Court finds that the existence of an undercutting margin in a range of 31.6% to 39.2%, covering 62.6% of the sales of the sampled EU producers, appears sufficient, in the present case, to conclude that there was significant price undercutting as compared with the price of a like product of the EU industry.

Finally, as regards the possibility of making an adjustment to the normal value of the product concerned on account of value added tax (VAT) where the Commission uses the analogue country method, the Court recalls that the objective of using that method is to prevent account being taken of prices and costs in non-market economy countries to the extent that those parameters are not the normal result of market forces. That does not mean, however, that the normal value thus determined cannot be adjusted at all. [71] There is nothing in the basic regulation to indicate that using the analogue country method gives rise to a general derogation from the requirement to make adjustments for comparability purposes. However, where adjustments to the normal value are envisaged, they must not reincorporate, in the institutions' analysis, factors linked to the parameters which, in that country, are not the normal result of market forces. In the present case, the Court concludes that the application to the normal value of the VAT rate applicable in the People's Republic of China does not amount to introducing or reintroducing an element of distortion of the Chinese system into the calculation of the normal value determined on the basis of the analogue country method.

70 Report of the WTO Appellate Body in the dispute 'China – Measures imposing anti-dumping duties on high-performance stainless steel seamless tubes "HP-SSST" from Japan' (WT/DS 454/AB/R and WT/DS 460/AB/R, report of 14 October 2015).

71 Article 2(10) of the basic regulation.

Nota :

The summaries of the following cases are currently finalised and will be published in a subsequent issue of the Monthly Case-Law Bulletin :

- Judgment of 15 July 2021, Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR), Request for a preliminary ruling from the Conseil d'État, Case C-911/19, ECLI:EU:C:2021:599
- Judgment of 5 May 2021, ITD, Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission, Case T-561/18, ECLI:EU:T:2021:240
- Judgment of 7 July 2021, Naser Bateni v Council of the European Union, Case T-455/17, ECLI:EU:T:2021:411
- Judgment of 7 July 2021, HTTS Hanseatic Trade Trust & Shipping GmbH v Council of the European Union, Case T-692/15 RENV, ECLI:EU:T:2021:410