Case C-128/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 February 2022

Referring court:

Nederlandstalige rechtbank van eerste aanleg Brussel (Belgium)

Date of the decision to refer:

7 February 2022

Applicant:

NORDIC INFO

Defendant:

Belgische Staat

Subject matter of the main proceedings

The applicant alleges that the defendant committed errors in issuing a prohibition on non-essential travel as a measure against the spread of the coronavirus COVID-19, using a colour classification of countries drawn up on the basis of epidemiological data. The applicant claims compensation for the damage which it has suffered as a travel organisation as a result of the introduction and amendment of the colour codes.

Subject matter and legal basis of the request

The referring court seeks to ascertain whether a general national measure imposing a ban on the entry and exit of Union citizens based on a colour code drawn up on the basis of epidemiological data is compatible with Articles 2, 4, 5, 27 and 29 of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (first question) and with Articles 1, 3 and 22 of Regulation (EC) No 562/2006 of the European Parliament

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and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (second question).

Legal basis: Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Articles 2, 4, 5, 27 and 29 of the Citizenship Directive 2004/38, which implement Articles 20 and 21 TFEU, be interpreted as not precluding the regulations of a Member State (in the present case, deriving from Articles 18 and 22 of the Ministerieel Besluit van 30 juni 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken (Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus COVID-19), as amended respectively by Articles 3 and 5 of the Ministerieel besluit van 10 juli 2020 (Ministerial Decree of 10 July 2020)) which by way of a general measure:

- impose, in principle, on Belgian nationals and their family members as well as on Union citizens residing in Belgian territory and their family members an exit ban for non-essential travel from Belgium to countries within the EU and the Schengen Area that are coloured red in accordance with a colour code drawn up on the basis of epidemiological data;

- impose on non-Belgian Union citizens and their family members (who may or may not have the right to reside in Belgian territory) entry restrictions (such as quarantines and tests) for non-essential travel from countries within the EU and the Schengen Area to Belgium which are coloured red in accordance with a colour code drawn up on the basis of epidemiological data?

2. Must Articles 1, 3 and 22 of the Schengen Borders Code be interpreted as not precluding the regulations of a Member State (in the present case, Articles 18 and 22 of the Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus COVID-19 (as amended by Articles 3 and 5 respectively of the Ministerial Decree of 10 July 2020)) which impose an exit ban on non-essential travel from Belgium to countries within the EU and the Schengen Area and an entry ban from those countries to Belgium which may not only be checked and sanctioned, but may also be enforced ex officio by the Minister, the mayor and the police commander?

Provisions of European Union law relied on

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: Articles 2, 4, 5, 27 and 29

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Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code): Articles 1, 3 and 22

European Commission, COVID-19 – Guidelines for border management measures to protect health and ensure the availability of goods and essential services [C(2020) 1753 final] of 16 March 2020 (OJ 2020 C 86 I, p 1)

European Commission, Proposal of 14 December 2021 for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, C(2021) 891 final

TFEU, Articles 20 and 21

Provisions of national law relied on

Ministerieel besluit van 30 juni 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken, zoals gewijzigd bij artikel 3 en 5 van het ministerieel besluit van 10 juli 2020 (Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Decree of 10 July 2020): Articles 18 and 22

Succinct presentation of the facts and procedure in the main proceedings

1 As part of urgent measures to limit the spread of the coronavirus COVID-19, the defendant issued a ban on non-essential travel from and to Belgium, using, as of 12 July, a colour classification which divided countries into red, orange and green according to their epidemiological situation. Green meant travel was allowed without any special restrictions. Orange meant that travel to the country concerned was advised against and that quarantine and a test on return were requested, but not mandatory. Red meant that travel to the country concerned was prohibited and that travellers had to undergo quarantine and mandatory testing on their return. In the event of a breach of the measures, the regulations also provided for control and sanction measures which could be carried out ex officio by the minister van Binnenlandse Zaken (Minister for the Interior), the mayor and the police commander.

2 The applicant is a travel organisation which, inter alia, organises trips to Sweden. As of 12 July 2020, Sweden was classified as red under the aforementioned colour classification. The applicant subsequently cancelled all scheduled trips from Belgium to Sweden during the summer season and informed the travellers already present there and provided them with assistance.

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3 On 15 July 2020, Sweden's colour code was changed to orange, thereby restoring the possibility of travel to that country.

4 The applicant alleges that the defendant committed errors in adopting the legislation at issue and seeks compensation before the referring court for the damage which it claims to have suffered as a result of the introduction and amendment of the colour codes.

Essential arguments of the parties to the main proceedings

5 The **applicant** alleges that the defendant committed errors in adopting a general, non-individualised measure which impeded the entry and exit of Union citizens. It relies on a number of pleas in law, two of which relate to European Union law.

6 By its first plea, the applicant argues that the measure is contrary to Directive 2004/38. More specifically, it submits that the exit ban imposed on Union citizens and their families is contrary to that directive and that the general entry ban on non-Belgian Union citizens – without individualisation – is contrary to Articles 27 to 31 of the aforementioned directive.

7 By its second plea, the applicant argues that the regulations adopted by the defendant introduced internal border controls which infringe the criteria laid down in Articles 25 to 30 of the Schengen Borders Code, since that code does not mention public health as a justification for the temporary reintroduction of border controls. In addition, it argues that the envisaged border control by means of the exercise of a police power has the same effect as a border check, which is in breach of Article 23(a) of the Schengen Borders Code.

8 As regards the first plea, the **defendant** submits that the free movement of citizens is not absolute and that it is possible to restrict the rights arising therefrom on public health grounds. According to the defendant, such restrictions are a long accepted practice, and it also refers in this context to the digital EU-COVID19 certificate, to Article 12 of the International Covenant on Economic, Social and Cultural Rights and to the precautionary principle contained in the European Social Charter. With regard specifically to the right of exit, the defendant also refers to Articles 2.2 and 2.3 of the Fourth Protocol to the European Convention on Human Rights (ECHR) and Articles 12.2 and 12.3 of the International Covenant on Civil and Political Rights, which would allow the defendant to impose restrictions in view of the need to protect public health. A restriction on the right of exit was allegedly also 'promoted' by the European Commission in its guidelines of 16 March 2020. With regard specifically to the right of entry, the defendant refers to the case-law of the Court of Justice which, in its view, permits the restriction of freedom of movement – while respecting the principles of non-discrimination and proportionality – in the context of the maintenance of public policy or public security (which would then cover the virus pandemic) and to Articles 27 and 29 of Directive 2004/38, which, in its view, constitute an express legal basis for a general restriction on the right of entry.

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9 As regards the second plea, the defendant acknowledges that the reintroduction of border controls is subject to the limitations in the Schengen Borders Code and that public health is not explicitly mentioned as a justification, but it considers that public health is one of the underlying objectives of the Schengen Borders Code. The defendant regards the regulations to be justified on the basis of the precautionary principle and the safeguarding of public policy and internal security. It sees its position confirmed by the case-law of the Court of Justice, the guidelines of the European Commission of 16 March 2020 and the finding that EU competence in the area of public health is merely supplementary and supportive.

Succinct presentation of the reasoning in the request for a preliminary ruling

Question 1

10 The referring court takes the view that the introduction of the regulations led to a restriction of the rights of entry and exit of Union citizens in that, on account of the colour code that had been devised, it was prohibited to travel to a 'red' country and conditions were imposed on travellers (such as quarantines and tests) when entering from a 'red' country. The referring court states, in its reasons for referring the first question to the Court of Justice, that it does not find the proper justification in European Union law for such a general restriction.

11 The referring court examines, first, whether the defendant could rely on Directive 2004/38 in order to impose those rules. It cites Articles 27 and 29 of Directive 2004/38, which form part of the chapter on restrictions on the right of entry on grounds of, inter alia, public health. Article 27 lays down general principles and Article 29 has the heading 'public health'.

12 The referring court observes, however, that the scope of Article 27 of Directive 2004/38 is wider and also covers exit, in that it uses the words 'freedom of movement'. It also refers, in that regard, to the case-law of the Court of Justice in which the restrictions in Article 27(1) of Directive 2004/38 are applied to a situation covered by the right of exit. [1] Article 27(1) therefore allows restrictions on entry and exit and also mentions 'public health' as a justification for doing so.

13 The parties proceed on the assumption, however, that Articles 27 and 29 of Directive 2004/38 must be read together, with the referring court asking whether Article 29 applies only to entry. As regards Article 29(2) and (3), it is clear from the text that they refer only to entry, but Article 29(1) also uses the words 'freedom of movement'.

[1] Judgments of 10 July 2008, *Jipa*, C-33/07, ECLI:EU:C:2008:396 and 17 November 2011, C-434/10 *Aladzhov*, ECLI:EU:C:2011:750 and C-430/10 *Gaydarov*, ECLI:EU:C:2011:749.

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14 In the event of a narrow interpretation of Article 29(1), which assumes that it applies only to entry, the referring court wonders whether Article 29(1) and Article 27(1) must be read together or whether they constitute two independent grounds of justification, with Article 27(1) being sufficient in its own right to justify restrictions on exit on public health grounds.

15 The referring court also wonders whether Articles 27(1) and 29(1) of Directive 2004/38 allow a Member State to adopt a general measure such as the legislation at issue. That doubt continues to exist both in the event that it can be assumed that Article 27 may restrict the right of entry and exit on public health grounds, and in the event that that article must be read in conjunction with Article 29(1), which may then either restrict only the right of entry of non-Belgian Union citizens or restrict the entry of nationals of other Member States and the exit of Union citizens.

16 In the event that the defendant is unable to rely on Directive 2004/38 to restrict the right of entry and exit by means of a general measure on public health grounds, the referring court wonders whether that restriction is possible on the basis of the TFEU and/or a general principle of EU law.

17 As regards the existence of such a general principle of law, the question arises, according to the referring court, whether a Member State may, in the light of, for example, Article 168(2) TFEU and/or Article 35 of the Charter of Fundamental Rights of the European Union, irrespective of the provisions of Directive 2004/38 and of whether or not that directive has a fully harmonising character, impose restrictions on the right of entry and exit on public health grounds, provided, of course, that those restrictions are non-discriminatory and respect the principle of proportionality. Such a principle would allow a Member State – in so far as it cannot do so under Articles 27 to 30 of Directive 2004/38 – to adopt, by way of derogation from Articles 4(1) and 5(1) of Directive 2004/38, a general non-discriminatory restrictive measure relating to the right of entry and exit, provided that it pursues a legitimate aim and contains a measure which is appropriate and necessary for achieving that aim.

Question 2

18 The reintroduction of border control is subject to certain restrictions in the Schengen Borders Code, with public health not being explicitly mentioned as one of the justifications for the introduction of border control at internal borders. The referring court therefore wonders whether, in times of crisis, an infectious disease can be equated with a threat to public policy or internal security within the meaning of Articles 23(a) and 25 of the Schengen Borders Code, thus making the reintroduction of internal border controls and an increase in police powers possible on that basis.

19 The court refers to the Guidelines of 16 March 2020, according to which Member States may reintroduce temporary border controls if justified for reasons of public

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policy or internal security. However, the referring court does not see the wording of those guidelines as expressly confirming that the Commission considers the pandemic to be a public policy reason justifying the reintroduction of internal border controls, but rather as a reminder of the obligation to notify, in accordance with the Schengen Borders Code, the introduction of internal border controls.

20 Furthermore, the referring court also cites a recent Commission proposal to amend the Schengen Borders Code which aims to replace Article 23(a) of that Code by enabling the exercise of police powers also in the event of the spread of an infectious disease with epidemic potential. In the light of the interpretation of the standards at issue in the present case, the referring court has two reservations concerning that proposal. First, it wonders whether that proposal introduces an additional restriction on a freedom which cannot apply to the past or whether it seeks to introduce a standard to clarify what already applied in the past. Second, the proposal classifies a particular public health situation as 'public policy', whereas an identical situation under Directive 2004/38 would appear to fall under a separate category of 'public health'.

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