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Legal Alert



EU Law

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1. Relevant case law of the ECJ - January 2020

Case Law

Order of the Court (Ninth Chamber) of 15 January 2019. Bank E v G.D. (Case C-381/19)

Reference for a preliminary ruling - Article 99 of the Rules of Procedure of the Court - Consumer protection - Directive 93/13 / EEC - Introduction of a new remedy during the process - Principles of legal certainty and effectiveness.

The principles of legal certainty and effectiveness must be interpreted as not precluding a procedural rule that modifies the system of appeals provided for by the domestic legal order, by introducing an additional remedy and a degree of jurisdiction, and which applies to a pending process. already in the role at the time of this change, having as parties a consumer and a professional, since this new appeal is open to both the consumer and the professional.

Judgment of the Court (Grand Chamber) of 21 January 2020. Proceedings brought by Banco de Santander SA. Request for a preliminary ruling from the Tribunal Económico Administrativo Central. (Case C-274/14)

Reference for a preliminary ruling – Article 267 TFEU – Definition of ‘court or tribunal of a Member State’ – Criteria – Independence of the national body concerned – Irremovability of the members – Inadmissibility of the request for a preliminary ruling.

57 *According to the case-law of the Court, the concept of ‘independence’ has two aspects. The first aspect, which is external, requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source*

whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited).

(...)

61 *The second – internal – aspect of the concept of ‘independence’ is linked to ‘impartiality’ and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 16 February 2017, Margarit Panicello, C-503/15, EU:C:2017:126, paragraph 38 and the case-law cited).*

62 *Thus, according to the settled case-law of the Court, the concept of ‘independence’, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (see, to that effect, judgments of 30 March 1993, Corbiau, C-24/92, EU:C:1993:118, paragraph 15, and of 9 October 2014, TDC, C-222/13, EU:C:2014:2265, paragraph 29 and the case-law cited).*

63 *Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 9 October 2014, TDC, C-222/13, EU:C:2014:2265, paragraph 32).*

Judgment of the Court (Fifth Chamber) of 23 January 2020. Proceedings brought by Energiavirasto. Request for a preliminary ruling from the Korkein hallinto-oikeus. (Case C-578/18)

Reference for a preliminary ruling – Internal market in electricity – Directive 2009/72/EC – Article 3 – Consumer protection – Article 37 – Tasks and powers of the regulatory authority – Out-of-court dispute settlement – Concept of ‘party’ – Right to appeal against a decision of the regulatory authority – Complaint made by a household customer against an electricity distribution system operator.

Article 37 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as meaning that it does not require Member States to confer competence on the regulatory authority to settle disputes between household customers and system operators and, consequently, to grant household

customers who have lodged a complaint with the regulatory authority against a system operator the status of ‘party’ within the meaning of that provision, and the right to appeal against the decision taken by that authority following that complaint.

Judgment of the Court (Grand Chamber) of 28 January 2020. European Commission v Italian Republic. (Case C-122/18)

Failure of a Member State to fulfil obligations – Directive 2011/7/EU – Combating late payment in commercial transactions – Commercial transactions where the debtor is a public authority – Obligation of Member States to ensure that the period for payment imposed on public authorities does not exceed 30 or 60 days – Obligation to achieve a specified result.

47 *Those considerations, pertaining to the large number of commercial transactions in which public authorities are the debtors of undertakings and to the costs and difficulties created for undertakings by those authorities’ late payments, show that the EU legislature intended to impose increased obligations on Member States as regards transactions between undertakings and public authorities and imply that Article 4(3) and (4) of Directive 2011/7 is to be interpreted as requiring Member States to ensure that those authorities make, within the periods prescribed by those provisions, payments as remuneration for commercial transactions with undertakings.*

48 *It follows from the foregoing that the interpretation of the Italian Republic, according to which Article 4(3) and (4) of Directive 2011/7 imposes on Member States only the obligation to ensure that the statutory and contractual payment periods applicable to commercial transactions involving public authorities are in conformity with those provisions and to provide, in the event of non-compliance with those periods, for the right of a creditor who has fulfilled his contractual and statutory obligations to obtain statutory interest for late payment, but does not impose the obligation to ensure that those public authorities effectively comply with those periods, cannot be accepted.*

(...)

51 *Next, in considering, in paragraphs 31 and 36 of that judgment, that the waiver, by the creditor of a public authority, of interest for late payment and of compensation for recovery costs must, in order to be in conformity with Directive 2011/7, not only have been freely agreed to, but, in addition, be made in exchange for ‘immediate’ payment of the principal amount of the debt, the Court has, as the Commission has pointed out, stressed the paramount importance which Member States must attach, in the context of that directive, to the effective and prompt payment of such amounts.*

(...)

53 *In the light of the foregoing considerations, it must be held that Article 4(3) and (4) of Directive 2011/7 must be interpreted as requiring Member States to ensure that their public authorities effectively comply with the periods for payment prescribed therein.*

(...)

Declares that, by not ensuring that its public authorities effectively comply with the periods for payment prescribed in Article 4(3) and (4) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, the Italian Republic has failed to fulfil its obligations under those provisions.

Judgment of the Court (Fourth Chamber) of 29 January 2020. Sky plc and Others v Skykick UK Limited and Skykick Inc. Request for a preliminary ruling from the High Court of Justice (Chancery Division). (Case C-371/18)

Reference for a preliminary ruling – Approximation of laws – Community trade mark – Regulation (EC) No 40/94 – Articles 7 and 51 – First Directive 89/104/EEC – Articles 3 and 13 – Identification of the goods or services covered by the registration – Failure to comply with the requirements of clarity and precision – Bad faith of the applicant – No intention to use the trade mark for the goods or services covered by the registration – Total or partial invalidity of the trade mark – National legislation requiring the applicant to state that he or she intends to use the trade mark applied for.

1. *Articles 7 and 51 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, as amended by Council Regulation (EC) No 1891/2006 of 18 December 2006, and Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that a Community trade mark or a national trade mark cannot be declared wholly or partially invalid on the ground that terms used to designate the goods and services in respect of which that trade mark was registered lack clarity and precision.*

2. *Article 51(1)(b) of Regulation No 40/94, as amended by Regulation No 1891/2006, and Article 3(2)(d) of First Directive 89/104 must be interpreted as meaning that a trade mark application made without any intention to use the trade mark in relation to the goods and services covered by the registration constitutes bad faith, within the meaning of those provisions, if the applicant for registration of that mark had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark. When the absence of the intention to use the trade mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for*

registration, that application constitutes bad faith only in so far as it relates to those goods or services.

3. First Directive 89/104 must be interpreted as not precluding a provision of national law under which an applicant for registration of a trade mark must state that the trade mark is being used in relation to the goods and services in relation to which it is sought to register the trade mark, or that he or she has a bona fide intention that it should be so used, in so far as the infringement of such an obligation does not constitute, in itself, a ground for invalidity of a trade mark already registered.

Judgment of the Court (Fourth Chamber) of 29 January 2020. GAEC Jeanningros v Institut national de l'origine et de la qualité (INAO) and Others. Request for a preliminary ruling from the Conseil d'État (France). (Case C-785/18)

Reference for a preliminary ruling – Agriculture – Protection of geographical indications and designations of origin for agricultural products and foodstuffs – Protected designation of origin ‘Comté’ – Minor amendment to a product specification – Action before national courts contesting an application for an amendment – Case-law of the national courts according to which the action becomes devoid of purpose when the European Commission has approved the amendment – Effective judicial protection – Obligation to rule on the action.

Article 53(2) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, Article 6 of Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013 supplementing Regulation No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialities guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules, and Article 10 of Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation No 1151/2012 of the European Parliament and of the Council, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, when the European Commission has granted an application made by the authorities of a Member State seeking a minor amendment to a product specification for a protected designation of origin, the national courts hearing an action concerning the lawfulness of the decision made by those authorities on that application with a view to submitting it to the Commission, in accordance with Article 53(2) of Regulation No 1151/2012, cannot, on that ground alone, decide that there is no longer any need to adjudicate on the dispute pending before them.

Judgment of the Court (Seventh Chamber) of 30 January 2020. *Köln-Aktienfonds Deka v Staatssecretaris van Financiën*. Request for a preliminary ruling from the Hoge Raad der Nederlanden. (Case C-156/17)

Reference for a preliminary ruling – Free movement of capital and liberalisation of payments – Restrictions – Taxation of dividends received by undertakings for collective investment in transferable securities (UCITS) – Refund of tax withheld on dividends – Conditions – Objective differentiation criteria – Criteria which are by nature or in fact favourable to resident taxpayers.

1. *Article 63 TFEU must be interpreted as not precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted, on the ground that it has not provided proof that its shareholders or participants meet the conditions laid down by that legislation, a refund of dividend tax withheld on dividends that it has received from corporate bodies established in that Member State, provided that those conditions do not de facto disadvantage non-resident investment funds and provided that the tax authorities require proof of compliance with those conditions to be provided also by resident investment funds, which it is for the referring court to verify.*

2. *Article 63 TFEU must be interpreted as precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted a refund of dividend tax which it has had to pay in that Member State, on the ground that it has not met the legal conditions for that refund, namely that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis within 8 months of the end of its financial year, where, in its Member State of establishment, the proceeds of its investments which have not been distributed are deemed to have been distributed or are taken into account in the tax which that Member State levies on shareholders or participants as though that profit had been distributed and where, having regard to the objective underlying those conditions, such a fund is in a situation that is comparable to that of a resident fund which benefits from the refund of that tax, which it is for the referring court to verify.*

Judgment of the Court (Second Chamber) of 30 January 2020. *Autoservizi Giordano società cooperativa v Agenzia delle Dogane e dei Monopoli - Ufficio di Palermo*. Request for a preliminary ruling from the Commissione Tributaria Provinciale di Palermo. (Case C-513/18)

Reference for a preliminary ruling – Taxation of energy products and electricity – Directive 2003/96/EC – Article 7(2) and (3) – Concept of ‘commercial gas oil used as propellant’ – National legislation levying a duty on commercial gas oil used as propellant for the regular carriage of passengers but not for the occasional carriage of passengers – Principle of equal treatment.

Article 7(2) and (3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity must be interpreted as meaning, first, that a private undertaking engaged in the activity of the carriage of passengers, by means of services of hiring a bus or a coach with a driver, falls within its scope, provided that the vehicles hired out by that undertaking are in category M2 or M3, within the meaning of Directive 70/156/EEC, and, secondly, that it does not preclude national legislation which provides for a reduced rate of excise duty for commercial gas oil used as propellant for the regular carriage of passengers, without, however, providing for such a rate for that used for the occasional carriage of passengers, provided that that legislation observes the principle of equal treatment, which it is for the referring court to ascertain.

Judgment of the Court (Second Chamber) of 30 January 2020. *Tim SpA - Direzione e coordinamento Vivendi SA v Consip SpA and Ministero dell'Economia e delle Finanze. Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio. (Case C-395/18)*

Reference for a preliminary ruling – Public procurement of supplies, works or services – Directive 2014/24/EU – Article 18(2) – Article 57(4) – Optional grounds for exclusion – Ground for exclusion of a subcontractor mentioned in the economic operator's tender – Subcontractor's failure to comply with environmental, social and labour law obligations – National legislation providing for automatic exclusion of the economic operator for such a failure.

Article 57(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC does not preclude national legislation under which the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is established in respect of one of the subcontractors mentioned in that operator's tender. However, that provision, read in conjunction with Article 57(6) of that directive, and the principle of proportionality preclude national legislation providing for the automatic nature of such an exclusion.

Judgment of the Court (Second Chamber) of 30 January 2020. *I.G.I. Srl v Maria Grazia Cienia and Others. Request for a preliminary ruling from the Corte di appello di Napoli. (Case C-394/18)*

Reference for a preliminary ruling – Directive 82/891/EEC – Articles 12 and 19 – Division of limited liability companies – Protection of the interests of the creditors of the company being divided – Nullity of the division – Actio pauliana.

1. Article 12 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies, as amended by Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007, read in conjunction with Articles 21 and 22 of Directive 82/891, must be interpreted as not precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that article, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the newly formed company.

2. Article 19 of Directive 82/891, as amended by Directive 2007/63, read in conjunction with Articles 21 and 22 of Directive 82/891, which lays down nullity rules for divisions, must be interpreted as not precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors.

Judgment of the Court (Eighth Chamber) of 30 January 2020. *České dráhy a.s. v The European Commission* (Joined Cases C-538/18 P and C-539/18 P)

Appeal - Competition - Regulation (EC) No 1/2003 - Article 20 (4) - Inspection decisions - Obligation to state reasons - Sufficiently serious evidence of a breach of the competition rules - Legally gathered evidence - Inspection ordered on the basis of evidence from a previous inspection

62 As regards the substance of the admissible part of this plea, it should be recalled that, in accordance with the case-law mentioned in paragraphs 42 and 43 of this judgment, taking into account the fact that the purpose of an inspection is precisely to collect evidence relating to an alleged infringement in order to verify the merits of the Commission's suspicions, the Commission is not required to carry out a rigorous legal classification of the alleged infringements, provided that it clearly indicates the presumptions it intends to verify.

63 Furthermore, the Court has also already made it clear that, as regards the assessment of the proportionality of an inspection measure, it is for the Commission, in principle, to assess whether information is necessary in order to be able to detect an infringement of the competition rules. Even if it already has indications or even evidence relating to the existence of an infringement, the Commission can therefore legitimately consider it necessary to order additional checks enabling it to better understand the infringement, its duration or the circle of companies involved (see,

to that effect, judgment of 22 October 2002, *Roquette Frères*, C - 94/00, EU: C: 2002: 603, points 77 and 78 as well as the case-law cited).

64 *It follows that, in the presence of evidence sufficiently serious to allow such a violation to be suspected, the Commission cannot be required to assess all the indications going in the opposite direction. This is all the more so since such indications can be put forward by the company concerned in the context of its defense in the eventual continuation of the administrative or, where appropriate, judicial proceedings against the decision terminating the investigation.*

Judgment of the Court (Second Chamber) of 30 January 2020. *Dr. Willmar Schwabe GmbH & Co.KG v Queisser Pharma GmbH & Co. KG*. Request for a preliminary ruling from the *Bundesgerichtshof*. (Case C-524/18)

Reference for a preliminary ruling – Public health – Information and consumer protection – Regulation (EC) No 1924/2006 – Implementing Decision 2013/63/EU – Nutritional and health claims made on foods – Article 10(3) – Reference to general, non-specific benefits – Concept of ‘accompanying’ a specific health claim – Obligation to produce scientific evidence – Scope.

1. *Article 10(3) of Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as amended by Commission Regulation (EC) No 107/2008 of 15 January 2008 of the European Parliament and of the Council, must be interpreted as meaning that the requirement which it lays down that any reference to general, non-specific benefits of the nutrient or food must be accompanied by a specific health claim included in the lists provided for in Articles 13 or 14 of that regulation, is not satisfied where the packaging of a food supplement contains a reference to general, non-specific health benefits of a nutrient or food on the front of the packaging, whereas the specific health claim intended to accompany it appears only on the back of that packaging and there is no clear reference, such as an asterisk, between the two.*

2. *Article 10(3) of Regulation No 1924/2006 as amended by Regulation No 107/2008 must be interpreted as meaning that references to general, non-specific benefits of a nutrient or food for overall good health or health-related well-being must be justified by scientific evidence within the meaning of Articles 5(1)(a) and 6(1) of that regulation. To that end, it suffices for such references to be accompanied by specific health claims included in the lists provided for in Article 13 or Article 14 of that regulation.*

Judgment of the Court (Fourth Chamber) of 30 January 2020. Generics (UK) Ltd and Others v Competition and Markets Authority. Request for a preliminary ruling from the Competition Appeal Tribunal. (Case C-307/18)

Reference for a preliminary ruling – Competition – Pharmaceutical products – Barriers to the entry on the market of generic medicines arising from settlement agreements (relating to disputes concerning process patents) concluded by a manufacturer of originator medicines who is the holder of those patents and manufacturers of generic products - Article 101 TFEU – Potential competition – Restriction by object – Characterisation – Restriction by effect – Assessment of effects – Article 102 TFEU – Relevant market - Inclusion of generic medicines in the relevant market – Abuse of dominant position – Characterisation – Justifications.

1. *Article 101(1) TFEU must be interpreted as meaning that a manufacturer of originator medicines who is the holder of a manufacturing process patent for an active ingredient that is in the public domain, on the one hand, and the manufacturers of generic medicines who are preparing to enter the market of the medicine containing that active ingredient, on the other, who are in dispute as to whether that patent is valid or whether the generic medicines concerned infringe that patent, are potential competitors, where it is established that the manufacturer of generic medicines has in fact a firm intention and an inherent ability to enter the market, and that its market entry does not meet barriers that are insurmountable, which it is for the referring court to assess.*

2. *Article 101(1) TFEU must be interpreted as meaning that a settlement agreement with respect to pending court proceedings between a manufacturer of originator medicines and a manufacturer of generic medicines, who are potential competitors, concerning whether a process patent (for the manufacture of an active ingredient of an originator medicine that is in the public domain) held by the manufacturer of originator medicines is valid and whether a generic version of that medicine infringes the patent, whereby that manufacturer of generic medicines undertakes not to enter the market of the medicine containing that active ingredient and not to pursue its action for the revocation of that patent for the duration of that agreement, in return for transfers of value in its favour by the manufacturer of originator medicines, constitutes an agreement which has as its object the prevention, restriction or distortion of competition:*

- if it is clear from all the information available that the net gain from the transfers of value by the manufacturer of originator medicines in favour of the manufacturer of generic medicines can have no explanation other than the commercial interest of the parties to the agreement not to engage in competition on the merits;

- unless the settlement agreement concerned is accompanied by proven pro-competitive effects capable of giving rise to a reasonable doubt that it causes a sufficient degree of harm to competition.

3. Article 101(1) TFEU must be interpreted as meaning that if a settlement agreement, such as those at issue in the main proceedings, is to be demonstrated to have appreciable potential or real effects on competition, and, therefore, is to be characterized as a 'restriction by effect', that does not presuppose a finding that, in the absence of that agreement, either the manufacturer of generic medicines who is a party to that agreement would probably have been successful in the proceedings relating to the process patent at issue, or the parties to that agreement would probably have concluded a less restrictive settlement agreement.

4. Article 102 TFEU must be interpreted as meaning that, in a situation where a manufacturer of originator medicines containing an active ingredient which is in the public domain, but the process of manufacturing which is covered by a process patent, the validity of which is disputed, impedes, on the basis of that process patent, the market entry of generic versions of that medicine, there must be taken into consideration, for the purposes of definition of the product market concerned, not only the originator version of that medicine but also its generic versions, even if the latter would not be able to enter the market legally before the expiry of that process patent, if the manufacturers concerned of generic medicines are in a position to present themselves within a short period on the market concerned with sufficient strength to constitute a serious counterbalance to the manufacturer of originator medicines already on that market, which it is for the referring court to determine.

5. Article 102 TFEU must be interpreted as meaning that the strategy of a dominant undertaking, the holder of a process patent for the production of an active ingredient that is in the public domain, which leads it to conclude, either as a precautionary measure or following the bringing of court proceedings challenging the validity of that patent, a set of settlement agreements which have, at the least, the effect of keeping temporarily outside the market potential competitors who manufacture generic medicines using that active ingredient, constitutes an abuse of a dominant position within the meaning of Article 102 TFEU, provided that that strategy has the capacity to restrict competition and, in particular, to have exclusionary effects, going beyond the specific anticompetitive effects of each of the settlement agreements that are part of that strategy, which it is for the referring court to determine.

Editors

Țuca Zbârcea & Asociații provides complex legal services in matters involving **European Union Law** whose norms take precedence over the applicable national legislation. Our team includes lawyers who are specialized in the specific areas of this field of law, which includes public procurement, free movement of goods and services, free movement of capital and payments, freedom, security and justice, transport, competition, state aid, insolvency and restructuring, indirect taxation, economic and monetary policy, social policy and public health, consumer protection, environment, energy, tourism, agriculture policies, and others.

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