INDEX

JUDGMENT OF THE COURT (Grand Chamber)

16 July 2020 (*)

(Reference for a preliminary ruling — Protection of individuals with regard to the processing of personal data — Charter of Fundamental Rights of the European Union — Articles 7, 8 and 47 — Regulation (EU) 2016/679 — Article 2(2) — Scope — Transfers of personal data to third countries for commercial purposes — Article 45 — Commission adequacy decision — Article 46 — Transfers subject to appropriate safeguards — Article 58 — Powers of the supervisory authorities — Processing of the data transferred by the public authorities of a third country for national security purposes — Assessment of the adequacy of the level of protection in the third country — Decision 2010/87/EU — Protective standard clauses on the transfer of personal data to third countries — Suitable safeguards provided by the data controller — Validity — Implementing Decision (EU) 2016/1250 — Adequacy of the protection provided by the EU-US Privacy Shield — Validity — Complaint by a natural person whose data was transferred from the European Union to the United States)

In Case C-311/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 4 May 2018, received at the Court on 9 May 2018, in the proceedings

Data Protection Commissioner

v

Facebook Ireland Ltd,

Maximillian Schrems,

intervening parties:

The United States of America,

Electronic Privacy Information Centre,

BSA Business Software Alliance Inc.,

Digitaleurope,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, M. Safjan, S. Rodin, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, M. Ilešič, T. von Danwitz (Rapporteur), and D. Šváby, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2019,

after considering the observations submitted on behalf of:

– the Data Protection Commissioner, by D. Young, Solicitor, B. Murray and M. Collins, Senior Counsel, and C. Donnelly, Barrister-at-Law,

– Facebook Ireland Ltd, by P. Gallagher and N. Hyland, Senior Counsel, A. Mulligan and F. Kieran, Barristers-at-Law, and P. Nolan, C. Monaghan, C. O'Neill and R. Woulfe, Solicitors,

– Mr Schrems, by H. Hofmann, Rechtsanwalt, E. McCullough, J. Doherty and S. O'Sullivan, Senior Counsel, and G. Rudden, Solicitor,

– the United States of America, by E. Barrington, Senior Counsel, S. Kingston, Barrister-at-Law, S. Barton and B. Walsh, Solicitors,

– the Electronic Privacy Information Centre, by S. Lucey, Solicitor, G. Gilmore and A. Butler, Barristers-at-Law, and C. O'Dwyer, Senior Counsel,

– BSA Business Software Alliance Inc., by B. Van Vooren and K. Van Quathem, advocaten,

– Digitaleurope, by N. Cahill, Barrister, J. Cahir, Solicitor, and M. Cush, Senior Counsel,

– Ireland, by A. Joyce and M. Browne, acting as Agents, and D. Fennelly, Barrister-at-Law,

– the Belgian Government, by J.-C. Halleux and P. Cottin, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil, O. Serdula and A. Kasalická, acting as Agents,

– the German Government, by J. Möller, D. Klebs and T. Henze, acting as Agents,

– the French Government, by A.-L. Desjonquères, acting as Agent,

– the Netherlands Government, by C.S. Schillemans, M.K. Bulterman and M. Noort, acting as Agents,

– the Austrian Government, by J. Schmoll and G. Kunnert, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes, A. Pimenta and C. Vieira Guerra, acting as Agents,

– the United Kingdom Government, by S. Brandon, acting as Agent, and J. Holmes QC, and C. Knight, Barrister,

– the European Parliament, by M.J. Martínez Iglesias and A. Caiola, acting as Agents,

– the European Commission, by D. Nardi, H. Krämer and H. Kranenborg, acting as Agents,

– the European Data Protection Board (EDPB), by A. Jelinek and K. Behn, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2019,

gives the following

Judgment

1 This reference for a preliminary ruling, in essence, concerns:

– the interpretation of the first indent of Article 3(2), Articles 25 and 26 and Article 28(3) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), read in the light of Article 4(2) TEU and of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter');

– the interpretation and validity of Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46 (OJ 2010 L 39, p. 5), as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 (OJ 2016 L 344, p. 100) ('the SCC Decision'); and

– the interpretation and validity of Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46 on the adequacy of the protection provided by the EU-US Privacy Shield (OJ 2016 L 207, p. 1; 'the Privacy Shield Decision').

2 The request has been made in proceedings between the Data Protection Commissioner (Ireland) ('the Commissioner'), on the one hand, and Facebook Ireland Ltd and Maximillian Schrems, on the other, concerning a complaint brought by Mr Schrems concerning the transfer of his personal data by Facebook Ireland to Facebook Inc. in the United States.

Legal context

Directive 95/46

3 Article 3 of Directive 95/46, under the heading 'Scope', stated, in paragraph 2:

'This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– …'

4 Article 25 of that directive provided:

'1. The Member States shall provide that the transfer to a third country of personal data … may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; …

…

6. The Commission may find, in accordance with the procedure referred to in Article 31(2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's Decision.'

5 Article 26(2) and (4) of the directive provided:

'2. Without prejudice to paragraph 1, a Member State may authorise a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

…

4. Where the Commission decides, in accordance with the procedure referred to in Article 31(2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision.'

6 Pursuant to Article 28(3) of that directive:

'Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,

– the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been infringed or to bring those infringements to the attention of the judicial authorities.

…'

The GDPR

7 Directive 95/46 was repealed and replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

8 Recitals 6, 10, 101, 103, 104, 107 to 109, 114, 116 and 141 of the GDPR state:

'(6) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.

…

(10) In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. Regarding the processing of personal data for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Member States should be allowed to maintain or introduce national provisions to further specify the application of the rules of this Regulation. In conjunction with the general and horizontal law on data protection implementing Directive 95/46/EC, Member States have several sector-specific laws in areas that need more specific provisions. This Regulation also provides a margin of manoeuvre for Member States to specify its rules, including for the processing of special categories of personal data ("sensitive

data"). To that extent, this Regulation does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful.

…

(101) Flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in these flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers, processors in the same or another third country or international organisation. In any event, transfers to third countries and international organisations may only be carried out in full compliance with this Regulation. A transfer could take place only if, subject to the other provisions of this Regulation, the conditions laid down in the provisions of this Regulation relating to the transfer of personal data to third countries or international organisations are complied with by the controller or processor.

…

(103) The Commission may decide with effect for the entire Union that a third country, a territory or specified sector within a third country, or an international organisation, offers an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third country or international organisation which is considered to provide such level of protection. In such cases, transfers of personal data to that third country or international organisation may take place without the need to obtain any further authorisation. The Commission may also decide, having given notice and a full statement setting out the reasons to the third country or international organisation, to revoke such a decision.

(104) In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission should, in its assessment of the third country, or of a territory or specified sector within a third country, take into account how a particular third country respects the rule of law, access to justice as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law. The adoption of an adequacy decision with regard to a territory or a specified sector in a third country should take into account clear and objective criteria, such as specific processing activities and the scope of applicable legal standards and legislation in force in the third country. The third country should offer guarantees ensuring an adequate level of protection essentially equivalent to that ensured within the Union, in particular where personal data are processed in one or several specific sectors. In particular, the third country should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities, and the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress.

…

(107) The Commission may recognise that a third country, a territory or a specified sector within a third country, or an international organisation no longer ensures an adequate level of data protection. Consequently the transfer of personal data to that third country or international organisation should be prohibited, unless the requirements in this Regulation relating to transfers subject to appropriate safeguards, including binding corporate rules, and derogations for specific situations are fulfilled. In that case, provision should be made for consultations between the Commission and such third countries or international organisations. The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation.

(108) In the absence of an adequacy decision, the controller or processor should take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject. Such appropriate safeguards may consist of making use of binding corporate rules, standard data protection clauses adopted by the Commission, standard data protection clauses adopted by a supervisory authority or contractual clauses authorised by a supervisory authority. Those safeguards should ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union, including the availability of enforceable data subject rights and of effective legal remedies, including to obtain effective administrative or judicial redress and to claim compensation, in the Union or in a third country. They should relate in particular to compliance with the general principles relating to personal data processing, the principles of data protection by design and by default. …

(109) The possibility for the controller or processor to use standard data-protection clauses adopted by the Commission or by a supervisory authority should prevent controllers or processors neither from including the standard data-protection clauses in a wider contract, such as a contract between the processor and another processor, nor from adding other clauses or additional safeguards provided that they do not contradict, directly or indirectly, the standard contractual clauses adopted by the Commission or by a supervisory authority or prejudice the fundamental rights or freedoms of the data subjects. Controllers and processors should be encouraged to provide additional safeguards via contractual commitments that supplement standard protection clauses.

…

(114) In any case, where the Commission has taken no decision on the adequate level of data protection in a third country, the controller or processor should make use of solutions that provide data subjects with enforceable and effective rights as regards the processing of their data in the Union once those data have been transferred so that that they will continue to benefit from fundamental rights and safeguards.

…

(116) When personal data moves across borders outside the Union it may put at increased risk the ability of natural persons to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of that information. At the same time, supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders. Their efforts to work together in the cross-border context may also be hampered by insufficient preventative or remedial powers, inconsistent legal regimes, and practical obstacles like resource constraints. …

…

(141) Every data subject should have the right to lodge a complaint with a single supervisory authority, in particular in the Member State of his or her habitual residence, and the right to an effective judicial remedy in accordance with Article 47 of the Charter if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. …'

9 Article 2(1) and (2) of the GDPR provides:

'1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law;

(b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;

(c) by a natural person in the course of a purely personal or household activity;

(d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.'

10 Article 4 of the GDPR provides:

'For the purposes of this Regulation:

…

(2) "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

…

(7) "controller" means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

(8) "processor", means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

(9) "recipient" means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;

…'

11 Article 23 of the GDPR states:

'1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;

…

2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

(a) the purposes of the processing or categories of processing;

(b) the categories of personal data;

(c) the scope of the restrictions introduced;

(d) the safeguards to prevent abuse or unlawful access or transfer;

(e) the specification of the controller or categories of controllers;

(f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.'

12 Chapter V of the GDPR, under the heading 'Transfers of personal data to third countries or international organisations', contains Articles 44 to 50 of that regulation. According to Article 44 thereof, under the heading 'General principle for transfers':

'Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.'

13 Article 45 of the GDPR, under the heading 'Transfers on the basis of an adequacy decision', provides, in paragraphs 1 to 3:

'1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

(a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;

(b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and

(c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3. The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 93(2).'

14 Article 46 of the GDPR, under the heading 'Transfers subject to appropriate safeguards', provides, in paragraphs 1 to 3:

'1. In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

2. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from a supervisory authority, by:

(a) a legally binding and enforceable instrument between public authorities or bodies;

(b) binding corporate rules in accordance with Article 47;

(c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93(2);

(d) standard data protection clauses adopted by a supervisory authority and approved by the Commission pursuant to the examination procedure referred to in Article 93(2);

(e) an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights; or

(f) an approved certification mechanism pursuant to Article 42 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.

3. Subject to the authorisation from the competent supervisory authority, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

(a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or

(b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.'

15 Article 49 of the GDPR, under the heading 'Derogations for specific situations', states:

'1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:

(a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

(d) the transfer is necessary for important reasons of public interest;

(e) the transfer is necessary for the establishment, exercise or defence of legal claims;

(f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;

(g) the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

2. A transfer pursuant to point (g) of the first subparagraph of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register. Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

3. Points (a), (b) and (c) of the first subparagraph of paragraph 1 and the second subparagraph thereof shall not apply to activities carried out by public authorities in the exercise of their public powers.

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

5. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation. Member States shall notify such provisions to the Commission.

6. The controller or processor shall document the assessment as well as the suitable safeguards referred to in the second subparagraph of paragraph 1 of this Article in the records referred to in Article 30.'

16 Under Article 51(1) of the GDPR:

‘Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union (“supervisory authority”).’

17 In accordance with Article 55(1) of the GDPR, ‘each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State’.

18 Article 57(1) of that regulation states as follows:

‘Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

(a) monitor and enforce the application of this Regulation;

…

(f) handle complaints lodged by a data subject … and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;

…’

19 According to Article 58(2) and (4) of the GDPR:

‘2. Each supervisory authority shall have all of the following corrective powers:

…

(f) to impose a temporary or definitive limitation including a ban on processing;

…

(j) to order the suspension of data flows to a recipient in a third country or to an international organisation.

…

4. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter.’

20 Article 64(2) of the GDPR states:

‘Any supervisory authority, the Chair of the [European Data Protection Board (EDPB)] or the Commission may request that any matter of general application or producing effects in more than one Member State be examined by the Board with a view to obtaining an opinion, in particular where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 61 or for joint operations in accordance with Article 62.’

21 Under Article 65(1) of the GDPR:

‘In order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases:

…

(c) where a competent supervisory authority does not request the opinion of the Board in the cases referred to in Article 64(1), or does not follow the opinion of the Board issued under Article 64. In that case, any supervisory authority concerned or the Commission may communicate the matter to the Board.'

22 Article 77 of the GDPR, under the heading 'Right to lodge a complaint with a supervisory authority', states:

'1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.'

23 Article 78 of the GDPR, under the heading 'Right to an effective judicial remedy against a supervisory authority', provides, in paragraphs 1 and 2:

'1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.

2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to [an] effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77.'

24 Article 94 of the GDPR provides:

'1. Directive [95/46] is repealed with effect from 25 May 2018.

2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive [95/46] shall be construed as references to the European Data Protection Board established by this Regulation.'

25 Pursuant to Article 99 of the GDPR:

'1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 25 May 2018.'

The SCC Decision

26 Recital 11 of the SCC Decision reads as follows:

'Supervisory authorities of the Member States play a key role in this contractual mechanism in ensuring that personal data are adequately protected after the transfer. In exceptional cases where data exporters refuse or are unable to instruct the data importer properly, with an imminent risk of grave harm to the data subjects, the standard contractual clauses should allow the supervisory authorities to audit data importers and sub-processors and, where appropriate, take decisions which are binding on data importers and sub-processors. The supervisory authorities should have the power to prohibit or suspend a data transfer or a set of transfers based on the standard contractual clauses in those exceptional cases where it is established that a transfer on contractual basis is likely to have a substantial adverse effect on the warranties and obligations providing adequate protection for the data subject.'

27 Article 1 of the SCC Decision states:

‘The standard contractual clauses set out in the Annex are considered as offering adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights as required by Article 26(2) of Directive [95/46].’

28 In accordance with the second paragraph of Article 2 of the SCC Decision, that decision ‘shall apply to the transfer of personal data by controllers established in the European Union to recipients established outside the territory of the European Union who act only as data processors’.

29 Article 3 of the SCC Decision provides:

‘For the purposes of this Decision, the following definitions shall apply:

…

(c) “data exporter” means the controller who transfers the personal data;

(d) “data importer” means the processor established in a third country who agrees to receive from the data exporter personal data intended for processing on the data exporter’s behalf after the transfer in accordance with his instructions and the terms of this Decision and who is not subject to a third country’s system ensuring adequate protection within the meaning of Article 25(1) of Directive [95/46];

…

(f) “applicable data protection law” means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established;

…’

30 According to its original wording, prior to the entry into force of Implementing Decision 2016/2297, Article 4 of Decision 2010/87 provided:

‘1. ‘Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to Chapters II, III, V and VI of Directive [95/46], the competent authorities in the Member States may exercise their existing powers to prohibit or suspend data flows to third countries in order to protect individuals with regard to the processing of their personal data in cases where:

(a) it is established that the law to which the data importer or a sub-processor is subject imposes upon him requirements to derogate from the applicable data protection law which go beyond the restrictions necessary in a democratic society as provided for in Article 13 of Directive [95/46] where those requirements are likely to have a substantial adverse effect on the guarantees provided by the applicable data protection law and the standard contractual clauses;

(b) a competent authority has established that the data importer or a sub-processor has not respected the standard contractual clauses in the Annex; or

(c) there is a substantial likelihood that the standard contractual clauses in the Annex are not being or will not be complied with and the continuing transfer would create an imminent risk of grave harm to the data subjects.

2. The prohibition or suspension pursuant to paragraph 1 shall be lifted as soon as the reasons for the suspension or prohibition no longer exist.

3. When Member States adopt measures pursuant to paragraphs 1 and 2, they shall, without delay, inform the Commission which will forward the information to the other Member States.’

31 Recital 5 of Implementing Decision 2016/2297, adopted after the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650) was handed down, reads as follows:

'*Mutatis mutandis*, a Commission decision adopted pursuant to Article 26(4) of Directive [95/46] is binding on all organs of the Member States to which it is addressed, including their independent supervisory authorities, in so far as it has the effect of recognising that transfers taking place on the basis of standard contractual clauses set out therein offer sufficient safeguards as required by Article 26(2) of that Directive. This does not prevent a national supervisory authority from exercising its powers to oversee data flows, including the power to suspend or ban a transfer of personal data when it determines that the transfer is carried out in violation of EU or national data protection law, such as, for instance, when the data importer does not respect the standard contractual clauses.'

32 According to its current wording, resulting from Implementing Decision 2016/2297, Article 4 of the SCC Decision states:

'Whenever the competent authorities in Member States exercise their powers pursuant to Article 28(3) of Directive [95/46] leading to the suspension or definitive ban of data flows to third countries in order to protect individuals with regard to the processing of their personal data, the Member State concerned shall, without delay, inform the Commission which will forward the information to the other Member States.'

33 The annex to the SCC Decision, under the heading 'Standard Contractual Clauses (Processors)', is comprised of 12 standard clauses. Clause 3 thereof, itself under the heading 'Third-party beneficiary clause', provides:

'1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.

2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.

…'

34 According to Clause 4 in that annex, under the heading 'Obligations of the data exporter':

'The data exporter agrees and warrants:

(a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;

(b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;

…

(f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive [95/46];

(g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter

decides to continue the transfer or to lift the suspension;

…'

35 Clause 5 in that annex, under the heading 'Obligations of the data importer …', provides:

'The data importer agrees and warrants:

(a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

(b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

…

(d) that it will promptly notify the data exporter about:

(i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;

(ii) any accidental or unauthorised access; and

(iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;

…'

36 The footnote to the heading of Clause 5 states:

'Mandatory requirements of the national legislation applicable to the data importer which do not go beyond what is necessary in a democratic society on the basis of one of the interests listed in Article 13(1) of Directive [95/46], that is, if they constitute a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for the regulated professions, an important economic or financial interest of the State or the protection of the data subject or the rights and freedoms of others, are not in contradiction with the standard contractual clauses. …'

37 Clause 6 in the annex to the SCC Decision, under the heading 'Liability', provides:

'1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.

2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter …

…'

38 Clause 8 in that annex, under the heading ‘Cooperation with supervisory authorities’, stipulates, in paragraph 2 thereof:

‘The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.’

39 Clause 9 in that annex, under the heading ‘Governing law’, specifies that the clauses are to be governed by the law of the Member State in which the data exporter is established.

40 According to Clause 11 in that annex, under the heading ‘Sub-processing’:

‘1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses …

2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.

…’

41 Clause 12 in the annex to the SCC Decision, under the heading ‘Obligation after the termination of personal data-processing services’, states, in paragraph 1 thereof:

‘The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. …’

The Privacy Shield Decision

42 In the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), the Court declared Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7), in which the Commission had found that that third country ensured an adequate level of protection, invalid.

43 Following the delivery of that judgment, the Commission adopted the Privacy Shield Decision, after having, for the purposes of adopting that decision, assessed the US legislation, as stated in recital 65 of the decision:

‘The Commission has assessed the limitations and safeguards available in U.S. law as regards access and use of personal data transferred under the EU-U.S. Privacy Shield by U.S. public authorities for national security, law enforcement and other public interest purposes. In addition, the U.S. government, through its Office of the Director of National Intelligence (ODNI) …, has provided the Commission with detailed representations and commitments that are contained in Annex VI to this decision. By letter signed by the Secretary of State and attached as Annex III to this decision the U.S. government has also committed to create a new oversight mechanism for national security interference, the Privacy Shield Ombudsperson, who is independent from the Intelligence Community. Finally, a representation from the U.S. Department of Justice, contained in Annex VII to this decision, describes the limitations

and safeguards applicable to access and use of data by public authorities for law enforcement and other public interest purposes. In order to enhance transparency and to reflect the legal nature of these commitments, each of the documents listed and annexed to this decision will be published in the U.S. Federal Register.'

44 The Commission's assessment of those limitations and guarantees is summarised in recitals 67 to 135 of the Privacy Shield Decision, while the Commission's conclusions on the adequate level of protection in the context of the EU-US Privacy Shield are set out in recitals 136 to 141 thereof.

45 In particular, Recitals 68, 69, 76, 77, 109, 112 to 116, 120, 136 and 140 of the Privacy Shield Decision state:

'(68) Under the U.S. Constitution, ensuring national security falls within the President's authority as Commander in Chief, as Chief Executive and, as regards foreign intelligence, to conduct U.S. foreign affairs … While Congress has the power to impose limitations, and has done so in various respects, within these boundaries the President may direct the activities of the U.S. Intelligence Community, in particular through Executive Orders or Presidential Directives. … At present, the two central legal instruments in this regard are Executive Order 12333 ("E.O. 12333") … and Presidential Policy Directive 28.

(69) Presidential Policy Directive 28 ("PPD-28"), issued on 17 January 2014, imposes a number of limitations for "signals intelligence" operations … This presidential directive has binding force for U.S. intelligence authorities … and remains effective upon change in the U.S. Administration … PPD-28 is of particular importance for non-US persons, including EU data subjects. …

…

(76) Although not phrased in … legal terms, [the] principles [of PPD-28] capture the essence of the principles of necessity and proportionality. …

(77) As a directive issued by the President as the Chief Executive, these requirements bind the entire Intelligence Community and have been further implemented through agency rules and procedures that transpose the general principles into specific directions for day-to-day operations. …

…

(109) Conversely, under Section 702 [of the Foreign Intelligence Surveillance Act (FISA)], the [United States Foreign Intelligence Surveillance Court (FISC)] does not authorise individual surveillance measures; rather, it authorises surveillance programs (like PRISM, UPSTREAM) on the basis of annual certifications prepared by the [US] Attorney General and the Director of National Intelligence [(DNI)]. … As indicated, the certifications to be approved by the FISC contain no information about the individual persons to be targeted but rather identify categories of foreign intelligence information … While the FISC does not assess — under a probable cause or any other standard — that individuals are properly targeted to acquire foreign intelligence information …, its control extends to the condition that "a significant purpose of the acquisition is to obtain foreign intelligence information" …

…

(112) First, the [FISA] provides a number of remedies, available also to non-U.S. persons, to challenge unlawful electronic surveillance … This includes the possibility for individuals to bring a civil cause of action for money damages against the United States when information about them has been unlawfully and wilfully used or disclosed …; to sue U.S. government officials in their personal capacity ("under colour of law") for money damages …; and to challenge the legality of surveillance (and seek to suppress the information) in the event the U.S. government intends to use or disclose any information obtained or derived from electronic

surveillance against the individual in judicial or administrative proceedings in the United States …

(113) Second, the U.S. government referred the Commission to a number of additional avenues that EU data subjects could use to seek legal recourse against government officials for unlawful government access to, or use of, personal data, including for purported national security purposes …

(114) Finally, the U.S. government has pointed to the [Freedom of Information Act (FOIA)] as a means for non-U.S. persons to seek access to existing federal agency records, including where these contain the individual's personal data … Given its focus, the FOIA does not provide an avenue for individual recourse against interference with personal data as such, even though it could in principle enable individuals to get access to relevant information held by national intelligence agencies. …

(115) While individuals, including EU data subjects, therefore have a number of avenues of redress when they have been the subject of unlawful (electronic) surveillance for national security purposes, it is equally clear that at least some legal bases that U.S. intelligence authorities may use (e.g. E.O. 12333) are not covered. Moreover, even where judicial redress possibilities in principle do exist for non-U.S. persons, such as for surveillance under FISA, the available causes of action are limited … and claims brought by individuals (including U.S. persons) will be declared inadmissible where they cannot show "standing" …, which restricts access to ordinary courts …

(116) In order to provide for an additional redress avenue accessible for all EU data subjects, the U.S. government has decided to create a new Ombudsperson Mechanism as set out in the letter from the U.S. Secretary of State to the Commission which is contained in Annex III to this decision. This mechanism builds on the designation, under PPD-28, of a Senior Coordinator (at the level of Under-Secretary) in the State Department as a contact point for foreign governments to raise concerns regarding U.S. signals intelligence activities, but goes significantly beyond this original concept.

…

(120) … the U.S. government commits to ensure that, in carrying out its functions, the Privacy Shield Ombudsperson will be able to rely on the cooperation from other oversight and compliance review mechanisms existing in U.S. law. … Where any non-compliance has been found by one of these oversight bodies, the Intelligence Community element (e.g. an intelligence agency) concerned will have to remedy the non-compliance as only this will allow the Ombudsperson to provide a "positive" response to the individual (i.e. that any non-compliance has been remedied) to which the U.S. government has committed. …

…

(136) In the light of [those] findings, the Commission considers that the United States ensures an adequate level of protection for personal data transferred from the Union to self-certified organisations in the United States under the EU-U.S. Privacy Shield.

…

(140) Finally, on the basis of the available information about the U.S. legal order, including the representations and commitments from the U.S. government, the Commission considers that any interference by U.S. public authorities with the fundamental rights of the persons whose data are transferred from the Union to the United States under the Privacy Shield for national security, law enforcement or other public interest purposes, and the ensuing restrictions imposed on self-certified organisations with respect to their adherence to the Principles, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that there exists effective legal protection against such interference.'

46 Under Article 1 of the Privacy Shield Decision:

‘1. For the purposes of Article 25(2) of [Directive 95/46], the United States ensures an adequate level of protection for personal data transferred from the Union to organisations in the United States under the EU-U.S. Privacy Shield.

2. The EU-U.S. Privacy Shield is constituted by the Principles issued by the U.S. Department of Commerce on 7 July 2016 as set out in Annex II and the official representations and commitments contained in the documents listed in Annexes I [and] III to VII.

3. For the purpose of paragraph 1, personal data are transferred under the EU-U.S. Privacy Shield where they are transferred from the Union to organisations in the United States that are included in the “Privacy Shield List”, maintained and made publicly available by the U.S. Department of Commerce, in accordance with Sections I and III of the Principles set out in Annex II.’

47 Under the heading ‘EU-U.S. Privacy Shield Framework Principles issued by the U.S. Department of Commerce’, Annex II to the Privacy Shield Decision, provides, in paragraph I.5 thereof, that adherence to those principles may be limited, inter alia, ‘to the extent necessary to meet national security, public interest, or law enforcement requirements’.

48 Annex III to that decision contains a letter from Mr John Kerry, then Secretary of State (United States), to the Commissioner for Justice, Consumers and Gender Equality from 7 July 2016, to which a memorandum, Annex A, was attached, entitled ‘EU-U.S. Privacy Shield Ombudsperson mechanism regarding signals intelligence’, the latter of which contains the following passage:

‘In recognition of the importance of the EU-U.S. Privacy Shield Framework, this Memorandum sets forth the process for implementing a new mechanism, consistent with [PPD-28], regarding signals intelligence …

… President Obama announced the issuance of a new presidential directive — PPD-28 — to “clearly prescribe what we do, and do not do, when it comes to our overseas surveillance.”

Section 4(d) of PPD-28 directs the Secretary of State to designate a “Senior Coordinator for International Information Technology Diplomacy” (Senior Coordinator) “to […] serve as a point of contact for foreign governments who wish to raise concerns regarding signals intelligence activities conducted by the United States.” …

…

1. … The Senior Coordinator will serve as the Privacy Shield Ombudsperson and … will work closely with appropriate officials from other departments and agencies who are responsible for processing requests in accordance with applicable United States law and policy. The Ombudsperson is independent from the Intelligence Community. The Ombudsperson reports directly to the Secretary of State who will ensure that the Ombudsperson carries out its function objectively and free from improper influence that is liable to have an effect on the response to be provided.

…’

49 Annex VI to the Privacy Shield Decision contains a letter from the Office of the Director of National Intelligence to the United States Department of Commerce and to the International Trade Administration from 21 June 2016, in which it is stated that PPD-28 allows for ‘“bulk” collection … of a relatively large volume of signals intelligence information or data under circumstances where the Intelligence Community cannot use an identifier associated with a specific target … to focus the collection’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

50 Mr Schrems, an Austrian national residing in Austria, has been a user of the Facebook social network ('Facebook') since 2008.

51 Any person residing in the European Union who wishes to use Facebook is required to conclude, at the time of his or her registration, a contract with Facebook Ireland, a subsidiary of Facebook Inc. which is itself established in the United States. Some or all of the personal data of Facebook Ireland's users who reside in the European Union is transferred to servers belonging to Facebook Inc. that are located in the United States, where it undergoes processing.

52 On 25 June 2013, Mr Schrems filed a complaint with the Commissioner whereby he requested, in essence, that Facebook Ireland be prohibited from transferring his personal data to the United States, on the ground that the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities in which the public authorities were engaged. That complaint was rejected on the ground, inter alia, that, in Decision 2000/520, the Commission had found that the United States ensured an adequate level of protection.

53 The High Court (Ireland), before which Mr Schrems had brought judicial review proceedings against the rejection of his complaint, made a request to the Court for a preliminary ruling on the interpretation and validity of Decision 2000/520. In a judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), the Court declared that decision invalid.

54 Following that judgment, the referring court annulled the rejection of Mr Schrems's complaint and referred that decision back to the Commissioner. In the course of the Commissioner's investigation, Facebook Ireland explained that a large part of personal data was transferred to Facebook Inc. pursuant to the standard data protection clauses set out in the annex to the SCC Decision. On that basis, the Commissioner asked Mr Schrems to reformulate his complaint.

55 In his reformulated complaint lodged on 1 December 2015, Mr Schrems claimed, inter alia, that United States law requires Facebook Inc. to make the personal data transferred to it available to certain United States authorities, such as the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI). He submitted that, since that data was used in the context of various monitoring programmes in a manner incompatible with Articles 7, 8 and 47 of the Charter, the SCC Decision cannot justify the transfer of that data to the United States. In those circumstances, Mr Schrems asked the Commissioner to prohibit or suspend the transfer of his personal data to Facebook Inc.

56 On 24 May 2016, the Commissioner published a 'draft decision' summarising the provisional findings of her investigation. In that draft decision, she took the provisional view that the personal data of EU citizens transferred to the United States were likely to be consulted and processed by the US authorities in a manner incompatible with Articles 7 and 8 of the Charter and that US law did not provide those citizens with legal remedies compatible with Article 47 of the Charter. The Commissioner found that the standard data protection clauses in the annex to the SCC Decision are not capable of remedying that defect, since they confer only contractual rights on data subjects against the data exporter and importer, without, however, binding the United States authorities.

57 Taking the view that, in those circumstances, Mr Schrems's reformulated complaint raised the issue of the validity of the SCC Decision, on 31 May 2016, the Commissioner brought an action before the High Court, relying on the case-law arising from the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 65), in order for the High Court to refer a question on that issue to the Court. By order of 4 May 2018, the High Court made the present reference for a preliminary ruling to the Court.

58 In an annex to the order for reference, the High Court provided a copy of a judgment handed down on 3 October 2017, in which it had set out the results of an examination of the evidence produced before it in the national proceedings, in which the US Government had participated.

59 In that judgment, to which the request for a preliminary ruling refers on several occasions, the referring court stated that, as a matter of principle, it is not only entitled, but is obliged, to consider all of the facts and arguments presented to it and to decide on the basis of those facts and arguments whether or not a reference is required. The High Court considers that, in any event, it is required to

take into account any amendments that may have occurred in the interval between the institution of the proceedings and the hearing which it held. That court stated that, in the main proceedings, its own assessment is not confined to the grounds of invalidity put forward by the Commissioner, as a result of which it may of its own motion decide that there are other well-founded grounds of invalidity and, on those grounds, refer questions for a preliminary ruling.

60 According to the findings in that judgment, the US authorities' intelligence activities concerning the personal data transferred to the United States are based, inter alia, on Section 702 of the FISA and on E.O. 12333.

61 In its judgment, the referring court specifies that Section 702 of the FISA permits the Attorney General and the Director of National Intelligence to authorise jointly, following FISC approval, the surveillance of individuals who are not United States citizens located outside the United States in order to obtain 'foreign intelligence information', and provides, inter alia, the basis for the PRISM and UPSTREAM surveillance programmes. In the context of the PRISM programme, Internet service providers are required, according to the findings of that court, to supply the NSA with all communications to and from a 'selector', some of which are also transmitted to the FBI and the Central Intelligence Agency (CIA).

62 As regards the UPSTREAM programme, that court found that, in the context of that programme, telecommunications undertakings operating the 'backbone' of the Internet — that is to say, the network of cables, switches and routers — are required to allow the NSA to copy and filter Internet traffic flows in order to acquire communications from, to or about a non-US national associated with a 'selector'. Under that programme, the NSA has, according to the findings of that court, access both to the metadata and to the content of the communications concerned.

63 The referring court found that E.O. 12333 allows the NSA to access data 'in transit' to the United States, by accessing underwater cables on the floor of the Atlantic, and to collect and retain such data before arriving in the United States and being subject there to the FISA. It adds that activities conducted pursuant to E.O. 12333 are not governed by statute.

64 As regards the limits on intelligence activities, the referring court emphasises the fact that non-US persons are covered only by PPD-28, which merely states that intelligence activities should be 'as tailored as feasible'. On the basis of those findings, the referring court considers that the United States carries out mass processing of personal data without ensuring a level of protection essentially equivalent to that guaranteed by Articles 7 and 8 of the Charter.

65 As regards judicial protection, the referring court states that EU citizens do not have the same remedies as US citizens in respect of the processing of personal data by the US authorities, since the Fourth Amendment to the Constitution of the United States, which constitutes, in United States law, the most important cause of action available to challenge unlawful surveillance, does not apply to EU citizens. In that regard, the referring court states that there are substantial obstacles in respect of the causes of action open to EU citizens, in particular that of *locus standi*, which it considers to be excessively difficult to satisfy. Furthermore, according to the findings of the referring court, the NSA's activities based on E.O. 12333 are not subject to judicial oversight and are not justiciable. Lastly, the referring court considers that, in so far as, in its view, the Privacy Shield Ombudsperson is not a tribunal within the meaning of Article 47 of the Charter, US law does not afford EU citizens a level of protection essentially equivalent to that guaranteed by the fundamental right enshrined in that article.

66 In its request for reference preliminary ruling, the referring court also states that the parties to the main proceedings disagree, inter alia, on the applicability of EU law to transfers to a third country of personal data which are likely to be processed by the authorities of that country, inter alia, for purposes of national security and on the factors to be taken into consideration for the purposes of assessing whether that country ensures an adequate level of protection. In particular, that court notes that, according to Facebook Ireland, the Commission's findings on the adequacy of the level of protection ensured by a third country, such as those set out in the Privacy Shield Decision, are also binding on the supervisory authorities in the context of a transfer of personal data pursuant to the standard data protection clauses in the annex to the SCC Decision.

67 As regards those standard data protection clauses, that court asks whether the SCC Decision may be considered to be valid, despite the fact that, according to that court, those clauses are not binding on the State authorities of the third country concerned and, therefore, are not capable of remedying a possible lack of an adequate level of protection in that country. In that regard, it considers that the possibility, afforded to the competent authorities in the Member States by Article 4(1)(a) of Decision 2010/87, in its version prior to the entry into force of Implementing Decision 2016/2297, of prohibiting transfers of personal data to a third country that imposes requirements on the importer that are incompatible with the guarantees contained in those clauses, demonstrates that the state of the law in the third country can justify prohibiting the transfer of data, even when carried out pursuant to the standard data protection clauses in the annex to the SCC Decision, and therefore makes clear that those requirements may be insufficient in ensuring an adequate level of protection. Nonetheless, the referring court harbours doubts as to the extent of the Commissioner's power to prohibit a transfer of data based on those clauses, despite taking the view that discretion cannot be sufficient to ensure adequate protection.

68 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) In circumstances in which personal data is transferred by a private company from a European Union (EU) Member State to a private company in a third country for a commercial purpose pursuant to [the SCC Decision] and may be further processed in the third country by its authorities for purposes of national security but also for purposes of law enforcement and the conduct of the foreign affairs of the third country, does EU law (including the Charter) apply to the transfer of the data notwithstanding the provisions of Article 4(2) TEU in relation to national security and the provisions of the first indent of Article 3(2) of Directive [95/46] in relation to public security, defence and State security?

(2) (a) In determining whether there is a violation of the rights of an individual through the transfer of data from the [European Union] to a third country under the [SCC Decision] where it may be further processed for national security purposes, is the relevant comparator for the purposes of [Directive 95/46]:

(i) the Charter, the EU Treaty, the FEU Treaty, [Directive 95/46], the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950] (or any other provision of EU law); or

(ii) the national laws of one or more Member States?

(b) If the relevant comparator is (ii), are the practices in the context of national security in one or more Member States also to be included in the comparator?

(3) When assessing whether a third country ensures the level of protection required by EU law to personal data transferred to that country for the purposes of Article 26 of [Directive 95/46], ought the level of protection in the third country be assessed by reference to:

(a) the applicable rules in the third country resulting from its domestic law or international commitments, and the practice designed to ensure compliance with those rules, to include the professional rules and security measures which are complied with in the third country;

or

(b) the rules referred to in (a) together with such administrative, regulatory and compliance practices and policy safeguards, procedures, protocols, oversight mechanisms and non-judicial remedies as are in place in the third country?

(4) Given the facts found by the High Court in relation to US law, if personal data is transferred from the European Union to the United States under [the SCC Decision] does this violate the rights of individuals under Articles 7 and/or 8 of the Charter?

(5) Given the facts found by the High Court in relation to US law, if personal data is transferred from the European Union to the United States under [the SCC Decision]:

(a) does the level of protection afforded by the United States respect the essence of an individual's right to a judicial remedy for breach of his or her data privacy rights guaranteed by Article 47 of the Charter?

If the answer to Question 5(a) is in the affirmative:

(b) are the limitations imposed by US law on an individual's right to a judicial remedy in the context of US national security proportionate within the meaning of Article 52 of the Charter and do not exceed what is necessary in a democratic society for national security purposes?

(6) (a) What is the level of protection required to be afforded to personal data transferred to a third country pursuant to standard contractual clauses adopted in accordance with a decision of the Commission under Article 26(4) [of Directive 95/46] in light of the provisions of [Directive 95/46] and in particular Articles 25 and 26 read in the light of the Charter?

(b) What are the matters to be taken into account in assessing whether the level of protection afforded to data transferred to a third country under [the SCC Decision] satisfies the requirements of [Directive 95/46] and the Charter?

(7) Does the fact that the standard contractual clauses apply as between the data exporter and the data importer and do not bind the national authorities of a third country who may require the data importer to make available to its security services for further processing the personal data transferred pursuant to the clauses provided for in [the SCC Decision] preclude the clauses from adducing adequate safeguards as envisaged by Article 26(2) of [Directive 95/46]?

(8) If a third country data importer is subject to surveillance laws that in the view of a data protection authority conflict with the [standard contractual clauses] or Article 25 and 26 of [Directive 95/46] and/or the Charter, is a data protection authority required to use its enforcement powers under Article 28(3) of [Directive 95/46] to suspend data flows or is the exercise of those powers limited to exceptional cases only, in light of recital 11 of [the SCC Decision], or can a data protection authority use its discretion not to suspend data flows?

(9) (a) For the purposes of Article 25(6) of [Directive 95/46], does [the Privacy Shield Decision] constitute a finding of general application binding on data protection authorities and the courts of the Member States to the effect that the United States ensures an adequate level of protection within the meaning of Article 25(2) of [Directive 95/46] by reason of its domestic law or of the international commitments it has entered into?

(b) If it does not, what relevance, if any, does the Privacy Shield Decision have in the assessment conducted into the adequacy of the safeguards provided to data transferred to the United States which is transferred pursuant to the [SCC Decision]?

(10) Given the findings of the High Court in relation to US law, does the provision of the Privacy Shield ombudsperson under Annex A to Annex III to the Privacy Shield Decision when taken in conjunction with the existing regime in the United States ensure that the US provides a remedy to data subjects whose personal data is transferred to the United States under the [SCC Decision] that is compatible with Article 47 of the Charter]?

(11) Does the [SCC Decision] violate Articles 7, 8 and/or 47 of the Charter?'

Admissibility of the request for a preliminary ruling

69 Facebook Ireland and the German and United Kingdom Governments claim that the request for a preliminary ruling is inadmissible.

70 With regard to the objection raised by Facebook Ireland, that company observes that the provisions of Directive 95/46, on which the questions referred for a preliminary ruling are based, were repealed by

the GDPR.

71 In that regard, although Directive 95/46 was, under Article 94(1) of the GDPR, repealed with effect from 25 May 2018, that directive was still in force when, on 4 May 2018, the present request for a preliminary ruling, received at the Court on 9 May 2018, was made. In addition, the first indent of Article 3(2) and Articles 25, 26 and 28(3) of Directive 95/46 cited in the questions referred, were, in essence, reproduced in Article 2(2) and Articles 45, 46 and 58 of the GDPR, respectively. Furthermore, it must be borne in mind that the Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 43 and the case-law cited). On those grounds, the fact that the referring court referred its questions by reference solely to the provisions of Directive 95/46 cannot render the present request for a preliminary ruling inadmissible.

72 For its part, the German Government bases its objection of inadmissibility on the fact, first, that the Commissioner merely expressed doubts, and not a definitive opinion, as to the validity of the SCC Decision and, second, that the referring court failed to ascertain whether Mr Schrems had unambiguously given his consent to the transfers of data at issue in the main proceedings, which, if that had been the case, would have the effect of rendering an answer to that question redundant. Lastly, the United Kingdom Government maintains that the questions referred for a preliminary ruling are hypothetical since that court did not find that that data had actually been transferred on the basis of that decision.

73 It follows from settled case-law of the Court that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. It follows that questions referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it appears that the interpretation sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 24 and 25; of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 45; and of 19 December 2019, *Dobersberger*, C-16/18, EU:C:2019:1110, paragraphs 18 and 19).

74 In the present case, the request for a preliminary ruling contains sufficient factual and legal material to understand the significance of the questions referred. Furthermore, and most importantly, nothing in the file before the Court leads to the conclusion that the interpretation of EU law that is requested is unrelated to the actual facts of the main action or its object, or that the problem is hypothetical, inter alia, on the basis that the transfer of the personal data at issue in the main proceedings may have been based on the express consent of the data subject of that transfer rather than based on the SCC Decision. As indicated in the request for a preliminary ruling, Facebook Ireland has acknowledged that it transfers the personal data of its subscribers residing in the European Union to Facebook Inc. and that those transfers, the lawfulness of which Mr Schrems disputes, were in large part carried out pursuant to the standard data protection clauses in the annex to the SCC Decision.

75 Moreover, it is irrelevant to the admissibility of the present request for a preliminary ruling that the Commissioner did not express a definitive opinion on the validity of that decision in so far as the referring court considers that an answer to the questions referred for a preliminary ruling concerning the interpretation and validity of rules of EU law is necessary in order to dispose of the case in the main proceedings.

76 It follows that the request for a preliminary ruling is admissible.

Consideration of the questions referred

77 As a preliminary matter, it must be borne in mind that the present request for a preliminary ruling has arisen following a complaint made by Mr Schrems requesting that the Commissioner order the suspension or prohibition, in the future, of the transfer by Facebook Ireland of his personal data to Facebook Inc. Although the questions referred for a preliminary ruling refer to the provisions of Directive 95/46, it is common ground that the Commissioner had not yet adopted a final decision on that complaint when that directive was repealed and replaced by the GDPR with effect from 25 May 2018.

78 That absence of a national decision distinguishes the situation at issue in the main proceedings from those which gave rise to the judgments of 24 September 2019, *Google (Territorial scope of de-referencing)* (C-507/17, EU:C:2019:772), and of 1 October 2019, *Planet49* (C-673/17, EU:C:2019:801), in which decisions adopted prior to the repeal of that directive were at issue.

79 The questions referred for a preliminary ruling must therefore be answered in the light of the provisions of the GDPR rather than those of Directive 95/46.

The first question

80 By its first question, the referring court wishes to know, in essence, whether Article 2(1) and Article 2(2)(a), (b) and (d) of the GDPR, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that that regulation applies to the transfer of personal data by an economic operator established in a Member State to another economic operator established in a third country, in circumstances where, at the time of that transfer or thereafter, that data is liable to be processed by the authorities of that third country for the purposes of public security, defence and State security.

81 In that regard, it should be made clear at the outset that the rule in Article 4(2) TEU, according to which, within the European Union, national security remains the sole responsibility of each Member State, concerns Member States of the European Union only. That rule is therefore irrelevant, in the present case, for the purposes of interpreting Article 2(1) and Article 2(2)(a), (b) and (d) of the GDPR.

82 Under Article 2(1) of the GDPR, that regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system. Article 4(2) of that regulation defines ‘processing’ as ‘any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means’ and mentions, by way of example, ‘disclosure by transmission, dissemination or otherwise making available’, but does not distinguish between operations which take place within the European Union and those which are connected with a third country. Furthermore, the GDPR subjects transfers of personal data to third countries to specific rules in Chapter V thereof, entitled ‘Transfers of personal data to third countries or international organisations’, and also confers specific powers on the supervisory authorities for that purpose, which are set out in Article 58(2)(j) of that regulation.

83 It follows that the operation of having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 4(2) of the GDPR, carried out in a Member State, and falls within the scope of that regulation under Article 2(1) thereof (see, by analogy, as regards Article 2(b) and Article 3(1) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 45 and the case-law cited).

84 As to whether such an operation may be regarded as being excluded from the scope of the GDPR under Article 2(2) thereof, it should be noted that that provision lays down exceptions to the scope of that regulation, as defined in Article 2(1) thereof, which must be interpreted strictly (see, by analogy, as regards Article 3(2) of Directive 95/46, judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 37 and the case-law cited).

85 In the present case, since the transfer of personal data at issue in the main proceedings is from Facebook Ireland to Facebook Inc., namely between two legal persons, that transfer does not fall within Article 2(2)(c) of the GDPR, which refers to the processing of data by a natural person in the course of a purely personal or household activity. Such a transfer also does not fall within the exceptions laid down in Article 2(2)(a), (b) and (d) of that regulation, since the activities mentioned

therein by way of example are, in any event, activities of the State or of State authorities and are unrelated to fields in which individuals are active (see, by analogy, as regards Article 3(2) of Directive 95/46, judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 38 and the case-law cited).

86 The possibility that the personal data transferred between two economic operators for commercial purposes might undergo, at the time of the transfer or thereafter, processing for the purposes of public security, defence and State security by the authorities of that third country cannot remove that transfer from the scope of the GDPR.

87 Indeed, by expressly requiring the Commission, when assessing the adequacy of the level of protection afforded by a third country, to take account, inter alia, of 'relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation', it is patent from the very wording of Article 45(2)(a) of that regulation that no processing by a third country of personal data for the purposes of public security, defence and State security excludes the transfer at issue from the application of the regulation.

88 It follows that such a transfer cannot fall outside the scope of the GDPR on the ground that the data at issue is liable to be processed, at the time of that transfer or thereafter, by the authorities of the third country concerned, for the purposes of public security, defence and State security.

89 Therefore, the answer to the first question is that Article 2(1) and (2) of the GDPR must be interpreted as meaning that that regulation applies to the transfer of personal data for commercial purposes by an economic operator established in a Member State to another economic operator established in a third country, irrespective of whether, at the time of that transfer or thereafter, that data is liable to be processed by the authorities of the third country in question for the purposes of public security, defence and State security.

The second, third and sixth questions

90 By its second, third and sixth questions, the referring court seeks clarification from the Court, in essence, on the level of protection required by Article 46(1) and Article 46(2)(c) of the GDPR in respect of a transfer of personal data to a third country based on standard data protection clauses. In particular, the referring court asks the Court to specify which factors need to be taken into consideration for the purpose of determining whether that level of protection is ensured in the context of such a transfer.

91 As regards the level of protection required, it follows from a combined reading of those provisions that, in the absence of an adequacy decision under Article 45(3) of that regulation, a controller or processor may transfer personal data to a third country only if the controller or processor has provided 'appropriate safeguards', and on condition that 'enforceable data subject rights and effective legal remedies for data subjects' are available, such safeguards being able to be provided, inter alia, by the standard data protection clauses adopted by the Commission.

92 Although Article 46 of the GDPR does not specify the nature of the requirements which flow from that reference to 'appropriate safeguards', 'enforceable rights' and 'effective legal remedies', it should be noted that that article appears in Chapter V of that regulation and, accordingly, must be read in the light of Article 44 of that regulation, entitled 'General principle for transfers', which lays down that 'all provisions [in that chapter] shall be applied in order to ensure that the level of protection of natural persons guaranteed by [that regulation] is not undermined'. That level of protection must therefore be guaranteed irrespective of the provision of that chapter on the basis of which a transfer of personal data to a third country is carried out.

93 As the Advocate General stated in point 117 of his Opinion, the provisions of Chapter V of the GDPR are intended to ensure the continuity of that high level of protection where personal data is transferred to a third country, in accordance with the objective set out in recital 6 thereof.

94 The first sentence of Article 45(1) of the GDPR provides that a transfer of personal data to a third country may be authorised by a Commission decision to the effect that that third country, a territory or one or more specified sectors within that third country, ensures an adequate level of protection. In that regard, although not requiring a third country to ensure a level of protection identical to that guaranteed in the EU legal order, the term 'adequate level of protection' must, as confirmed by recital 104 of that regulation, be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of the regulation, read in the light of the Charter. If there were no such requirement, the objective referred to in the previous paragraph would be undermined (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 73).

95 In that context, recital 107 of the GDPR states that, where 'a third country, a territory or a specified sector within a third country … no longer ensures an adequate level of data protection. … the transfer of personal data to that third country … should be prohibited, unless the requirements [of that regulation] relating to transfers subject to appropriate safeguards … are fulfilled'. To that effect, recital 108 of the regulation states that, in the absence of an adequacy decision, the appropriate safeguards to be taken by the controller or processor in accordance with Article 46(1) of the regulation must 'compensate for the lack of data protection in a third country' in order to 'ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union'.

96 It follows, as the Advocate General stated in point 115 of his Opinion, that such appropriate guarantees must be capable of ensuring that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded, as in the context of a transfer based on an adequacy decision, a level of protection essentially equivalent to that which is guaranteed within the European Union.

97 The referring court also asks whether the level of protection essentially equivalent to that guaranteed within the European Union must be determined in the light of EU law, in particular the rights guaranteed by the Charter and/or the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), or in the light of the national law of the Member States.

98 In that regard, it should be noted that, although, as Article 6(3) TEU confirms, the fundamental rights enshrined in the ECHR constitute general principles of EU law and although Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44 and the case-law cited, and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 22).

99 In those circumstances, the Court has held that the interpretation of EU law and examination of the legality of EU legislation must be undertaken in the light of the fundamental rights guaranteed by the Charter (see, by analogy, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 24).

100 Furthermore, the Court has consistently held that the validity of provisions of EU law and, in the absence of an express reference to the national law of the Member States, their interpretation, cannot be construed in the light of national law, even national law of constitutional status, in particular fundamental rights as formulated in the national constitutions (see, to that effect, judgments of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 3; of 13 December 1979, *Hauer*, 44/79, EU:C:1979:290, paragraph 14; and of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 28 and the case-law cited).

101 It follows that, since, first, a transfer of personal data, such as that at issue in the main proceedings, for commercial purposes by an economic operator established in one Member State to another economic

operator established in a third country, falls, as is apparent from the answer to the first question, within the scope of the GDPR and, second, the purpose of that regulation is, inter alia, as is apparent from recital 10 thereof, to ensure a consistent and high level of protection of natural persons within the European Union and, to that end, to ensure a consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of such natural persons with regard to the processing of personal data throughout the European Union, the level of protection of fundamental rights required by Article 46(1) of that regulation must be determined on the basis of the provisions of that regulation, read in the light of the fundamental rights enshrined in the Charter.

102 The referring court also seeks to ascertain what factors should be taken into consideration for the purposes of determining the adequacy of the level of protection where personal data is transferred to a third country pursuant to standard data protection clauses adopted under Article 46(2)(c) of the GDPR.

103 In that regard, although that provision does not list the various factors which must be taken into consideration for the purposes of assessing the adequacy of the level of protection to be observed in such a transfer, Article 46(1) of that regulation states that data subjects must be afforded appropriate safeguards, enforceable rights and effective legal remedies.

104 The assessment required for that purpose in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the European Union and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country. As regards the latter, the factors to be taken into consideration in the context of Article 46 of that regulation correspond to those set out, in a non-exhaustive manner, in Article 45(2) of that regulation.

105 Therefore, the answer to the second, third and sixth questions is that Article 46(1) and Article 46(2)(c) of the GDPR must be interpreted as meaning that the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter. To that end, the assessment of the level of protection afforded in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the European Union and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country, in particular those set out, in a non-exhaustive manner, in Article 45(2) of that regulation.

The eighth question

106 By its eighth question, the referring court wishes to know, in essence, whether Article 58(2)(f) and (j) of the GDPR must be interpreted as meaning that the competent supervisory authority is required to suspend or prohibit a transfer of personal data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of the GDPR and by the Charter, cannot be ensured, or as meaning that the exercise of those powers is limited to exceptional cases.

107 In accordance with Article 8(3) of the Charter and Article 51(1) and Article 57(1)(a) of the GDPR, the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of natural persons with regard to the processing of personal data. Each of those authorities is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down in that regulation (see, by analogy, as regards Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 47).

108 It follows from those provisions that the supervisory authorities' primary responsibility is to monitor the application of the GDPR and to ensure its enforcement. The exercise of that responsibility is of particular importance where personal data is transferred to a third country since, as is clear from

recital 116 of that regulation, ‘when personal data moves across borders outside the Union it may put at increased risk the ability of natural persons to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of that information’. In such cases, as is stated in that recital, ‘supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders’.

109 In addition, under Article 57(1)(f) of the GDPR, each supervisory authority is required on its territory to handle complaints which, in accordance with Article 77(1) of that regulation, any data subject is entitled to lodge where that data subject considers that the processing of his or her personal data infringes the regulation, and is required to examine the nature of that complaint as necessary. The supervisory authority must handle such a complaint with all due diligence (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 63).

110 Article 78(1) and (2) of the GDPR recognises the right of each person to an effective judicial remedy, in particular, where the supervisory authority fails to deal with his or her complaint. Recital 141 of that regulation also refers to that ‘right to an effective judicial remedy in accordance with Article 47 of the Charter’ in circumstances where that supervisory authority ‘does not act where such action is necessary to protect the rights of the data subject’.

111 In order to handle complaints lodged, Article 58(1) of the GDPR confers extensive investigative powers on each supervisory authority. If a supervisory authority takes the view, following an investigation, that a data subject whose personal data have been transferred to a third country is not afforded an adequate level of protection in that country, it is required, under EU law, to take appropriate action in order to remedy any findings of inadequacy, irrespective of the reason for, or nature of, that inadequacy. To that effect, Article 58(2) of that regulation lists the various corrective powers which the supervisory authority may adopt.

112 Although the supervisory authority must determine which action is appropriate and necessary and take into consideration all the circumstances of the transfer of personal data in question in that determination, the supervisory authority is nevertheless required to execute its responsibility for ensuring that the GDPR is fully enforced with all due diligence.

113 In that regard, as the Advocate General also stated in point 148 of his Opinion, the supervisory authority is required, under Article 58(2)(f) and (j) of that regulation, to suspend or prohibit a transfer of personal data to a third country if, in its view, in the light of all the circumstances of that transfer, the standard data protection clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.

114 The interpretation in the previous paragraph is not undermined by the Commissioner’s reasoning that Article 4 of Decision 2010/87, in its version prior to the entry into force of Implementing Decision 2016/2297, read in the light of recital 11 of that decision, confined the power of supervisory authorities to suspend or prohibit a transfer of personal data to a third country to certain exceptional circumstances. As amended by Implementing Decision 2016/2297, Article 4 of the SCC Decision refers to the power of the supervisory authorities, now under Article 58(2)(f) and (j) of the GDPR, to suspend or ban such a transfer, without confining the exercise of that power to exceptional circumstances.

115 In any event, the implementing power which Article 46(2)(c) of the GDPR grants to the Commission for the purposes of adopting standard data protection clauses does not confer upon it competence to restrict the national supervisory authorities’ powers on the basis of Article 58(2) of that regulation (see, by analogy, as regards Article 25(6) and Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraphs 102 and 103). Moreover, as stated in recital 5 of Implementing Decision 2016/2297, the SCC Decision ‘does not prevent a [supervisory authority] from exercising its powers to oversee data flows, including the power to suspend or ban a transfer of personal data when it determines that the transfer is carried out in violation of EU or national data protection law’.

116 It should, however, be pointed out that the powers of the competent supervisory authority are subject to full compliance with the decision in which the Commission finds, where relevant, under the first sentence of Article 45(1) of the GDPR, that a particular third country ensures an adequate level of protection. In such a case, it is clear from the second sentence of Article 45(1) of that regulation, read in conjunction with recital 103 thereof, that transfers of personal data to the third country in question may take place without requiring any specific authorisation.

117 Under the fourth paragraph of Article 288 TFEU, a Commission adequacy decision is, in its entirety, binding on all the Member States to which it is addressed and is therefore binding on all their organs in so far as it finds that the third country in question ensures an adequate level of protection and has the effect of authorising such transfers of personal data (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 51 and the case-law cited).

118 Thus, until such time as a Commission adequacy decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection (judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 52 and the case-law cited) and, as a result, to suspend or prohibit transfers of personal data to that third country.

119 However, a Commission adequacy decision adopted pursuant to Article 45(3) of the GDPR cannot prevent persons whose personal data has been or could be transferred to a third country from lodging a complaint, within the meaning of Article 77(1) of the GDPR, with the competent national supervisory authority concerning the protection of their rights and freedoms in regard to the processing of that data. Similarly, a decision of that nature cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities by Article 8(3) of the Charter and Article 51(1) and Article 57(1)(a) of the GDPR (see, by analogy, as regards Article 25(6) and Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 53).

120 Thus, even if the Commission has adopted a Commission adequacy decision, the competent national supervisory authority, when a complaint is lodged by a person concerning the protection of his or her rights and freedoms in regard to the processing of personal data relating to him or her, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the GDPR and, where relevant, to bring an action before the national courts in order for them, if they share the doubts of that supervisory authority as to the validity of the Commission adequacy decision, to make a reference for a preliminary ruling for the purpose of examining its validity (see, by analogy, as regards Article 25(6) and Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraphs 57 and 65).

121 In the light of the foregoing considerations, the answer to the eighth question is that Article 58(2)(f) and (j) of the GDPR must be interpreted as meaning that, unless there is a valid Commission adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of the GDPR and by the Charter, cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.

The7th and 11th questions

122 By its 7th and 11th questions, which it is appropriate to consider together, the referring court seeks clarification from the Court, in essence, on the validity of the SCC Decision in the light of Articles 7, 8 and 47 of the Charter.

123 In particular, as is clear from the wording of the seventh question and the corresponding explanations in the request for a preliminary ruling, the referring court asks whether the SCC Decision is capable of ensuring an adequate level of protection of the personal data transferred to third countries given that

the standard data protection clauses provided for in that decision do not bind the supervisory authorities of those third countries.

124 Article 1 of the SCC Decision provides that the standard data protection clauses set out in its annex are considered to offer adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals in accordance with the requirements of Article 26(2) of Directive 95/46. The latter provision was, in essence, reproduced in Article 46(1) and Article 46(2)(c) of the GDPR.

125 However, although those clauses are binding on a controller established in the European Union and the recipient of the transfer of personal data established in a third country where they have concluded a contract incorporating those clauses, it is common ground that those clauses are not capable of binding the authorities of that third country, since they are not party to the contract.

126 Therefore, although there are situations in which, depending on the law and practices in force in the third country concerned, the recipient of such a transfer is in a position to guarantee the necessary protection of the data solely on the basis of standard data protection clauses, there are others in which the content of those standard clauses might not constitute a sufficient means of ensuring, in practice, the effective protection of personal data transferred to the third country concerned. That is the case, in particular, where the law of that third country allows its public authorities to interfere with the rights of the data subjects to which that data relates.

127 Thus, the question arises whether a Commission decision concerning standard data protection clauses, adopted pursuant to Article 46(2)(c) of the GDPR, is invalid in the absence, in that decision, of guarantees which can be enforced against the public authorities of the third countries to which personal data is or could be transferred pursuant to those clauses.

128 Article 46(1) of the GDPR provides that, in the absence of an adequacy decision, a controller or processor may transfer personal data to a third country only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. According to Article 46(2)(c) of the GDPR, those safeguards may be provided by standard data protection clauses drawn up by the Commission. However, those provisions do not state that all safeguards must necessarily be provided for in a Commission decision such as the SCC Decision.

129 It should be noted in that regard that such a standard clauses decision differs from an adequacy decision adopted pursuant to Article 45(3) of the GDPR, which seeks, following an examination of the legislation of the third country concerned taking into account, inter alia, the relevant legislation on national security and public authorities' access to personal data, to find with binding effect that a third country, a territory or one or more specified sectors within that third country ensures an adequate level of protection and that the access of that third country's public authorities to such data does not therefore impede transfers of such personal data to the third country. Such an adequacy decision can therefore be adopted by the Commission only if it has found that the third country's relevant legislation in that field does in fact provide all the necessary guarantees from which it can be concluded that that legislation ensures an adequate level of protection.

130 By contrast, in the case of a Commission decision adopting standard data protection clauses, such as the SCC Decision, in so far as such a decision does not refer to a third country, a territory or one or more specific sectors in a third country, it cannot be inferred from Article 46(1) and Article 46(2)(c) of the GDPR that the Commission is required, before adopting such a decision, to assess the adequacy of the level of protection ensured by the third countries to which personal data could be transferred pursuant to such clauses.

131 In that regard, it must be borne in mind that, according to Article 46(1) of the GDPR, in the absence of a Commission adequacy decision, it is for the controller or processor established in the European Union to provide, inter alia, appropriate safeguards. Recitals 108 and 114 of the GDPR confirm that, where the Commission has not adopted a decision on the adequacy of the level of data protection in a third country, the controller or, where relevant, the processor 'should take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject' and

that ‘those safeguards should ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union, including the availability of enforceable data subject rights and of effective legal remedies … in the Union or in a third country’.

132 Since by their inherently contractual nature standard data protection clauses cannot bind the public authorities of third countries, as is clear from paragraph 125 above, but that Article 44, Article 46(1) and Article 46(2)(c) of the GDPR, interpreted in the light of Articles 7, 8 and 47 of the Charter, require that the level of protection of natural persons guaranteed by that regulation is not undermined, it may prove necessary to supplement the guarantees contained in those standard data protection clauses. In that regard, recital 109 of the regulation states that ‘the possibility for the controller … to use standard data-protection clauses adopted by the Commission … should [not] prevent [it] … from adding other clauses or additional safeguards’ and states, in particular, that the controller ‘should be encouraged to provide additional safeguards … that supplement standard [data] protection clauses’.

133 It follows that the standard data protection clauses adopted by the Commission on the basis of Article 46(2)(c) of the GDPR are solely intended to provide contractual guarantees that apply uniformly in all third countries to controllers and processors established in the European Union and, consequently, independently of the level of protection guaranteed in each third country. In so far as those standard data protection clauses cannot, having regard to their very nature, provide guarantees beyond a contractual obligation to ensure compliance with the level of protection required under EU law, they may require, depending on the prevailing position in a particular third country, the adoption of supplementary measures by the controller in order to ensure compliance with that level of protection.

134 In that regard, as the Advocate General stated in point 126 of his Opinion, the contractual mechanism provided for in Article 46(2)(c) of the GDPR is based on the responsibility of the controller or his or her subcontractor established in the European Union and, in the alternative, of the competent supervisory authority. It is therefore, above all, for that controller or processor to verify, on a case-by-case basis and, where appropriate, in collaboration with the recipient of the data, whether the law of the third country of destination ensures adequate protection, under EU law, of personal data transferred pursuant to standard data protection clauses, by providing, where necessary, additional safeguards to those offered by those clauses.

135 Where the controller or a processor established in the European Union is not able to take adequate additional measures to guarantee such protection, the controller or processor or, failing that, the competent supervisory authority, are required to suspend or end the transfer of personal data to the third country concerned. That is the case, in particular, where the law of that third country imposes on the recipient of personal data from the European Union obligations which are contrary to those clauses and are, therefore, capable of impinging on the contractual guarantee of an adequate level of protection against access by the public authorities of that third country to that data.

136 Therefore, the mere fact that standard data protection clauses in a Commission decision adopted pursuant to Article 46(2)(c) of the GDPR, such as those in the annex to the SCC Decision, do not bind the authorities of third countries to which personal data may be transferred cannot affect the validity of that decision.

137 That validity depends, however, on whether, in accordance with the requirement of Article 46(1) and Article 46(2)(c) of the GDPR, interpreted in the light of Articles 7, 8 and 47 of the Charter, such a standard clauses decision incorporates effective mechanisms that make it possible, in practice, to ensure compliance with the level of protection required by EU law and that transfers of personal data pursuant to the clauses of such a decision are suspended or prohibited in the event of the breach of such clauses or it being impossible to honour them.

138 As regards the guarantees contained in the standard data protection clauses in the annex to the SCC Decision, it is clear from Clause 4(a) and (b), Clause 5(a), Clause 9 and Clause 11(1) thereof that a data controller established in the European Union, the recipient of the personal data and any processor thereof mutually undertake to ensure that the processing of that data, including the transfer thereof, has been and will continue to be carried out in accordance with ‘the applicable data protection law’,

namely, according to the definition set out in Article 3(f) of that decision, 'the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established'. The provisions of the GDPR, read in the light of the Charter, form part of that legislation.

139 In addition, a recipient of personal data established in a third country undertakes, pursuant to Clause 5(a), to inform the controller established in the European Union promptly of any inability to comply with its obligations under the contract concluded. In particular, according to Clause 5(b), the recipient certifies that it has no reason to believe that the legislation applicable to it prevents it from fulfilling its obligations under the contract entered into and undertakes to notify the data controller about any change in the national legislation applicable to it which is likely to have a substantial adverse effect on the warranties and obligations provided by the standard data protection clauses in the annex to the SCC Decision, promptly upon notice thereof. Furthermore, although Clause 5(d)(i) allows a recipient of personal data not to notify a controller established in the European Union of a legally binding request for disclosure of the personal data by a law enforcement authority, in the event of legislation prohibiting that recipient from doing so, such as a prohibition under criminal law the aim of which is to preserve the confidentiality of a law enforcement investigation, the recipient is nevertheless required, pursuant to Clause 5(a) in the annex to the SCC Decision, to inform the controller of his or her inability to comply with the standard data protection clauses.

140 Clause 5(a) and (b), in both cases to which it refers, confers on the controller established in the European Union the right to suspend the transfer of data and/or to terminate the contract. In the light of the requirements of Article 46(1) and (2)(c) of the GDPR, read in the light of Articles 7 and 8 of the Charter, the controller is bound to suspend the transfer of data and/or to terminate the contract where the recipient is not, or is no longer, able to comply with the standard data protection clauses. Unless the controller does so, it will be in breach of its obligations under Clause 4(a) in the annex to the SCC Decision as interpreted in the light of the GDPR and of the Charter.

141 It follows that Clause 4(a) and Clause 5(a) and (b) in that annex oblige the controller established in the European Union and the recipient of personal data to satisfy themselves that the legislation of the third country of destination enables the recipient to comply with the standard data protection clauses in the annex to the SCC Decision, before transferring personal data to that third country. As regards that verification, the footnote to Clause 5 states that mandatory requirements of that legislation which do not go beyond what is necessary in a democratic society to safeguard, inter alia, national security, defence and public security are not in contradiction with those standard data protection clauses. Conversely, as stated by the Advocate General in point 131 of his Opinion, compliance with an obligation prescribed by the law of the third country of destination which goes beyond what is necessary for those purposes must be treated as a breach of those clauses. Operators' assessments of the necessity of such an obligation must, where relevant, take into account a finding that the level of protection ensured by the third country in a Commission adequacy decision, adopted under Article 45(3) of the GDPR, is appropriate.

142 It follows that a controller established in the European Union and the recipient of personal data are required to verify, prior to any transfer, whether the level of protection required by EU law is respected in the third country concerned. The recipient is, where appropriate, under an obligation, under Clause 5(b), to inform the controller of any inability to comply with those clauses, the latter then being, in turn, obliged to suspend the transfer of data and/or to terminate the contract.

143 If the recipient of personal data to a third country has notified the controller, pursuant to Clause 5(b) in the annex to the SCC Decision, that the legislation of the third country concerned does not allow him or her to comply with the standard data protection clauses in that annex, it follows from Clause 12 in that annex that data that has already been transferred to that third country and the copies thereof must be returned or destroyed in their entirety. In any event, under Clause 6 in that annex, breach of those standard clauses will result in a right for the person concerned to receive compensation for the damage suffered.

144 It should be added that, under Clause 4(f) in the annex to the SCC Decision, a controller established in the European Union undertakes, where special categories of data could be transferred to a third country not providing adequate protection, to inform the data subject before, or as soon as possible after, the transfer. That notice enables the data subject to be in a position to bring legal action against the controller pursuant to Clause 3(1) in that annex so that the controller suspends the proposed transfer, terminates the contract concluded with the recipient of the personal data or, where appropriate, requires the recipient to return or destroy the data transferred.

145 Lastly, under Clause 4(g) in that annex, the controller established in the European Union is required, when the recipient of personal data notifies him or her, pursuant to Clause 5(b), in the event of a change in the relevant legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the standard data protection clauses, to forward any notification to the competent supervisory authority if the controller established in the European Union decides, notwithstanding that notification, to continue the transfer or to lift the suspension. The forwarding of such a notification to that supervisory authority and its right to conduct an audit of the recipient of personal data pursuant to Clause 8(2) in that annex enable that supervisory authority to ascertain whether the proposed transfer should be suspended or prohibited in order to ensure an adequate level of protection.

146 In that context, Article 4 of the SCC Decision, read in the light of recital 5 of Implementing Decision 2016/2297, supports the view that the SCC Decision does not prevent the competent supervisory authority from suspending or prohibiting, as appropriate, a transfer of personal data to a third country pursuant to the standard data protection clauses in the annex to that decision. In that regard, as is apparent from the answer to the eighth question, unless there is a valid Commission adequacy decision, the competent supervisory authority is required, under Article 58(2)(f) and (j) of the GDPR, to suspend or prohibit such a transfer, if, in its view and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.

147 As regards the fact, underlined by the Commissioner, that transfers of personal data to such a third country may result in the supervisory authorities in the various Member States adopting divergent decisions, it should be added that, as is clear from Article 55(1) and Article 57(1)(a) of the GDPR, the task of enforcing that regulation is conferred, in principle, on each supervisory authority on the territory of its own Member State. Furthermore, in order to avoid divergent decisions, Article 64(2) of the GDPR provides for the possibility for a supervisory authority which considers that transfers of data to a third country must, in general, be prohibited, to refer the matter to the European Data Protection Board (EDPB) for an opinion, which may, under Article 65(1)(c) of the GDPR, adopt a binding decision, in particular where a supervisory authority does not follow the opinion issued.

148 It follows that the SCC Decision provides for effective mechanisms which, in practice, ensure that the transfer to a third country of personal data pursuant to the standard data protection clauses in the annex to that decision is suspended or prohibited where the recipient of the transfer does not comply with those clauses or is unable to comply with them.

149 In the light of all of the foregoing considerations, the answer to the 7th and 11th questions is that examination of the SCC Decision in the light of Articles 7, 8 and 47 of the Charter has disclosed nothing to affect the validity of that decision.

The 4th, 5th, 9th and 10th questions

150 By its ninth question, the referring court wishes to know, in essence, whether and to what extent findings in the Privacy Shield Decision to the effect that the United States ensures an adequate level of protection are binding on the supervisory authority of a Member State. By its 4th, 5th and 10th questions, that court asks, in essence, whether, in view of its own findings on US law, the transfer to that third country of personal data pursuant to the standard data protection clauses in the annex to the SCC Decision breaches the rights enshrined in Articles 7, 8 and 47 of the Charter and asks the Court,

in particular, whether the introduction of the ombudsperson referred to in Annex III to the Privacy Shield Decision is compatible with Article 47 of the Charter.

151 As a preliminary matter, it should be noted that, although the Commissioner's action in the main proceedings only calls into question the SCC Decision, that action was brought before the referring court prior to the adoption of the Privacy Shield Decision. In so far as, by its fourth and fifth questions, that court asks the Court, at a general level, what protection must be ensured, under Articles 7, 8 and 47 of the Charter, in the context of such a transfer, the Court's analysis must take into consideration the consequences arising from the subsequent adoption of the Privacy Shield Decision. A fortiori that is the case in so far as the referring court asks expressly, by its 10th question, whether the protection required by Article 47 of the Charter is ensured by the offices of the ombudsperson to which the Privacy Shield Decision refers.

152 In addition, it is clear from the information provided in the order for reference that, in the main proceedings, Facebook Ireland claims that the Privacy Shield Decision is binding on the Commissioner in respect of the finding on the adequacy of the level of protection ensured by the United States and therefore in respect of the lawfulness of a transfer to that third country of personal data pursuant to the standard data protection clauses in the annex to the SCC Decision.

153 As appears from paragraph 59 above, in its judgment of 3 October 2017, provided in an annex to the order for reference, the referring court stated that it was obliged to take account of amendments to the law that may have occurred in the interval between the institution of the proceedings and the hearing of the action before it. Thus, that court would appear to be obliged to take into account, in order to dispose of the case in the main proceedings, the change in circumstances brought about by the adoption of the Privacy Shield Decision and any binding force it may have.

154 In particular, the question whether the finding in the Privacy Shield Decision that the United States ensures an adequate level of protection is binding is relevant for the purposes of assessing both the obligations, set out in paragraphs 141 and 142 above, of the controller and recipient of personal data transferred to a third country pursuant to the standard data protection clauses in the annex to the SCC Decision and also any obligations to which the supervisory authority may be subject to suspend or prohibit such a transfer.

155 As to whether the Privacy Shield Decision has binding effects, Article 1(1) of that decision provides that, for the purposes of Article 45(1) of the GDPR, 'the United States ensures an adequate level of protection for personal data transferred from the [European] Union to organisations in the United States under the EU-U.S. Privacy Shield'. In accordance with Article 1(3) of the decision, personal data are regarded as transferred under the EU-US Privacy Shield where they are transferred from the Union to organisations in the United States that are included in the 'Privacy Shield List', maintained and made publicly available by the US Department of Commerce, in accordance with Sections I and III of the Principles set out in Annex II to that decision.

156 As follows from the case-law set out in paragraphs 117 and 118 above, the Privacy Shield Decision is binding on the supervisory authorities in so far as it finds that the United States ensures an adequate level of protection and, therefore, has the effect of authorising personal data transferred under the EU-US Privacy Shield. Therefore, until the Court should declare that decision invalid, the competent supervisory authority cannot suspend or prohibit a transfer of personal data to an organisation that abides by that privacy shield on the ground that it considers, contrary to the finding made by the Commission in that decision, that the US legislation governing the access to personal data transferred under that privacy shield and the use of that data by the public authorities of that third country for national security, law enforcement and other public interest purposes does not ensure an adequate level of protection.

157 The fact remains that, in accordance with the case-law set out in paragraphs 119 and 120 above, when a person lodges a complaint with the competent supervisory authority, that authority must examine, with complete independence, whether the transfer of personal data at issue complies with the requirements laid down by the GDPR and, if, in its view, the arguments put forward by that person with a view to challenging the validity of an adequacy decision are well founded, bring an action

before the national courts in order for them to make a reference to the Court for a preliminary ruling for the purpose of examining the validity of that decision.

158 A complaint lodged under Article 77(1) of the GDPR, by which a person whose personal data has been or could be transferred to a third country contends that, notwithstanding what the Commission has found in a decision adopted pursuant to Article 45(3) of the GDPR, the law and practices of that country do not ensure an adequate level of protection must be understood as concerning, in essence, the issue of whether that decision is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals (see, by analogy, as regards Article 25(6) and Article 28(4) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 59).

159 In the present case, in essence, Mr Schrems requested the Commissioner to prohibit or suspend the transfer by Facebook Ireland of his personal data to Facebook Inc., established in the United States, on the ground that that third country did not ensure an adequate level of protection. Following an investigation into Mr Schrems's claims, the Commissioner brought the matter before the referring court and that court appears, in the light of the evidence adduced and of the competing arguments put by the parties before it, to be unsure whether Mr Schrems's doubts as to the adequacy of the level of protection ensured in that third country are well founded, despite the subsequent findings of the Commission in the Privacy Shield Decision, and that has led that court to refer the 4th, 5th and 10th questions to the Court for a preliminary ruling.

160 As the Advocate General observed in point 175 of his Opinion, those questions must therefore be regarded, in essence, as calling into question the Commission's finding, in the Privacy Shield Decision, that the United States ensures an adequate level of protection of personal data transferred from the European Union to that third country, and, therefore, as calling into question the validity of that decision.

161 In the light of the considerations set out in paragraphs 121 and 157 to 160 above and in order to give the referring court a full answer, it should therefore be examined whether the Privacy Shield Decision complies with the requirements stemming from the GDPR read in the light of the Charter (see, by analogy, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 67).

162 In order for the Commission to adopt an adequacy decision pursuant to Article 45(3) of the GDPR, it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 96).

The Privacy Shield Decision

163 The Commission found, in Article 1(1) of the Privacy Shield Decision, that the United States ensures an adequate level of protection for personal data transferred from the Union to organisations in the United States under the EU-US Privacy Shield, the latter being comprised, inter alia, under Article 1(2) of that decision, of the Principles issued by the US Department of Commerce on 7 July 2016 as set out in Annex II to the decision and the official representations and commitments contained in the documents listed in Annexes I and III to VII to that decision.

164 However, the Privacy Shield Decision also states, in paragraph I.5. of Annex II, under the heading 'EU-U.S. Privacy Shield Framework Principles', that adherence to those principles may be limited, inter alia, 'to the extent necessary to meet national security, public interest, or law enforcement requirements'. Thus, that decision lays down, as did Decision 2000/520, that those requirements have primacy over those principles, primacy pursuant to which self-certified United States organisations receiving personal data from the European Union are bound to disregard the principles without limitation where they conflict with the requirements and therefore prove incompatible with them (see, by analogy, as regards Decision 2000/520, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 86).

165 In the light of its general nature, the derogation set out in paragraph I.5 of Annex II to the Privacy Shield Decision thus enables interference, based on national security and public interest requirements

or on domestic legislation of the United States, with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States (see, by analogy, as regards Decision 2000/520, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 87). More particularly, as noted in the Privacy Shield Decision, such interference can arise from access to, and use of, personal data transferred from the European Union to the United States by US public authorities through the PRISM and UPSTREAM surveillance programmes under Section 702 of the FISA and E.O. 12333.

166 In that context, in recitals 67 to 135 of the Privacy Shield Decision, the Commission assessed the limitations and safeguards available in US law, inter alia under Section 702 of the FISA, E.O. 12333 and PPD-28, as regards access to, and use of, personal data transferred under the EU-US Privacy Shield by US public authorities for national security, law enforcement and other public interest purposes.

167 Following that assessment, the Commission found, in recital 136 of that decision, that 'the United States ensures an adequate level of protection for personal data transferred from the [European] Union to self-certified organisations in the United States', and, in recital 140 of the decision, it considered that, 'on the basis of the available information about the U.S. legal order, … any interference by U.S. public authorities with the fundamental rights of the persons whose data are transferred from the [European] Union to the United States under the Privacy Shield for national security, law enforcement or other public interest purposes, and the ensuing restrictions imposed on self-certified organisations with respect to their adherence to the Principles, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that there exists effective legal protection against such interference'.

The finding of an adequate level of protection

168 In the light of the factors mentioned by the Commission in the Privacy Shield Decision and the referring court's findings in the main proceedings, the referring court harbours doubts as to whether US law in fact ensures the adequate level of protection required under Article 45 of the GDPR, read in the light of the fundamental rights guaranteed in Articles 7, 8 and 47 of the Charter. In particular, that court considers that the law of that third country does not provide for the necessary limitations and safeguards with regard to the interferences authorised by its national legislation and does not ensure effective judicial protection against such interferences. As far as concerns effective judicial protection, it adds that the introduction of a Privacy Shield Ombudsperson cannot, in its view, remedy those deficiencies since an ombudsperson cannot be regarded as a tribunal within the meaning of Article 47 of the Charter.

169 As regards, in the first place, Articles 7 and 8 of the Charter, which contribute to the level of protection required within the European Union, compliance with which must be established by the Commission before it adopts an adequacy decision under Article 45(1) of the GDPR, it must be borne in mind that Article 7 of the Charter states that everyone has the right to respect for his or her private and family life, home and communications. Article 8(1) of the Charter expressly confers on everyone the right to the protection of personal data concerning him or her.

170 Thus, access to a natural person's personal data with a view to its retention or use affects the fundamental right to respect for private life guaranteed in Article 7 of the Charter, which concerns any information relating to an identified or identifiable individual. Such processing of data also falls within the scope of Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, accordingly, must necessarily satisfy the data protection requirements laid down in that article (see, to that effect, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 49 and 52, and of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 29; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 122 and 123).

171 The Court has held that the communication of personal data to a third party, such as a public authority, constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated. The same is true of the retention of

personal data and access to that data with a view to its use by public authorities, irrespective of whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference (see, to that effect, judgments of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraphs 74 and 75, and of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 33 to 36; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 124 and 126).

172 However, the rights enshrined in Articles 7 and 8 of the Charter are not absolute rights, but must be considered in relation to their function in society (see, to that effect, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 48 and the case-law cited, and of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 33 and the case-law cited; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 136).

173 In this connection, it should also be observed that, under Article 8(2) of the Charter, personal data must, inter alia, be processed 'for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.

174 Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

175 Following from the previous point, it should be added that the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 139 and the case-law cited).

176 Lastly, in order to satisfy the requirement of proportionality according to which derogations from and limitations on the protection of personal data must apply only in so far as is strictly necessary, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose data has been transferred have sufficient guarantees to protect effectively their personal data against the risk of abuse. It must, in particular, indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater where personal data is subject to automated processing (see, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 140 and 141 and the case-law cited).

177 To that effect, Article 45(2)(a) of the GDPR states that, in its assessment of the adequacy of the level of protection in a third country, the Commission is, in particular, to take account of 'effective and enforceable data subject rights' for data subjects whose personal data are transferred.

178 In the present case, the Commission's finding in the Privacy Shield Decision that the United States ensures an adequate level of protection for personal data essentially equivalent to that guaranteed in the European Union by the GDPR, read in the light of Articles 7 and 8 of the Charter, has been called into question, inter alia, on the ground that the interference arising from the surveillance programmes based on Section 702 of the FISA and on E.O. 12333 are not covered by requirements ensuring, subject to the principle of proportionality, a level of protection essentially equivalent to that guaranteed by the second sentence of Article 52(1) of the Charter. It is therefore necessary to examine whether the implementation of those surveillance programmes is subject to such requirements, and it is not necessary to ascertain beforehand whether that third country has complied with conditions essentially equivalent to those laid down in the first sentence of Article 52(1) of the Charter.

179 In that regard, as regards the surveillance programmes based on Section 702 of the FISA, the Commission found, in recital 109 of the Privacy Shield Decision, that, according to that article, 'the FISC does not authorise individual surveillance measures; rather, it authorises surveillance programs (like PRISM, UPSTREAM) on the basis of annual certifications prepared by the Attorney General and the Director of National Intelligence (DNI)'. As is clear from that recital, the supervisory role of the FISC is thus designed to verify whether those surveillance programmes relate to the objective of acquiring foreign intelligence information, but it does not cover the issue of whether 'individuals are properly targeted to acquire foreign intelligence information'.

180 It is thus apparent that Section 702 of the FISA does not indicate any limitations on the power it confers to implement surveillance programmes for the purposes of foreign intelligence or the existence of guarantees for non-US persons potentially targeted by those programmes. In those circumstances and as the Advocate General stated, in essence, in points 291, 292 and 297 of his Opinion, that article cannot ensure a level of protection essentially equivalent to that guaranteed by the Charter, as interpreted by the case-law set out in paragraphs 175 and 176 above, according to which a legal basis which permits interference with fundamental rights must, in order to satisfy the requirements of the principle of proportionality, itself define the scope of the limitation on the exercise of the right concerned and lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards.

181 According to the findings in the Privacy Shield Decision, the implementation of the surveillance programmes based on Section 702 of the FISA is, indeed, subject to the requirements of PPD-28. However, although the Commission stated, in recitals 69 and 77 of the Privacy Shield Decision, that such requirements are binding on the US intelligence authorities, the US Government has accepted, in reply to a question put by the Court, that PPD-28 does not grant data subjects actionable rights before the courts against the US authorities. Therefore, the Privacy Shield Decision cannot ensure a level of protection essentially equivalent to that arising from the Charter, contrary to the requirement in Article 45(2)(a) of the GDPR that a finding of equivalence depends, inter alia, on whether data subjects whose personal data are being transferred to the third country in question have effective and enforceable rights.

182 As regards the monitoring programmes based on E.O. 12333, it is clear from the file before the Court that that order does not confer rights which are enforceable against the US authorities in the courts either.

183 It should be added that PPD-28, with which the application of the programmes referred to in the previous two paragraphs must comply, allows for '"bulk" collection … of a relatively large volume of signals intelligence information or data under circumstances where the Intelligence Community cannot use an identifier associated with a specific target … to focus the collection', as stated in a letter from the Office of the Director of National Intelligence to the United States Department of Commerce and to the International Trade Administration from 21 June 2016, set out in Annex VI to the Privacy Shield Decision. That possibility, which allows, in the context of the surveillance programmes based on E.O. 12333, access to data in transit to the United States without that access being subject to any judicial review, does not, in any event, delimit in a sufficiently clear and precise manner the scope of such bulk collection of personal data.

184 It follows therefore that neither Section 702 of the FISA, nor E.O. 12333, read in conjunction with PPD-28, correlates to the minimum safeguards resulting, under EU law, from the principle of proportionality, with the consequence that the surveillance programmes based on those provisions cannot be regarded as limited to what is strictly necessary.

185 In those circumstances, the limitations on the protection of personal data arising from the domestic law of the United States on the access and use by US public authorities of such data transferred from the European Union to the United States, which the Commission assessed in the Privacy Shield Decision, are not circumscribed in a way that satisfies requirements that are essentially equivalent to those required, under EU law, by the second sentence of Article 52(1) of the Charter.

186 In the second place, as regards Article 47 of the Charter, which also contributes to the required level of protection in the European Union, compliance with which must be determined by the Commission before it adopts an adequacy decision pursuant to Article 45(1) of the GDPR, it should be noted that the first paragraph of Article 47 requires everyone whose rights and freedoms guaranteed by the law of the Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. According to the second paragraph of that article, everyone is entitled to a hearing by an independent and impartial tribunal.

187 According to settled case-law, the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law. Thus, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter (judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95 and the case-law cited).

188 To that effect, Article 45(2)(a) of the GDPR requires the Commission, in its assessment of the adequacy of the level of protection in a third country, to take account, in particular, of 'effective administrative and judicial redress for the data subjects whose personal data are being transferred'. Recital 104 of the GDPR states, in that regard, that the third country 'should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities', and adds that 'the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress'.

189 The existence of such effective redress in the third country concerned is of particular importance in the context of the transfer of personal data to that third country, since, as is apparent from recital 116 of the GDPR, data subjects may find that the administrative and judicial authorities of the Member States have insufficient powers and means to take effective action in relation to data subjects' complaints based on allegedly unlawful processing, in that third country, of their data thus transferred, which is capable of compelling them to resort to the national authorities and courts of that third country.

190 In the present case, the Commission's finding in the Privacy Shield Decision that the United States ensures a level of protection essentially equivalent to that guaranteed in Article 47 of the Charter has been called into question on the ground, inter alia, that the introduction of a Privacy Shield Ombudsperson cannot remedy the deficiencies which the Commission itself found in connection with the judicial protection of persons whose personal data is transferred to that third country.

191 In that regard, the Commission found, in recital 115 of the Privacy Shield Decision, that 'while individuals, including EU data subjects, … have a number of avenues of redress when they have been the subject of unlawful (electronic) surveillance for national security purposes, it is equally clear that at least some legal bases that U.S. intelligence authorities may use (e.g. E.O. 12333) are not covered'. Thus, as regards E.O. 12333, the Commission emphasised, in recital 115, the lack of any redress mechanism. In accordance with the case-law set out in paragraph 187 above, the existence of such a lacuna in judicial protection in respect of interferences with intelligence programmes based on that presidential decree makes it impossible to conclude, as the Commission did in the Privacy Shield Decision, that United States law ensures a level of protection essentially equivalent to that guaranteed by Article 47 of the Charter.

192 Furthermore, as regards both the surveillance programmes based on Section 702 of the FISA and those based on E.O. 12333, it has been noted in paragraphs 181 and 182 above that neither PPD-28 nor E.O. 12333 grants data subjects rights actionable in the courts against the US authorities, from which it follows that data subjects have no right to an effective remedy.

193 The Commission found, however, in recitals 115 and 116 of the Privacy Shield Decision, that, as a result of the Ombudsperson Mechanism introduced by the US authorities, as described in a letter from the US Secretary of State to the European Commissioner for Justice, Consumers and Gender Equality from 7 July 2016, set out in Annex III to that decision, and of the nature of that Ombudsperson's role, in the present instance, a 'Senior Coordinator for International Information Technology Diplomacy',

the United States can be deemed to ensure a level of protection essentially equivalent to that guaranteed by Article 47 of the Charter.

194 An examination of whether the ombudsperson mechanism which is the subject of the Privacy Shield Decision is in fact capable of addressing the Commission's finding of limitations on the right to judicial protection must, in accordance with the requirements arising from Article 47 of the Charter and the case-law recalled in paragraph 187 above, start from the premiss that data subjects must have the possibility of bringing legal action before an independent and impartial court in order to have access to their personal data, or to obtain the rectification or erasure of such data.

195 In the letter referred to in paragraph 193 above, the Privacy Shield Ombudsperson, although described as 'independent from the Intelligence Community', was presented as '[reporting] directly to the Secretary of State who will ensure that the Ombudsperson carries out its function objectively and free from improper influence that is liable to have an effect on the response to be provided'. Furthermore, in addition to the fact that, as found by the Commission in recital 116 of that decision, the Ombudsperson is appointed by the Secretary of State and is an integral part of the US State Department, there is, as the Advocate General stated in point 337 of his Opinion, nothing in that decision to indicate that the dismissal or revocation of the appointment of the Ombudsperson is accompanied by any particular guarantees, which is such as to undermine the Ombudsman's independence from the executive (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 60 and 63 and the case-law cited).

196 Similarly, as the Advocate General stated, in point 338 of his Opinion, although recital 120 of the Privacy Shield Decision refers to a commitment from the US Government that the relevant component of the intelligence services is required to correct any violation of the applicable rules detected by the Privacy Shield Ombudsperson, there is nothing in that decision to indicate that that ombudsperson has the power to adopt decisions that are binding on those intelligence services and does not mention any legal safeguards that would accompany that political commitment on which data subjects could rely.

197 Therefore, the ombudsperson mechanism to which the Privacy Shield Decision refers does not provide any cause of action before a body which offers the persons whose data is transferred to the United States guarantees essentially equivalent to those required by Article 47 of the Charter.

198 Therefore, in finding, in Article 1(1) of the Privacy Shield Decision, that the United States ensures an adequate level of protection for personal data transferred from the Union to organisations in that third country under the EU-US Privacy Shield, the Commission disregarded the requirements of Article 45(1) of the GDPR, read in the light of Articles 7, 8 and 47 of the Charter.

199 It follows that Article 1 of the Privacy Shield Decision is incompatible with Article 45(1) of the GDPR, read in the light of Articles 7, 8 and 47 of the Charter, and is therefore invalid.

200 Since Article 1 of the Privacy Shield Decision is inseparable from Articles 2 and 6 of, and the annexes to, that decision, its invalidity affects the validity of the decision in its entirety.

201 In the light of all of the foregoing considerations, it is to be concluded that the Privacy Shield Decision is invalid.

202 As to whether it is appropriate to maintain the effects of that decision for the purposes of avoiding the creation of a legal vacuum (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 106), the Court notes that, in any event, in view of Article 49 of the GDPR, the annulment of an adequacy decision such as the Privacy Shield Decision is not liable to create such a legal vacuum. That article details the conditions under which transfers of personal data to third countries may take place in the absence of an adequacy decision under Article 45(3) of the GDPR or appropriate safeguards under Article 46 of the GDPR.

Costs

203 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 2(1) and (2) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), must be interpreted as meaning that that regulation applies to the transfer of personal data for commercial purposes by an economic operator established in a Member State to another economic operator established in a third country, irrespective of whether, at the time of that transfer or thereafter, that data is liable to be processed by the authorities of the third country in question for the purposes of public security, defence and State security.**

2. **Article 46(1) and Article 46(2)(c) of Regulation 2016/679 must be interpreted as meaning that the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter of Fundamental Rights of the European Union. To that end, the assessment of the level of protection afforded in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the European Union and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country, in particular those set out, in a non-exhaustive manner, in Article 45(2) of that regulation.**

3. **Article 58(2)(f) and (j) of Regulation 2016/679 must be interpreted as meaning that, unless there is a valid European Commission adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of that regulation and by the Charter of Fundamental Rights, cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.**

4. **Examination of Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EU of the European Parliament and of the Council, as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights has disclosed nothing to affect the validity of that decision.**

5. **Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield is invalid.**

Lenaerts Silva de Lapuerta Arabadjiev

Prechal Vilaras Safjan

Rodin Xuereb Rossi

Jarukaitis Ilešič von Danwitz

Šváby

Delivered in open court in Luxembourg on 16 July 2020.

A. Calot Escobar K. Lenaerts

Registrar President

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* Language of the case: English.

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2020 (*)

[Text rectified by order of 16 November 2020]

Table of Contents

(Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Providers of electronic communications services – Hosting service providers and Internet access providers – General and indiscriminate retention of traffic and location data – Automated analysis of data – Real-time access to data – Safeguarding national security and combating terrorism – Combating crime – Directive 2002/58/EC – Scope – Article 1(3) and Article 3 – Confidentiality of

electronic communications – Protection – Article 5 and Article 15(1) – Directive 2000/31/EC – Scope – Charter of Fundamental Rights of the European Union – Articles 4, 6, 7, 8 and 11 and Article 52(1) – Article 4(2) TEU)

In Joined Cases C-511/18, C-512/18 and C-520/18,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decisions of 26 July 2018, received at the Court on 3 August 2018 (C-511/18 and C-512/18), and from the Cour constitutionnelle (Constitutional Court, Belgium), made by decision of 19 July 2018, received at the Court on 2 August 2018 (C-520/18), in the proceedings

La Quadrature du Net (C-511/18 and C-512/18),

French Data Network (C-511/18 and C-512/18),

Fédération des fournisseurs d'accès à Internet associatifs (C-511/18 and C-512/18),

Igwan.net (C-511/18)

v

Premier ministre (C-511/18 and C-512/18),

Garde des Sceaux, ministre de la Justice (C-511/18 and C-512/18),

Ministre de l'Intérieur (C-511/18),

Ministre des Armées (C-511/18),

interveners:

Privacy International (C-512/18),

Center for Democracy and Technology (C-512/18),

and

Ordre des barreaux francophones et germanophone,

Académie Fiscale ASBL,

UA,

Liga voor Mensenrechten ASBL,

Ligue des Droits de l'Homme ASBL,

VZ,

WY,

XX

v

Conseil des ministres,

interveners:

Child Focus (C-520/18),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Safjan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, J. Malenovský, L. Bay Larsen, T. von Danwitz (Rapporteur), C. Toader, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 and 10 September 2019,

after considering the observations submitted on behalf of:

– La Quadrature du Net, the Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net and the Center for Democracy and Technology, by A. Fitzjean Ò Cobhthaigh, avocat,

– French Data Network, by Y. Padova, avocat,

– Privacy International, by H. Roy, avocat,

– the Ordre des barreaux francophones et germanophone, by E. Kiehl, P. Limbrée, E. Lemmens, A. Cassart and J.-F. Henrotte, avocats,

– the Académie Fiscale ASBL and UA, by J.-P. Riquet,

– the Liga voor Mensenrechten ASBL, by J. Vander Velpen, avocat,

– the Ligue des Droits de l'Homme ASBL, by R. Jespers and J. Fermon, avocats,

– VZ, WY and XX, by D. Pattyn, avocat,

– Child Focus, by N. Buisseret, K. De Meester and J. Van Cauter, avocats,

– the French Government, initially by D. Dubois, F. Alabrune, D. Colas, E. de Moustier and A.-L. Desjonquères, then by D. Dubois, F. Alabrune, E. de Moustier and A.-L. Desjonquères, acting as Agents,

– the Belgian Government, by J.-C. Halleux, P. Cottin and C. Pochet, acting as Agents, and by J. Vanpraet, Y. Peeters, S. Depré and E. de Lophem, avocats,

– the Czech Government, by M. Smolek, J. Vláčil and O. Serdula, acting as Agents,

– the Danish Government, initially by J. Nymann-Lindegren, M. Wolff and P. Ngo, then by J. Nymann-Lindegren and M. Wolff, acting as Agents,

– the German Government, initially by J. Möller, M. Hellmann, E. Lankenau, R. Kanitz and T. Henze, then by J. Möller, M. Hellmann, E. Lankenau and R. Kanitz, acting as Agents,

– the Estonian Government, by N. Grünberg and A. Kalbus, acting as Agents,

– Ireland, by A. Joyce, M. Browne and G. Hodge, acting as Agents, and by D. Fennelly, Barrister-at-Law,

– the Spanish Government, initially by L. Aguilera Ruiz and A. Rubio González, then by L. Aguilera Ruiz, acting as Agent,

– the Cypriot Government, by E. Neofytou, acting as Agent,

– the Latvian Government, by V. Soņeca, acting as Agent,

– the Hungarian Government, initially by M.Z. Fehér and Z. Wagner, then by M.Z. Fehér, acting as Agent,

– the Netherlands Government, by M.K. Bulterman and M.A.M. de Ree, acting as Agents,

– the Polish Government, by B. Majczyna, J. Sawicka and M. Pawlicka, acting as Agents,

– the Swedish Government, initially by H. Shev, H. Eklinder, C. Meyer-Seitz and A. Falk, then by H. Shev, H. Eklinder, C. Meyer-Seitz and J. Lundberg, acting as Agents,

– the United Kingdom Government, by S. Brandon, acting as Agent, and by G. Facenna QC and C. Knight, Barrister,

– [indent deleted by order of 16 November 2020],

– the European Commission, initially by H. Kranenborg, M. Wasmeier and P. Costa de Oliveira, then by H. Kranenborg and M. Wasmeier, acting as Agents,

– the European Data Protection Supervisor, by T. Zerdick and A. Buchta, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('Directive 2002/58'), and of Articles 12 to 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), read in the light of Articles 4, 6, 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 4(2) TEU.

2 The request in Case C-511/18 has been made in proceedings between La Quadrature du Net, French Data Network, the Fédération des fournisseurs d'accès à Internet associatifs and Igwan.net, on the one hand, and the Premier ministre (Prime Minister, France), the Garde des Sceaux, ministre de la Justice (Keeper of the Seals, Minister for Justice, France), the ministre de l'Intérieur (Minister for the Interior, France) and the ministre des Armées (Minister for the Armed Forces, France), on the other, concerning the lawfulness of: décret n° 2015-1185 du 28 septembre 2015 portant désignation des services spécialisés de renseignement (Decree No 2015-1185 of 28 September 2015 designating specialised intelligence services) (*Journal Officiel de la République Française* (JORF) of 29 September 2015, text 1 of 97; 'Decree No 2015-1185'); décret n° 2015-1211 du 1er octobre 2015 relatif au contentieux de la mise en œuvre des techniques de renseignement soumises à autorisation et des fichiers intéressant la sûreté de l'État (Decree No 2015-1211 of 1 October 2015 on litigation relating to the implementation of intelligence techniques subject to authorisation and files on matters of State security) (JORF of 2 October 2015, text 7 of 108; 'Decree No 2015-1211'), décret n° 2015-1639 du 11 décembre 2015 relatif à la désignation des services autres que les services spécialisés de renseignement, autorisés à recourir aux techniques mentionnées au titre V du livre VIII du code de la sécurité intérieure, pris en application de l'article L. 811-4 du code de la sécurité intérieure (Decree No 2015-1639 of

11 December 2015 on the designation of services other than the specialist intelligence services which are authorised to use the techniques referred to in Title V of Book VIII of the Internal Security Code, adopted pursuant to Article L. 811-4 thereof) (JORF of 12 December 2015, text 28 of 127; 'Decree No 2015-1639'), and décret n° 2016-67 du 29 janvier 2016 relatif aux techniques de recueil de renseignement (Decree No 2016-67 of 29 January 2016 on intelligence gathering techniques) (JORF of 31 January 2016, text 2 of 113; 'Decree No 2016-67').

3 The request in Case C-512/18 has been made in proceedings between French Data Network, La Quadrature du Net and the Fédération des fournisseurs d'accès à Internet associatifs, on the one hand, and the Prime Minister (France) and the Keeper of the Seals, Minister for Justice (France), on the other, concerning the lawfulness of Article R. 10-13 of the code des postes et des communications électroniques (Post and Electronic Communications Code; 'the CPCE') and décret n° 2011-219 du 25 février 2011 relatif à la conservation et à la communication des données permettant d'identifier toute personne ayant contribué à la création d'un contenu mis en ligne (Decree No 2011-219 of 25 February 2011 on the retention and communication of data that can be used to identify any person having assisted in the creation of content posted online) (JORF of 1 March 2011, text 32 of 170; 'Decree No 2011-219').

4 The request in Case C-520/18 has been made in proceedings between the Ordre des barreaux francophones et germanophone, the Académie Fiscale ASBL, UA, the Liga voor Mensenrechten ASBL, the Ligue des Droits de l'Homme ASBL, VZ, WY and XX, on the one hand, and the Conseil des ministres (Council of Ministers, Belgium), on the other, concerning the lawfulness of the loi du 29 mai 2016 relative à la collecte et à la conservation des données dans le secteur des communications électroniques (Law of 29 May 2016 on the collection and retention of data in the electronic telecommunications sector) (*Moniteur belge* of 18 July 2016, p. 44717; 'the Law of 29 May 2016').

Legislative framework

EU law

Directive 95/46

5 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) was repealed with effect from 25 May 2018 by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (OJ 2016 L 119, p 1). Article 3(2) of Directive 95/46 provided:

'This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household act.'

6 Article 22 of Directive 95/46, which is in Chapter III of that directive, headed 'Judicial remedies, liability and sanctions', was worded as follows:

'Without prejudice to any administrative remedy for which provision may be made, *inter alia* before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.'

Directive 97/66

7 Under Article 5 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1), headed ‘Confidentiality of the communications’:

‘1. Member States shall ensure via national regulations the confidentiality of communications by means of a public telecommunications network and publicly available telecommunications services. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications, by others than users, without the consent of the users concerned, except when legally authorised, in accordance with Article 14(1).

2. Paragraph 1 shall not affect any legally authorised recording of communications in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.’

Directive 2000/31

8 Recitals 14 and 15 of Directive 2000/31 provide:

‘(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive [95/46] and Directive [97/66] which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive [97/66]; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.’

9 Article 1 of Directive 2000/31 is worded as follows:

‘1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

…

5. This Directive shall not apply to:

…

(b) questions relating to information society services covered by Directives [95/46] and [97/66];

…’

10 Article 2 of Directive 2000/31 is worded as follows:

‘For the purpose of this Directive, the following terms shall bear the following meanings:

(a) “information society services”: services within the meaning of Article 1(2) of Directive 98/34/EC [of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37)] as amended by Directive 98/48/EC [of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18)];

…’

11 Article 15 of Directive 2000/31 provides:

‘1. ‘Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.’

Directive 2002/21

12 Recital 10 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) states:

‘The definition of “information society service” in Article 1 of Directive [98/34, as amended by Directive 98/48,] spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.’

13 Article 2 of Directive 2002/21 provides:

‘For the purposes of this Directive:

…

(c) “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive [98/34], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

…’

Directive 2002/58

14 Recitals 2, 6, 7, 11, 22, 26 and 30 of Directive 2002/58 state:

‘(2) This Directive seeks to respect the fundamental rights and observes the principles recognised in particular by the [Charter]. In particular, this Directive seeks to ensure full respect for the rights

set out in Articles 7 and 8 of that Charter.

…

(6) The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy.

(7) In the case of public communications networks, specific legal, regulatory and technical provisions should be made in order to protect fundamental rights and freedoms of natural persons and legitimate interests of legal persons, in particular with regard to the increasing capacity for automated storage and processing of data relating to subscribers and users.

…

(11) Like Directive [95/46], this Directive does not address issues of protection of fundamental rights and freedoms related to activities which are not governed by [Union] law. Therefore it does not alter the existing balance between the individual's right to privacy and the possibility for Member States to take the measures referred to in Article 15(1) of this Directive, necessary for the protection of public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the enforcement of criminal law. Consequently, this Directive does not affect the ability of Member States to carry out lawful interception of electronic communications, or take other measures, if necessary for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, [signed in Rome on 4 November 1950,] as interpreted by the rulings of the European Court of Human Rights. Such measures must be appropriate, strictly proportionate to the intended purpose and necessary within a democratic society and should be subject to adequate safeguards in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

…

(22) The prohibition of storage of communications and the related traffic data by persons other than the users or without their consent is not intended to prohibit any automatic, intermediate and transient storage of this information in so far as this takes place for the sole purpose of carrying out the transmission in the electronic communications network and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed. …

…

(26) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons and concern the right to respect for their correspondence or concern the legitimate interests of legal persons. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data … may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his/her consent to such processing. Traffic data used for marketing communications services … should also be erased or made anonymous …

…

(30) Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum. …'

15 Article 1 of Directive 2002/58, headed ‘Scope and aim’, provides:

‘1. This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the [European Union].

2. The provisions of this Directive particularise and complement Directive [95/46] for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

3. This Directive shall not apply to activities which fall outside the scope of the [TFEU], such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.’

16 Article 2 of Directive 2002/58, headed ‘Definitions’, provides:

‘Save as otherwise provided, the definitions in Directive [95/46] and in Directive [2002/21] shall apply.

The following definitions shall also apply:

(a) “user” means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;

(b) “traffic data” means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

(c) “location data” means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;

(d) “communication” means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

…’

17 Article 3 of Directive 2002/58, headed ‘Services concerned’, provides:

‘This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices.’

18 Article 5 of Directive 2002/58, headed ‘Confidentiality of the communications’, provides:

‘1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

…

3. Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive [95/46], inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.'

19 Article 6 of Directive 2002/58, headed 'Traffic data', provides:

'1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his or her prior consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

…

5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

…'

20 Article 9(1) of that directive, that article being headed 'Location data other than traffic data', provides:

'Where location data other than traffic data, relating to users or subscribers of public communications networks or publicly available electronic communications services, can be processed, such data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. …'

21 Article 15 of that directive, headed 'Application of certain provisions of Directive [95/46]', states:

'1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive [95/46]. To this end, Member States may, *inter alia*, adopt legislative measures providing for the retention of data for a limited period

justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of [Union] law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

…

2. The provisions of Chapter III on judicial remedies, liability and sanctions of Directive [95/46] shall apply with regard to national provisions adopted pursuant to this Directive and with regard to the individual rights derived from this Directive.

…'

Regulation 2016/679

22 Recital 10 of Regulation 2016/679 states:

'In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. …'

23 Article 2 of that regulation provides:

'1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law;

(b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;

…

(d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

…

4. This Regulation shall be without prejudice to the application of Directive [2000/31], in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.'

24 Article 4 of that regulation reads as follows:

'For the purposes of this Regulation:

(1) "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

(2) "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure

by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

…’

25 Article 5 of Regulation 2016/679 provides:

‘1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”);

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (“purpose limitation”);

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (“data minimisation”);

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (“accuracy”);

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods in so far as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (“storage limitation”);

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (“integrity and confidentiality”).

…’

26 Article 6 of that regulation reads as follows:

‘1. Processing shall be lawful only if and to the extent that at least one of the following applies:

…

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

…

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

(a) Union law; or

(b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis … That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing

procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

…'

27 Article 23 of that regulation provides:

'1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;

(e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation … matters, public health and social security;

(f) the protection of judicial independence and judicial proceedings;

(g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;

(h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);

(i) the protection of the data subject or the rights and freedoms of others;

(j) the enforcement of civil law claims.

2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

(a) the purposes of the processing or categories of processing;

(b) the categories of personal data;

(c) the scope of the restrictions introduced;

(d) the safeguards to prevent abuse or unlawful access or transfer;

(e) the specification of the controller or categories of controllers;

(f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.'

28 Under Article 79(1) of that regulation:

‘Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.’

29 Article 94 of Regulation 2016/679 provides:

‘1. Directive [95/46] is repealed with effect from 25 May 2018.

2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive [95/46] shall be construed as references to the European Data Protection Board established by this Regulation.’

30 Article 95 of that regulation provides:

‘This Regulation shall not impose additional obligations on natural or legal persons in relation to processing in connection with the provision of publicly available electronic communications services in public communication networks in the Union in relation to matters for which they are subject to specific obligations with the same objective set out in Directive [2002/58].’

French law

Code de la sécurité intérieure (Internal Security Code)

31 Book VIII of the legislative part of the code de la sécurité intérieure (Internal Security Code; ‘the CSI’) lays down rules relating to intelligence in Articles L. 801-1 to L. 898-1.

32 Article L. 811-3 of the CSI states:

‘For the sole performance of their respective tasks, the specialised intelligence services may use the techniques referred to in Title V of this Book in order to gather intelligence relating to the protection and promotion of the following fundamental State interests:

1. National independence, territorial integrity and national defence;

2. Major foreign policy interests, the implementation of France’s European and international commitments and the prevention of all forms of foreign interference;

3. France’s major economic, industrial and scientific interests;

4. The prevention of terrorism;

5. The prevention of:

(a) attacks against the republican nature of the institutions;

(b) actions designed to maintain or rebuild groups that have been disbanded under Article L. 212-1;

(c) collective violence liable to cause serious disruption to the maintenance of law and order;

6. The prevention of organised crime;

7. The prevention of the proliferation of weapons of mass destruction.’

33 Article L. 811-4 of the CSI provides:

‘A decree adopted in the Conseil d’État (Council of State, France) following consultation of the Commission nationale de contrôle des techniques de renseignement (Commission for the Oversight of Intelligence Techniques, France) shall designate the services, other than the specialised intelligence services, within the purview of the Ministers for Defence, the Interior and Justice and the ministers responsible for economic affairs, the budget and customs, which may be authorised to use the techniques referred to in Title V of the present Book under the conditions laid down in this Book. It shall specify, for each service, the purposes mentioned in Article L. 811-3 and the techniques which may be authorised.’

34 The first paragraph of Article L. 821-1 of the CSI is worded as follows:

‘The implementation on national territory of the intelligence gathering techniques referred to in Chapters I to IV of Title V of this Book shall be subject to prior authorisation from the Prime Minister following consultation of the Commission for the Oversight of Intelligence Techniques.’

35 Article L. 821-2 of the CSI provides:

‘The authorisation mentioned in Article L. 821-1 shall be issued upon a written and reasoned application from the Minister for Defence, the Minister for the Interior, the Minister for Justice or the ministers responsible for economic affairs, the budget or customs. Each minister may delegate that power individually only to immediate staff with clearance to handle confidential material relating to national defence.

The application shall state:

1. the technique(s) to be implemented;

2. the service for which it is submitted;

3. the purpose(s) pursued;

4. the reason(s) for the measures;

5. the period of validity of the authorisation;

6. the person(s), place(s) or vehicle(s) concerned.

In respect of point 6, persons whose identity is not known may be designated by their identifiers or status and places or vehicles may be designated by reference to the persons who are the subject of the application.

…’

36 Under the first paragraph of Article L. 821-3 of the CSI:

‘The application shall be sent to the President or, failing that, to one of the members of the Commission for the Oversight of Intelligence Techniques mentioned in points 2 and 3 of Article L. 831-1, who shall provide the Prime Minister with an opinion within 24 hours. If the application is examined by the select panel or the full panel of the Commission, the Prime Minister shall be informed forthwith and the opinion shall be issued within 72 hours.’

37 Article L. 821-4 of the CSI provides:

‘Authorisation to implement the techniques referred to in Chapters I to IV of Title V of this Book shall be issued by the Prime Minister for a maximum period of four months. … The authorisation shall contain the grounds and statements set out in points 1 to 6 of Article L. 821-2. All authorisations shall be renewable under the same conditions as those laid down in this Chapter.

Where the authorisation is issued after obtaining an unfavourable opinion from the Commission for the Oversight of Intelligence Techniques, it shall state the reasons why that opinion was not followed.

…’

38 Article L. 833-4 of the CSI, which appears in Chapter III of Title III, provides:

‘The Commission shall – on its own initiative or after receiving a complaint from any person wishing to verify that no intelligence techniques have been unlawfully implemented against him or her – conduct a review of the technique or techniques referred to with a view to determining whether they have been or are being implemented in accordance with this Book. It shall notify the complainant that the necessary investigations have been carried out, without confirming or denying their implementation.’

39 The first and second paragraphs of Article L. 841-1 of the CSI read as follows:

‘Subject to the special provisions set out in Article L. 854-9 of this Code, the Conseil d’État (Council of State, France) shall have jurisdiction to hear, under the conditions laid down in Chapter III bis of Title VII of Book VII of the code de justice administrative (Code of Administrative Justice), actions concerning the implementation of the intelligence techniques referred to in Title V of this Book.

An action may be brought before it by:

1. any person wishing to verify that no intelligence techniques have been unlawfully implemented against him or her and who can demonstrate that the procedure provided for in Article L. 833-4 has been conducted beforehand;

2. the Commission for the Oversight of Intelligence Techniques, under the conditions laid down in Article L. 833-8.’

40 Title V of Book VIII of the legislative part of the CSI, concerning ‘intelligence gathering techniques subject to authorisation’, includes, inter alia, Chapter I, headed ‘Access of the administrative authorities to connection data’, containing Articles L. 851-1 to L. 851-7 of the CSI.

41 Article L. 851-1 of the CSI provides:

‘Subject to the conditions laid down in Chapter I of Title II of this Book, the collection of information or documents processed or retained by their networks or electronic communications services, including technical data relating to the identification of the subscription or connection numbers to electronic communications services, the inventorying of the subscription and connection numbers of a specified person, the location of the terminal equipment used and the communications of a subscriber, namely the list of numbers called and calling and the duration and date of the communications, may be authorised from electronic communications operators and the persons referred to in Article L. 34-1 of the [CPCE] as well as from the persons referred to in Article 6(I)(1) and (2) of Loi n.° 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique (Law No 2004-575 of 21 June 2004 to promote trust in the digital economy) [(JORF of 22 June 2004, p. 11168)].

By way of derogation from Article L. 821-2, written and reasoned applications for technical data relating to the identification of subscription or connection numbers to electronic communications services, or the inventorying of all the subscription or connection numbers of a specified person, shall be sent directly to the Commission for the Oversight of Intelligence Techniques by individually designated and authorised agents of the intelligence services referred to in Articles L. 811-2 and L. 811-4. The Commission shall issue its opinion under the conditions laid down in Article L. 821-3.

A department reporting to the Prime Minister shall be responsible for gathering information or documents from the operators and persons referred to in the first paragraph of this article. The Commission for the Oversight of Intelligence Techniques shall have permanent, complete, direct and immediate access to the information or documents collected.

The detailed rules for the application of this article shall be laid down by decree adopted in the Conseil d’État (Council of State, France) following consultation of the Commission nationale de l’informatique

et des libertés (Data Protection Authority, France) and the Commission for the Oversight of Intelligence Techniques.'

42 Article L. 851-2 of the CSI provides:

'I. Under the conditions laid down in Chapter I of Title II of this Book, and for the sole purpose of preventing terrorism, the collection in real time, on the networks of the operators and persons referred to in Article L. 851-1, of the information or documents referred to in that article relating to a person previously identified as potentially having links to a threat, may be individually authorised. Where there are substantial grounds for believing that one or more persons belonging to the circle of the person to whom the authorisation relates are capable of providing information in respect of the purpose for which the authorisation was granted, authorisation may also be granted individually for each of those persons.

I bis. The maximum number of authorisations issued under this article in force at the same time shall be determined by the Prime Minister following consultation of the Commission for the Oversight of Intelligence Techniques. The decision establishing that quota and how it is to be allocated between the ministers referred to in the first paragraph of Article L. 821-2, together with the number of interception authorisations issued, shall be forwarded to the Commission.

…'

43 Article L. 851-3 of the CSI provides:

'I. Under the conditions laid down in Chapter I of Title II of this Book, and for the sole purpose of preventing terrorism, the operators and persons referred to in Article L. 851-1 may be required to implement on their networks automated data processing practices designed, within the parameters laid down in the authorisation, to detect links that might constitute a terrorist threat.

Such automated processing shall exclusively use the information or documents referred to in Article L. 851-1 and shall not collect any data other than data meeting the design parameters or allow the identification of the persons to whom the information or documents relate.

In accordance with the principle of proportionality, the authorisation of the Prime Minister shall specify the technical scope of the implementation of those processing practices.

II. The Commission for the Oversight of Intelligence Techniques shall issue an opinion on the application for authorisation for automated processing and the chosen detection parameters. It shall have permanent, complete and direct access to those processing practices and to the information and data collected. It shall be informed of any changes to the processing practices and parameters and may issue recommendations.

The first authorisation for the implementation of automated processing practices provided for in point I of this article shall be issued for a period of two months. The authorisation shall be renewable under the conditions on duration laid down in Chapter I of Title II of this Book. The application for renewal shall include a record of the number of identifiers flagged by the automated processing and an analysis of the relevance of that flagging.

III. The conditions laid down in Article L. 871-6 are applicable to the physical operations performed by the operators and persons referred to in Article L. 851-1 for the purpose of implementing such processing.

IV. Where the processing practices mentioned in point I of this article detect data likely to point to the existence of a terrorist threat, the Prime Minister or one of the persons delegated by him or her may – following consultation of the Commission for the Oversight of Intelligence Techniques under the conditions laid down in Chapter I of Title II of this Book – authorise the identification of the person or persons concerned and the collection of the related data. The data shall be used within 60 days of collection and shall be destroyed upon expiry of that period, unless there are substantial grounds confirming the existence of a terrorist threat associated with one or more of the persons concerned.

…’

44 Article L. 851-4 of the CSI reads as follows:

‘Under the conditions laid down in Chapter I of Title II of this Book, technical data relating to the location of the terminal equipment used, as mentioned in Article L. 851-1, may be collected upon request from the network and transmitted in real time by the operators to a department reporting to the Prime Minister.’

45 Article R. 851-5 of the CSI, which appears in the regulatory part of that code, provides:

‘I. The information or documents referred to in Article L. 851-1 are – excluding the content of the correspondence or the information consulted – as follows:

1. Those listed in Articles R. 10-13 and R. 10-14 of the [CPCE] and in Article 1 of Decree [No 2011-219];

2. Technical data other than the data mentioned in point 1:

(a) enabling terminal equipment to be located;

(b) relating to access by terminal equipment to online public communication networks or services;

(c) relating to the conveyance of electronic communications by networks;

(d) relating to the identification and authentication of a user, a connection, a network or an online public communication service;

(e) relating to the characteristics of terminal equipment and the configuration data of their software.

II. Only the information and documents referred to in point I(1) may be collected pursuant to Article L. 851-1. Such collection shall take place in non-real time.

The information listed in point I(2) may be collected only pursuant to Articles L. 851-2 and L. 851-3 under the conditions and within the limits laid down in those articles and subject to the application of Article R. 851-9.’

The CPCE

46 Article L. 34-1 of the CPCE states:

‘I. This article shall apply to the processing of personal data in the course of the provision to the public of electronic communications services; it shall apply in particular to networks that support data collection and identification devices.

II. Electronic communications operators, in particular persons whose business is to provide access to online public communication services, shall erase or render anonymous any data relating to traffic, subject to the provisions contained in points III, IV, V and VI.

Persons who provide electronic communications services to the public shall, with due regard for the provisions contained in the preceding paragraph, establish internal procedures for responding to requests from the competent authorities.

Persons who, as a principal or ancillary business activity, provide to the public a connection allowing online communication via access to the network shall, including where this is offered free of charge, be subject to compliance with the provisions applicable to electronic communications operators under this article.

III. For the purposes of investigating, detecting and prosecuting criminal offences or a failure to fulfil an obligation laid down in Article L. 336-3 of the code de la propriété intellectuelle (Intellectual

Property Code) or for the purposes of preventing breaches of automated data processing systems as provided for and punishable under Articles 323-1 to 323-3-1 of the Code pénal (Criminal Code), and for the sole purpose of making information available, as necessary, to the judicial authority or high authority mentioned in Article L. 331-12 of the Intellectual Property Code or to the national authority for the security of information systems mentioned in Article L. 2321-1 of the code de la défense (Defence Code), operations designed to erase or render anonymous certain categories of technical data may be deferred for a maximum period of one year. A decree adopted in the Conseil d'État (Council of State, France) following consultation of the Data Protection Authority shall, within the limits laid down in point VI, determine the categories of data involved and the period for which they are to be retained, depending on the business of the operators, the nature of the communications and the methods of offsetting any identifiable and specific additional costs associated with the services provided for these purposes by operators at the request of the State.

…

VI. Data retained and processed under the conditions set out in points III, IV and V shall relate exclusively to the identification of persons using the services provided by operators, the technical characteristics of the communications provided by the latter and the location of terminal equipment.

Under no circumstance may such data relate to the content of the correspondence or the information consulted, in any form whatsoever, as part of those communications.

The retention and processing of such data shall be effected with due regard for the provisions of loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (Law No 78-17 of 6 January 1978 on information technology, files and freedoms).

Operators shall take any measures necessary to prevent such data from being used for purposes other than those provided for in this article.'

47 Article R. 10-13 of the CPCE reads as follows:

'I. Pursuant to point III of Article L. 34-1, electronic communications operators shall retain the following data for the purposes of investigating, detecting and prosecuting criminal offences:

(a) Information identifying the user;

(b) Data relating to the communications terminal equipment used;

(c) The technical characteristics and date, time and duration of each communication;

(d) Data relating to the additional services requested or used and the providers of those services;

(e) Data identifying the addressee or addressees of the communication.

II. In the case of telephony activities, the operator shall retain the data referred to in point II and, additionally, data enabling the origin and location of the communication to be identified.

III. The data referred to in this article shall be retained for one year from the date of registration.

IV. Identifiable and specific additional costs borne by operators which have been ordered by judicial authorities to provide data falling within the categories mentioned in this article shall be offset in accordance with the methods laid down in Article R. 213-1 of the code de procédure pénale (Code of Criminal Procedure).'

48 Article R. 10-14 of the CPCE provides:

'I. Pursuant to point IV of Article L. 34-1, electronic communications operators are authorised to retain technical data identifying the user and the data mentioned in Article R. 10-13(I)(b), (c) and (d) for the purposes of their billing and payment operations.

II. In the case of telephony activities, operators may retain, in addition to the data mentioned in point I, technical data relating to the location of the communication and the identification of the addressee or addressees of the communication and data for billing purposes.

III. The data mentioned in points I and II of this article may be retained only if it is necessary for billing purposes and for the payment of services rendered. Its retention shall be limited to the time strictly necessary for that purpose and shall not exceed one year.

IV. Operators may retain the following data for a period not exceeding three months to ensure the security of networks and facilities:

(a) Data identifying the origin of the communication;

(b) The technical characteristics and date, time and duration of each communication;

(c) Technical data identifying the addressee or addressees of the communication;

(d) Data relating to the additional services requested or used and the providers of those services.'

Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (Law No 2004-575 of 21 June 2004 to promote trust in the digital economy)

49 Article 6 of Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (Law No 2004-575 of 21 June 2004 to promote trust in the digital economy) (JORF of 22 June 2004, p. 11168; 'the LCEN') provides:

'I. 1. Persons whose business is to provide access to online public communication services shall inform their subscribers of the existence of technical tools enabling access to some services to be restricted or for a selection of those services to be made and shall offer them at least one of those tools.

…

2. Natural or legal persons who, even free of charge, and for provision to the public via online public communications services, store signals, writing, images, sounds or messages of any kind provided by recipients of those services, may not incur any civil liability for the activities or information stored at the request of a recipient of those services if they had no actual knowledge of either the unlawful nature of the activities or information in question or of the facts and circumstances pointing to their unlawful nature, or if, as soon as they became aware of that unlawful nature, they acted expeditiously to remove the data at issue or block access to them.

…

II. The persons referred to in point I(1) and (2) shall keep and retain the data in such a way as to make it possible to identify anyone who has assisted in the creation of all or part of the content of the services of which they are the providers.

They shall provide persons who publish an online public communication service with technical tools enabling them to satisfy the identification conditions laid down in point III.

A judicial authority may require the service providers mentioned in point I(1) and (2) to communicate the data referred to in the first paragraph.

The provisions of Articles 226-17, 226-21 and 226-22 of the Criminal Code shall apply to the processing of that data.

A decree adopted in the Conseil d'État (Council of State, France) following consultation of the Data Protection Authority shall define the data referred to in the first paragraph and determine the period for which, and the methods by which, that data is to be retained.

…'

Decree No 2011-219

50 Chapter I of Decree No 2011-219, adopted on the basis of the last paragraph of Article 6(II) of the LCEN, contains Articles 1 to 4 of that decree.

51 Article 1 of Decree No 2011-219 provides:

‘The following data is the data referred to in Article 6(II) of the [LCEN], which persons are required to retain under that provision:

1. For the persons referred to in point I(1) of that article and for each connection of their subscribers:

(a) The connection identifier;

(b) The identifier assigned by those persons to the subscriber;

(c) The identifier of the terminal used for the connection when they have access to it;

(d) The date and time of the start and end of the connection;

(e) The characteristics of the subscriber’s line.

2. For the persons referred to in point I(2) of that article and for each creation operation:

(a) The identifier of the connection giving rise to the communication;

(b) The identifier assigned by the information system to the content forming the subject of the operation;

(c) The types of protocols used to connect to the service and transfer the content;

(d) The nature of the operation;

(e) The date and time of the operation;

(f) The identifier used by the author of the operation where provided by the author.

3. For the persons referred to in point I(1) and (2) of that article, the information provided by a user when signing up to a contract or creating an account:

(a) The identifier of the connection at the time when the account was created;

(b) The first name and surname or business name;

(c) The associated postal addresses;

(d) The pseudonyms used;

(e) The associated email or account addresses;

(f) The telephone numbers;

(g) The updated password and the data for verifying or changing it.

4. For the persons referred to in point I(1) and (2) of that article, where the signing up to the contract or the account is subject to payment, the following information relating to the payment, for each payment operation:

(a) The type of payment used;

(b) The payment reference;

(c) The amount;

(d) The date and time of the transaction.

The data mentioned in points 3 and 4 shall be retained only to the extent that the persons ordinarily collect such data.'

52 Article 2 of that decree reads as follows:

'Contributing to the creation of content involves the following operations:

(a) Initial content creation;

(b) Changes to content and content-related data;

(c) Content erasure.'

53 Article 3 of that decree provides:

'The data referred to in Article 1 shall be retained for one year from the date of:

(a) creation of the content, for each operation contributing to the creation of content as defined in Article 2, as regards the data mentioned in points 1 and 2;

(b) termination of the contract or closure of the account, as regards the data mentioned in point 3;

(c) issue of the bill or the payment operation, for each bill or payment operation, as regards the data mentioned in point 4.'

Belgian law

54 The Law of 29 May 2016 amended, in particular, the loi du 13 juin 2005 relative aux communications électroniques (Law of 13 June 2005 on electronic communications) (*Moniteur belge* of 20 June 2005, p. 28070; 'the Law of 13 June 2005'), the code d'instruction criminelle (Code of Criminal Procedure) and the loi du 30 novembre 1998 organique des services de renseignement et de sécurité (Basic Law of 30 November 1998 on the intelligence and security services) (*Moniteur belge* of 18 December 1998, p. 40312; 'the Law of 30 November 1998').

55 Article 126 of the Law of 13 June 2005, as amended by the Law of 29 May 2016, provides:

'1. Without prejudice to the Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel (Law of 8 December 1992 on the protection of privacy with respect to the processing of personal data), providers to the public of telephony services, including via the Internet, Internet access and Internet-based email, operators providing public electronic communications networks and operators providing any of those services shall retain the data referred to in paragraph 3 where that data is generated or processed by them in the course of providing the communications services concerned.

This article shall not concern the content of communications.

The obligation to retain the data referred to in paragraph 3 shall also apply to unsuccessful call attempts, provided that that data is, in the course of providing the communications services concerned:

(1) generated or processed by operators of publicly available electronic communications services or of a public electronic communications network, so far as concerns telephony data, or

(2) logged by those providers, so far as concerns Internet data.

2. Data retained under this article may be obtained, by simple request, from the providers and operators referred to in the first subparagraph of paragraph 1, for the purposes and under the conditions listed below, only by the following authorities:

(1) judicial authorities, with a view to the investigation, detection and prosecution of offences, in order to execute the measures referred to in Articles 46bis and 88bis of the Code of Criminal Procedure and under the conditions laid down in those articles;

(2) under the conditions laid down in this law, intelligence and security services, in order to carry out intelligence missions employing the data-gathering methods referred to in Articles 16/2, 18/7 and 18/8 of the Basic Law of 30 November 1998 on the intelligence and security services;

(3) any judicial police officer attached to the [Institut belge des services postaux et des télécommunications (Belgian Institute for Postal Services and Telecommunications)], with a view to the investigation, detection and prosecution of offences contrary to Articles 114 and 124 and this article;

(4) emergency services providing on-site assistance, in the case where, after having received an emergency call, they cannot obtain from the provider or operator concerned the data identifying the person having made the emergency call using the database referred to in the third subparagraph of Article 107(2), or obtain incomplete or incorrect data. Only the data identifying the caller may be requested and the request must be made no later than 24 hours after the call;

(5) any judicial police officer attached to the Missing Persons Unit of the Federal Police, in the course of his or her task of providing assistance to persons in danger, searching for persons whose disappearance is a cause for concern and in cases where there are serious presumptions or indications that the physical well-being of the missing person is in imminent danger. Only the data referred to in the first and second subparagraphs of paragraph 3, relating to the missing person, and retained during the 48 hours prior to the data request, may be requested from the operator or provider concerned via a police service designated by the King;

(6) the Telecommunications Ombudsman, with a view to identifying a person who has misused an electronic communications network or service, in accordance with the conditions laid down in Article 43bis(3)(7) of the loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques (Law of 21 March 1991 on the reform of certain public commercial undertakings). Only the identification data may be requested.

The providers and operators referred to in the first subparagraph of paragraph 1 shall ensure that the data referred to in paragraph 3 are accessible without restriction from Belgium and that that data and any other necessary information concerning that data may be transmitted without delay and only to the authorities referred to in this paragraph.

Without prejudice to other legal provisions, the providers and operators referred to in the first subparagraph of paragraph 1 may not use the data retained under paragraph 3 for any other purposes.

3. Data that can be used to identify the user or subscriber and the means of communication, other than the data specifically provided for in the second and third subparagraphs, shall be retained for 12 months as from the date on which communication was last able to be made using the service employed.

Data relating to the terminal devices' access and connection to the network and the service, and to the location of those devices, including the network termination point, shall be retained for 12 months as from the date of the communication.

Communication data other than content, including the origin and destination thereof, shall be retained for 12 months as from the date of the communication.

The King shall, by decree deliberated in the Council of Ministers and on a proposal from the Minister for Justice and the Minister [with responsibility for matters relating to electronic communications], and after obtaining the opinion of the Committee for the Protection of Privacy and the Institute, determine

the data to be retained by category type as referred to in the first to third subparagraphs and the requirements which that data must satisfy.

…'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-511/18

56 By applications lodged on 30 November 2015 and 16 March 2016, joined in the main proceedings, La Quadrature du Net, French Data Network, the Fédération des fournisseurs d'accès à Internet associatifs and Igwan.net brought actions before the Conseil d'État (Council of State, France) for the annulment of Decrees No 2015-1185, No 2015-1211, No 2015-1639 and No 2016-67, on the ground, inter alia, that they infringe the French Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and Directives 2000/31 and 2002/58, read in the light of Articles 7, 8 and 47 of the Charter.

57 As regards, in particular, the pleas alleging infringement of Directive 2000/31, the referring court states that the provisions of Article L. 851-3 of the CSI require electronic communications operators and technical service providers to 'implement on their networks automated data processing practices designed, within the parameters laid down in the authorisation, to detect links that might constitute a terrorist threat'. That technique is intended only to facilitate the collection, for a limited period and from all of the connection data processed by those operators and service providers, of such data as might be related to a serious offence of this kind. In those circumstances, those provisions, which do not impose a general obligation of active surveillance, do not, in the view of the referring court, infringe Article 15 of Directive 2000/31.

58 As regards the pleas alleging infringement of Directive 2002/58, the referring court considers that it follows, inter alia, from the provisions of that directive and from the judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970; '*Tele2*'), that national provisions imposing obligations on providers of electronic communications services, such as the general and indiscriminate retention of the traffic and location data of their users and subscribers, for the purposes stated in Article 15(1) of that directive, which include safeguarding national security, defence and public security, fall within the scope of that directive since those rules govern the activity of those providers. That also applies to rules governing access to and use of data by national authorities.

59 The referring court concludes from this that both the obligation to retain data resulting from Article L. 851-1 of the CSI and the access of the administrative authorities to that data, including real-time access, provided for in Articles L. 851-1, L. 851-2 and L. 851-4 of that code, fall within the scope of Directive 2002/58. The same is true, according to that court, of the provisions of Article L. 851-3 of the CSI, which, although they do not impose a general retention obligation on the operators concerned, do however require them to implement automated processing on their networks that is intended to detect links that might constitute a terrorist threat.

60 On the other hand, the referring court takes the view that the scope of Directive 2002/58 does not extend to the provisions of the CSI referred to in the applications for annulment which relate to intelligence gathering techniques applied directly by the State, but do not regulate the activities of providers of electronic communications services by imposing specific obligations on them. Accordingly, those provisions cannot be regarded as implementing EU law, with the result that the pleas alleging that they infringe Directive 2002/58 cannot validly be relied on.

61 Thus, with a view to settling the disputes concerning the lawfulness of Decrees No 2015-1185, No 2015-1211, No 2015-1639 and No 2016-67 in the light of Directive 2002/58, in so far as they were adopted to implement Articles L. 851-1 to L. 851-4 of the CSI, three questions on the interpretation of EU law arise.

62 As regards the interpretation of Article 15(1) of Directive 2002/58, the referring court is uncertain, in the first place, whether a general and indiscriminate retention obligation, imposed on providers of electronic communications services on the basis of Articles L. 851-1 and R. 851-5 of the CSI, is to be regarded in the light, inter alia, of the safeguards and checks to which the access of the administrative authorities to and the use of connection data are subject, as interference justified by the right to security guaranteed in Article 6 of the Charter and by the requirements of national security, responsibility for which falls to the Member States alone pursuant to Article 4 TEU.

63 As regards, in the second place, the other obligations which may be imposed on providers of electronic communications services, the referring court states that the provisions of Article L. 851-2 of the CSI permit, for the sole purpose of preventing terrorism, the collection of the information or documents referred to in Article L. 851-1 of that code from the same persons. Such collection, in relation solely to one or more individuals previously identified as potentially having links to a terrorist threat, is to be carried out in real time. The same is true of the provisions of Article L. 851-4, which authorise the real-time transmission by operators exclusively of technical data relating to the location of terminal equipment. Those techniques regulate the real-time access of the administrative authorities to data retained under the CPCE and the LCEN for various purposes and by various means, without, however, imposing on the providers concerned any additional retention requirement over and above what is necessary for the billing and provision of their services. In the same vein, nor do the provisions of Article L. 851-3 of the CSI, which require service providers to implement on their networks an automated system for the analysis of connections, entail general and indiscriminate retention.

64 The referring court considers that both general and indiscriminate retention and real-time access to connection data are of unparalleled operational usefulness, against a background of serious and persistent threats to national security, in particular the terrorist threat. General and indiscriminate retention allows the intelligence services to obtain access to communications data before the reasons for believing that the person concerned poses a threat to public security, defence or State security are identified. In addition, real-time access to connection data makes it possible to monitor, with a high level of responsiveness, the conduct of individuals who may pose an immediate threat to public order.

65 Furthermore, the technique provided for in Article L. 851-3 of the CSI makes it possible to detect, on the basis of criteria specifically defined for that purpose, those individuals whose conduct may, in view of their methods of communication, constitute a terrorist threat.

66 In the third place, as regards access by the competent authorities to retained data, the referring court is unsure whether Directive 2002/58, read in the light of the Charter, is to be interpreted as meaning that it is a prerequisite for the lawfulness of the procedures for the collection of connection data that the data subjects are informed whenever their being so informed is no longer liable to jeopardise the investigations being undertaken by the competent authorities, or whether such procedures may be regarded as lawful taking into account all the other procedural safeguards provided for in national law where those safeguards ensure that the right to a remedy is effective.

67 As regards those other procedural safeguards, the referring court states in particular that any person wishing to verify that no intelligence techniques have been unlawfully implemented against him or her may bring the matter before a specialist panel of the Conseil d'État (Council of State, France), which is responsible for determining – in the light of the information communicated to it outside *inter partes* proceedings – whether the applicant has been the subject of an intelligence technique and whether that technique was implemented in accordance with Book VIII of the CSI. The powers conferred on that panel to investigate applications ensure that the judicial review conducted by it is effective. Thus, it has jurisdiction to investigate applications, to raise of its own motion any illegalities it may find and to order the authorities to take all appropriate measures to remedy the illegalities found. In addition, it is for the Commission for the Oversight of Intelligence Techniques to check that intelligence gathering techniques are implemented, on national territory, in accordance with the requirements flowing from the CSI. Thus, the fact that the legislative provisions at issue in the main proceedings do not provide for the notification to the persons concerned of the surveillance measures applied to them does not, in itself, constitute excessive interference with the right to respect for private life.

68 It is on that basis that the Conseil d'État (Council of State, France) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the general and indiscriminate retention obligation imposed on providers on the basis of the implementing provisions of Article 15(1) of [Directive 2002/58] to be regarded, against a background of serious and persistent threats to national security, and in particular the terrorist threat, as interference justified by the right to security guaranteed in Article 6 of the [Charter] and the requirements of national security, responsibility for which falls to the Member States alone pursuant to Article 4 [TEU]?

(2) Is [Directive 2002/58], read in the light of the [Charter], to be interpreted as authorising legislative measures, such as the measures for the real-time collection of the traffic and location data of specified individuals, which, whilst affecting the rights and obligations of the providers of an electronic communications service, do not however require them to comply with a specific obligation to retain their data?

(3) Is [Directive 2002/58], read in the light of the [Charter], to be interpreted as meaning that it is a prerequisite for the lawfulness of the procedures for the collection of connection data that the data subjects are informed whenever their being so informed is no longer liable to jeopardise the investigations being undertaken by the competent authorities, or may such procedures be regarded as lawful taking into account all the other existing procedural safeguards where those safeguards ensure that the right to a remedy is effective?'

Case C-512/18

69 By application lodged on 1 September 2015, French Data Network, La Quadrature du Net and the Fédération des fournisseurs d'accès à Internet associatifs brought an action before the Conseil d'État (Council of State, France) for the annulment of the implied rejection decision arising from the Prime Minister's failure to reply to their application for the repeal of Article R. 10-13 of the CPCE and Decree No 2011-219, on the ground, inter alia, that those legislative texts infringe Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 of the Charter. Privacy International and the Center for Democracy and Technology were granted leave to intervene in the main proceedings.

70 As regards Article R. 10-13 of the CPCE and the obligation of general and indiscriminate retention of communications data laid down therein, the referring court, which raises similar considerations to those in Case C-511/18, observes that such retention allows a judicial authority to access data relating to communications made by an individual before being suspected of having committed a criminal offence, with the result that such retention is of unparalleled usefulness for the investigation, detection and prosecution of criminal offences.

71 As regards Decree No 2011-219, the referring court considers that Article 6(II) of the LCEN, which imposes an obligation to hold and retain only data relating to the creation of content, does not fall within the scope of Directive 2002/58 since that directive's scope is limited, in accordance with Article 3(1) thereof, to the provision of publicly available electronic communications services in public communications networks in the European Union. On the other hand, that national provision does fall within the scope of Directive 2000/31.

72 The referring court considers, however, that it follows from Article 15(1) and (2) of Directive 2000/31 that the directive does not establish a prohibition in principle on retaining data relating to the creation of content, from which derogation would be possible only by way of exception. Thus, the question arises whether Articles 12, 14 and 15 of Directive 2000/31, read in the light of Articles 6, 7, 8 and 11 and Article 52(1) of the Charter, are to be interpreted as allowing a Member State to introduce national legislation, such as Article 6(II) of the LCEN, which requires the persons concerned to retain data capable of enabling the identification of anyone who has contributed to the creation of the content or some of the content of the services which they provide, so that a judicial authority may, where appropriate, require the communication of that data with a view to ensuring compliance with the rules on civil and criminal liability.

73 It is on that basis that the Conseil d'État (Council of State, France) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the general and indiscriminate retention obligation imposed on providers on the basis of the implementing provisions of Article 15(1) of [Directive 2002/58] to be regarded, inter alia in the light of the safeguards and checks to which the collection and use of such connection data are then subject, as interference justified by the right to security guaranteed in Article 6 of the [Charter] and the requirements of national security, responsibility for which falls to the Member States alone pursuant to Article 4 [TEU]?

(2) Are the provisions of [Directive 2000/31], read in the light of Articles 6, 7, 8 and 11 and Article 52(1) of the [Charter], to be interpreted as allowing a State to introduce national legislation requiring the persons, whose activity consists in offering access to online public communications services and the natural or legal persons who, even free of charge, and for provision to the public via online public communications services, store signals, writing, images, sounds or messages of any kind provided by recipients of those services, to retain the data capable of enabling the identification of anyone who has contributed to the creation of the content or some of the content of the services which they provide, so that a judicial authority may, where appropriate, require the communication of that data with a view to ensuring compliance with the rules on civil and criminal liability?'

Case C-520/18

74 By applications lodged on 10, 16, 17 and 18 January 2017, joined in the main proceedings, the Ordre des barreaux francophones et germanophone, the Académie Fiscale ASBL and UA, the Liga voor Mensenrechten ASBL, the Ligue des Droits de l'Homme ASBL, and VZ, WY and XX brought actions before the Cour constitutionnelle (Constitutional Court, Belgium) for the annulment of the Law of 29 May 2016, on the ground that it infringes Articles 10 and 11 of the Belgian Constitution, read in conjunction with Articles 5, 6 to 11, 14, 15, 17 and 18 of the ECHR, Articles 7, 8, 11 and 47 and Article 52(1) of the Charter, Article 17 of the International Covenant on Civil and Political Rights, which was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976, the general principles of legal certainty, proportionality and self-determination in relation to information and Article 5(4) TEU.

75 In support of their actions, the applicants in the main proceedings submit, in essence, that the Law of 29 May 2016 is unlawful because, among other things, it goes beyond what is strictly necessary and does not lay down adequate guarantees of protection. In particular, neither its provisions relating to the retention of data nor those governing access by the authorities to retained data satisfy the requirements deriving from the judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238; '*Digital Rights*') and of 21 December 2016, *Tele2* (C-203/15 and C-698/15, EU:C:2016:970). They contend that those provisions entail a risk that personality profiles will be compiled, which may be misused by the competent authorities, and that they do not establish an appropriate level of security and protection for the retained data. Lastly, that law covers persons who are bound by professional secrecy and persons who are under a duty of confidentiality, and applies to personal communication data that is sensitive, without including specific safeguards to protect such data.

76 The referring court observes that the data which must be retained by providers of telephony services, including via the Internet, Internet access and Internet-based email and by operators providing public electronic communications networks, under the Law of 29 May 2016, is identical to that listed in Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), without any distinction being made as regards the persons concerned or on the basis of the objective pursued. As regards the latter point, the referring court states that the objective pursued by the legislature by means of that law is not only to combat terrorism and child pornography, but also to enable the use of the retained data in a wide variety of situations in the context of criminal investigations. The referring court also notes that it is apparent from the

explanatory memorandum for that law that the national legislature considered it impossible, in the light of the objective pursued, to impose a targeted and selective obligation to retain data, and that it chose to apply strict guarantees to the general and indiscriminate retention obligation, both as regards the data retained and access to that data, in order to keep interference with the right to respect for private life to a minimum.

77 The referring court also states that subparagraphs 1 and 2 of Article 126(2) of the Law of 13 June 2005, as amended by the Law of 29 May 2016, lay down the conditions under which, respectively, judicial authorities and the intelligence and security services may obtain access to retained data, and consequently the review of the lawfulness of that law in the light of the requirements of EU law should be deferred until the Court has adjudicated on two preliminary ruling procedures pending before it concerning such access.

78 Lastly, the referring court states that the Law of 29 May 2016 seeks to ensure an effective criminal investigation and effective penalties in cases involving the sexual abuse of minors and to make it possible to identify the perpetrator of such an offence, even where electronic communications systems are used. In the proceedings before it, attention was drawn in that respect to the positive obligations under Articles 3 and 8 of the ECHR. Those obligations may also arise under the corresponding provisions of the Charter, which may have consequences for the interpretation of Article 15(1) of Directive 2002/58.

79 It is on that basis that the Cour constitutionnelle (Constitutional Court, Belgium) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 15(1) of [Directive 2002/58], read in conjunction with the right to security, guaranteed by Article 6 of the [Charter], and the right to respect for personal data, as guaranteed by Articles 7, 8 and 52(1) of the [Charter], be interpreted as precluding national legislation such as that at issue, which lays down a general obligation for operators and providers of electronic communications services to retain the traffic and location data within the meaning of [Directive 2002/58], generated or processed by them in the context of the supply of those services, national legislation whose objective is not only the investigation, detection and prosecution of serious criminal offences but also the safeguarding of national security, the defence of the territory and of public security, the investigation, detection and prosecution of offences other than serious crime or the prevention of the prohibited use of electronic communication systems, or the attainment of another objective identified by Article 23(1) of [Regulation 2016/679] and which, furthermore, is subject to specific safeguards in that legislation in terms of data retention and access to that data?

(2) Must Article 15(1) of [Directive 2002/58], in conjunction with Articles 4, 7, 8, 11 and 52(1) of the [Charter], be interpreted as precluding national legislation such as that at issue, which lays down a general obligation for operators and providers of electronic communications services to retain the traffic and location data within the meaning of [Directive 2002/58], generated or processed by them in the context of the supply of those services, if the object of that legislation is, in particular, to comply with the positive obligations borne by the authority under Articles 4 and [7] of the Charter, consisting in the provision of a legal framework which allows the effective criminal investigation and the effective punishment of sexual abuse of minors and which permits the effective identification of the perpetrator of the offence, even where electronic communications systems are used?

(3) If, on the basis of the answer to the first or the second question, the Cour constitutionnelle (Constitutional Court, Belgium) should conclude that the contested law fails to fulfil one or more obligations arising under the provisions referred to in these questions, might it maintain on a temporary basis the effects of [the Law of 29 May 2016] in order to avoid legal uncertainty and to enable the data previously collected and retained to continue to be used for the objectives pursued by the law?’

Procedure before the Court

80 By decision of the President of the Court of 25 September 2018, Cases C-511/18 and C-512/18 were joined for the purposes of the written and oral parts of the procedure and the judgment. Case C-520/18 was joined to those cases by decision of the President of the Court of 9 July 2020 for the purposes of the judgment.

Consideration of the questions referred

Question 1 in Cases C-511/18 and C-512/18 and questions 1 and 2 in Case C-520/18

81 By question 1 in Cases C-511/18 and C-512/18 and questions 1 and 2 in Case C-520/18, which should be considered together, the referring courts essentially ask whether Article 15(1) of Directive 2002/58 must be interpreted as precluding national legislation which imposes on providers of electronic communications services, for the purposes set out in Article 15(1), an obligation requiring the general and indiscriminate retention of traffic and location data.

Preliminary remarks

82 It is apparent from the documents available to the Court that the legislation at issue in the main proceedings covers all electronic communications systems and applies to all users of such systems, without distinction or exception. Furthermore, the data which must be retained by providers of electronic communications services under that legislation is, in particular, the data necessary for locating the source of a communication and its destination, for determining the date, time, duration and type of communication, for identifying the communications equipment used, and for locating the terminal equipment and communications, data which comprises, inter alia, the name and address of the user, the telephone numbers of the caller and the person called, and the IP address for Internet services. By contrast, that data does not cover the content of the communications concerned.

83 Thus, the data which must, under the national legislation at issue in the main proceedings, be retained for a period of one year makes it possible, inter alia, to identify the person with whom the user of an electronic communications system has communicated and by what means, to determine the date, time and duration of the communications and Internet connections and the place from which those communications and connections took place, and to ascertain the location of the terminal equipment without any communication necessarily having been transmitted. In addition, that data enables the frequency of a user's communications with certain persons over a given period of time to be established. Last, as regards the national legislation at issue in Cases C-511/18 and C-512/18, it appears that that legislation, in so far as it also covers data relating to the conveyance of electronic communications by networks, also enables the nature of the information consulted online to be identified.

84 As for the aims pursued, it should be noted that the legislation at issue in Cases C-511/18 and C-512/18 pursues, among other aims, the investigation, detection and prosecution of criminal offences in general; national independence, territorial integrity and national defence; major foreign policy interests; the implementation of France's European and international commitments; France's major economic, industrial and scientific interests; and the prevention of terrorism, attacks against the republican nature of the institutions and collective violence liable to cause serious disruption to the maintenance of law and order. The objectives of the legislation at issue in Case C-520/18 are, inter alia, the investigation, detection and prosecution of criminal offences and the safeguarding of national security, the defence of the territory and public security.

85 The referring courts are uncertain, in particular, as to the possible impact of the right to security enshrined in Article 6 of the Charter on the interpretation of Article 15(1) of Directive 2002/58. Similarly, they ask whether the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter entailed by the retention of data provided for in the legislation at issue in the main proceedings may, in the light of the existence of rules restricting national authorities' access to retained data, be regarded as justified. In addition, according to the Conseil d'État (Council of State, France), since that question arises in a context characterised by serious and persistent threats to national security, it should also be assessed in the light of Article 4(2) TEU. The Cour constitutionnelle (Constitutional Court, Belgium), for its part, points out that the national legislation at issue in Case

C-520/18 also implements positive obligations flowing from Articles 4 and 7 of the Charter, consisting in the establishment of a legal framework for the effective prevention and punishment of the sexual abuse of minors.

86 While both the Conseil d'État (Council of State, France) and the Cour constitutionnelle (Constitutional Court, Belgium) start from the premiss that the respective national legislation at issue in the main proceedings, which governs the retention of traffic and location data and access to that data by national authorities for the purposes set out in Article 15(1) of Directive 2002/58, such as safeguarding national security, falls within the scope of that directive, a number of parties to the main proceedings and some of the Member States which submitted written observations to the Court disagree on that point, particularly concerning the interpretation of Article 1(3) of that directive. It is therefore necessary to examine, first of all, whether the legislation at issue falls within the scope of that directive.

Scope of Directive 2002/58

87 La Quadrature du Net, the Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net, Privacy International and the Center for Democracy and Technology rely on the Court's case-law on the scope of Directive 2002/58 to argue, in essence, that both the retention of data and access to retained data fall within that scope, whether that access takes place in non-real time or in real time. Indeed, they contend that since the objective of safeguarding national security is expressly mentioned in Article 15(1) of that directive, the pursuit of that objective does not render that directive inapplicable. In their view, Article 4(2) TEU, mentioned by the referring courts, does not affect that assessment.

88 As regards the intelligence measures implemented directly by the competent French authorities, without regulating the activities of providers of electronic communications services by imposing specific obligations on them, the Center for Democracy and Technology observes that those measures necessarily fall within the scope of Directive 2002/58 and of the Charter, since they are exceptions to the principle of confidentiality guaranteed in Article 5 of that directive. Those measures must therefore comply with the requirements stemming from Article 15(1) of the directive.

89 On the other hand, the Czech and Estonian Governments, Ireland, and the French, Cypriot, Hungarian, Polish, Swedish and United Kingdom Governments submit, in essence, that Directive 2002/58 does not apply to national legislation such as that at issue in the main proceedings, since the purpose of that legislation is to safeguard national security. The intelligence services' activities, in so far as they relate to the maintenance of public order and to the safeguarding of internal security and territorial integrity, are part of the essential functions of the Member States and, consequently, are within their exclusive competence, as evidenced, in particular, by the third sentence of Article 4(2) TEU.

90 Those governments and Ireland also refer to Article 1(3) of Directive 2002/58, which excludes from the scope of that directive, as the first indent of Article 3(2) of Directive 95/46 did in the past, activities concerning public security, defence and State security. They rely in that regard on the interpretation of the latter provision set out in the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346).

91 In that regard, it should be stated that, under Article 1(1) thereof, Directive 2002/58 provides, inter alia, for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communications sector.

92 Article 1(3) of that directive excludes from its scope 'activities of the State' in specified fields, including activities of the State in areas of criminal law and in the areas of public security, defence and State security, including the economic well-being of the State when the activities relate to State security matters. The activities thus mentioned by way of example are, in any event, activities of the State or of State authorities and are unrelated to fields in which individuals are active (judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 32 and the case-law cited).

93 In addition, Article 3 of Directive 2002/58 states that that directive is to apply to the processing of personal data in connection with the provision of publicly available electronic communications

services in public communications networks in the European Union, including public communications networks supporting data collection and identification devices ('electronic communications services'). Consequently, that directive must be regarded as regulating the activities of the providers of such services (judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 33 and the case-law cited).

94 In that context, Article 15(1) of Directive 2002/58 states that Member States may adopt, subject to the conditions laid down, 'legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of [that directive]' (judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 71).

95 Article 15(1) of Directive 2002/58 necessarily presupposes that the national legislative measures referred to therein fall within the scope of that directive, since it expressly authorises the Member States to adopt them only if the conditions laid down in the directive are met. Further, such measures regulate, for the purposes mentioned in that provision, the activity of providers of electronic communications services (judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 34 and the case-law cited).

96 It is in the light of, inter alia, those considerations that the Court has held that Article 15(1) of Directive 2002/58, read in conjunction with Article 3 thereof, must be interpreted as meaning that the scope of that directive extends not only to a legislative measure that requires providers of electronic communications services to retain traffic and location data, but also to a legislative measure requiring them to grant the competent national authorities access to that data. Such legislative measures necessarily involve the processing, by those providers, of the data and cannot, to the extent that they regulate the activities of those providers, be regarded as activities characteristic of States, referred to in Article 1(3) of that directive (see, to that effect, judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraphs 35 and 37 and the case-law cited).

97 In addition, having regard to the considerations set out in paragraph 95 above and the general scheme of Directive 2002/58, an interpretation of that directive under which the legislative measures referred to in Article 15(1) thereof were excluded from the scope of that directive because the objectives which such measures must pursue overlap substantially with the objectives pursued by the activities referred to in Article 1(3) of that same directive would deprive Article 15(1) thereof of any practical effect (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraphs 72 and 73).

98 The concept of 'activities' referred to in Article 1(3) of Directive 2002/58 cannot therefore, as was noted, in essence, by the Advocate General in point 75 of his Opinion in Joined Cases *La Quadrature du Net and Others* (C-511/18 and C-512/18, EU:C:2020:6), be interpreted as covering the legislative measures referred to in Article 15(1) of that directive.

99 Article 4(2) TEU, to which the governments listed in paragraph 89 of the present judgment have made reference, cannot invalidate that conclusion. Indeed, according to the Court's settled case-law, although it is for the Member States to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law (see, to that effect, judgments of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 38; of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraphs 75 and 76; and of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 143 and 170).

100 It is true that, in the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346, paragraphs 56 to 59), the Court held that the transfer of personal data by airlines to the public authorities of a third country for the purpose of preventing and combating terrorism and other serious crimes did not, pursuant to the first indent of Article 3(2) of Directive 95/46, fall within the scope of that directive, because that transfer fell within a framework established by the public authorities relating to public security.

101 However, having regard to the considerations set out in paragraphs 93, 95 and 96 of the present judgment, that case-law cannot be transposed to the interpretation of Article 1(3) of Directive 2002/58. Indeed, as the Advocate General noted, in essence, in points 70 to 72 of his Opinion in Joined Cases *La Quadrature du Net and Others* (C-511/18 and C-512/18, EU:C:2020:6), the first indent of Article 3(2) of Directive 95/46, to which that case-law relates, excluded, in a general way, from the scope of that directive 'processing operations concerning public security, defence, [and] State security', without drawing any distinction according to who was carrying out the data processing operation concerned. By contrast, in the context of interpreting Article 1(3) of Directive 2002/58, it is necessary to draw such a distinction. As is apparent from paragraphs 94 to 97 of the present judgment, all operations processing personal data carried out by providers of electronic communications services fall within the scope of that directive, including processing operations resulting from obligations imposed on those providers by the public authorities, although those processing operations could, where appropriate, on the contrary, fall within the scope of the exception laid down in the first indent of Article 3(2) of Directive 95/46, given the broader wording of that provision, which covers all processing operations concerning public security, defence, or State security, regardless of the person carrying out those operations.

102 Furthermore, it should be noted that Directive 95/46, which was at issue in the case that gave rise to the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346), has been, pursuant to Article 94(1) of Regulation 2016/679, repealed and replaced by that regulation with effect from 25 May 2018. Although that regulation states, in Article 2(2)(d) thereof, that it does not apply to processing operations carried out 'by competent authorities' for the purposes of, inter alia, the prevention and detection of criminal offences, including the safeguarding against and the prevention of threats to public security, it is apparent from Article 23(1)(d) and (h) of that regulation that the processing of personal data carried out by individuals for those same purposes falls within the scope of that regulation. It follows that the above interpretation of Article 1(3), Article 3 and Article 15(1) of Directive 2002/58 is consistent with the definition of the scope of Regulation 2016/679, which is supplemented and specified by that directive.

103 By contrast, where the Member States directly implement measures that derogate from the rule that electronic communications are to be confidential, without imposing processing obligations on providers of electronic communications services, the protection of the data of the persons concerned is covered not by Directive 2002/58, but by national law only, subject to the application of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89), with the result that the measures in question must comply with, inter alia, national constitutional law and the requirements of the ECHR.

104 It follows from the foregoing considerations that national legislation which requires providers of electronic communications services to retain traffic and location data for the purposes of protecting national security and combating crime, such as the legislation at issue in the main proceedings, falls within the scope of Directive 2002/58.

Interpretation of Article 15(1) of Directive 2002/58

105 It should be noted, as a preliminary point, that it is settled case-law that, in interpreting a provision of EU law, it is necessary not only to refer to its wording but also to consider its context and the objectives of the legislation of which it forms part, and in particular the origin of that legislation (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 44).

106 As is apparent from, inter alia, recitals 6 and 7 thereof, the purpose of Directive 2002/58 is to protect users of electronic communications services from risks for their personal data and privacy resulting from new technologies and, in particular, from the increasing capacity for automated storage and processing of data. In particular, that directive seeks, as is stated in recital 2 thereof, to ensure that the rights set out in Articles 7 and 8 of the Charter are fully respected. In that regard, it is apparent from the Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the

Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM (2000) 385 final), which gave rise to Directive 2002/58, that the EU legislature sought to 'ensure that a high level of protection of personal data and privacy will continue to be guaranteed for all electronic communications services regardless of the technology used'.

107 To that end, Article 5(1) of Directive 2002/58 enshrines the principle of confidentiality of both electronic communications and the related traffic data and requires, inter alia, that, in principle, persons other than users be prohibited from storing, without those users' consent, those communications and that data.

108 As regards, in particular, the processing and storage of traffic data by providers of electronic communications services, it is apparent from Article 6 and recitals 22 and 26 of Directive 2002/58 that such processing is permitted only to the extent necessary and for the time necessary for the marketing and billing of services and the provision of value added services. Once that period has elapsed, the data that has been processed and stored must be erased or made anonymous. As regards location data other than traffic data, Article 9(1) of that directive provides that that data may be processed only subject to certain conditions and after it has been made anonymous or the consent of the users or subscribers has been obtained (judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 86 and the case-law cited).

109 Thus, in adopting that directive, the EU legislature gave concrete expression to the rights enshrined in Articles 7 and 8 of the Charter, so that the users of electronic communications services are entitled to expect, in principle, that their communications and data relating thereto will remain anonymous and may not be recorded, unless they have agreed otherwise.

110 However, Article 15(1) of Directive 2002/58 enables the Member States to introduce exceptions to the obligation of principle, laid down in Article 5(1) of that directive, to ensure the confidentiality of personal data, and to the corresponding obligations, referred to, inter alia, in Articles 6 and 9 of that directive, where such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence and public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system. To that end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on one of those grounds.

111 That being said, the option to derogate from the rights and obligations laid down in Articles 5, 6 and 9 of Directive 2002/58 cannot permit the exception to the obligation of principle to ensure the confidentiality of electronic communications and data relating thereto and, in particular, to the prohibition on storage of that data, explicitly laid down in Article 5 of that directive, to become the rule (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraphs 89 and 104).

112 As regards the objectives that are capable of justifying a limitation of the rights and obligations laid down, in particular, in Articles 5, 6 and 9 of Directive 2002/58, the Court has previously held that the list of objectives set out in the first sentence of Article 15(1) of that directive is exhaustive, as a result of which a legislative measure adopted under that provision must correspond, genuinely and strictly, to one of those objectives (see, to that effect, judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 52 and the case-law cited).

113 In addition, it is apparent from the third sentence of Article 15(1) of Directive 2002/58 that the Member States are not permitted to adopt legislative measures to restrict the scope of the rights and obligations provided for in Articles 5, 6 and 9 of that directive unless they do so in accordance with the general principles of EU law, including the principle of proportionality, and with the fundamental rights guaranteed in the Charter. In that regard, the Court has previously held that the obligation imposed on providers of electronic communications services by a Member State by way of national legislation to retain traffic data for the purpose of making them available, if necessary, to the competent national authorities raises issues relating to compatibility not only with Articles 7 and 8 of the Charter, relating to the protection of privacy and to the protection of personal data, respectively, but also with Article 11 of the Charter, relating to the freedom of expression (see, to that effect, judgments of 8 April

2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 25 and 70, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraphs 91and 92 and the case-law cited).

114 Thus, the interpretation of Article 15(1) of Directive 2002/58 must take account of the importance both of the right to privacy, guaranteed in Article 7 of the Charter, and of the right to protection of personal data, guaranteed in Article 8 thereof, as derived from the case-law of the Court, as well as the importance of the right to freedom of expression, given that that fundamental right, guaranteed in Article 11 of the Charter, constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded (see, to that effect, judgments of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 39, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 93 and the case-law cited).

115 It should be made clear, in that regard, that the retention of traffic and location data constitutes, in itself, on the one hand, a derogation from the prohibition laid down in Article 5(1) of Directive 2002/58 barring any person other than the users from storing that data, and, on the other, an interference with the fundamental rights to respect for private life and the protection of personal data, enshrined in Articles 7 and 8 of the Charter, irrespective of whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraphs 124 and 126 and the case-law cited; see, by analogy, as regards Article 8 of the ECHR, ECtHR, 30 January 2020, *Breyer v. Germany*, CE:ECHR:2020:0130JUD005000112, § 81).

116 Whether or not the retained data has been used subsequently is also irrelevant (see, by analogy, as regards Article 8 of the ECHR, ECtHR, 16 February 2000, *Amann v. Switzerland*, CE:ECHR:2000:0216JUD002779895, § 69, and 13 February 2020, *Trajkovski and Chipovski v. North Macedonia*, CE:ECHR:2020:0213JUD005320513, § 51), since access to such data is a separate interference with the fundamental rights referred to in the preceding paragraph, irrespective of the subsequent use made of it (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraphs 124 and 126).

117 That conclusion is all the more justified since traffic and location data may reveal information on a significant number of aspects of the private life of the persons concerned, including sensitive information such as sexual orientation, political opinions, religious, philosophical, societal or other beliefs and state of health, given that such data moreover enjoys special protection under EU law. Taken as a whole, that data may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them. In particular, that data provides the means of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications (see, to that effect, judgments of 8 April 2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 27, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 99).

118 Therefore, first, the retention of traffic and location data for policing purposes is liable, in itself, to infringe the right to respect for communications, enshrined in Article 7 of the Charter, and to deter users of electronic communications systems from exercising their freedom of expression, guaranteed in Article 11 of the Charter (see, to that effect, judgments of 8 April 2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 28, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 101). Such deterrence may affect, in particular, persons whose communications are subject, according to national rules, to the obligation of professional secrecy and whistleblowers whose actions are protected by Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17). Moreover, that deterrent effect is all the more serious given the quantity and breadth of data retained.

119 Second, in view of the significant quantity of traffic and location data that may be continuously retained under a general and indiscriminate retention measure, as well as the sensitive nature of the information that may be gleaned from that data, the mere retention of such data by providers of electronic communications services entails a risk of abuse and unlawful access.

120 That being said, in so far as Article 15(1) of Directive 2002/58 allows Member States to introduce the derogations referred to in paragraph 110 above, that provision reflects the fact that the rights enshrined in Articles 7, 8 and 11 of the Charter are not absolute rights, but must be considered in relation to their function in society (see, to that effect, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 172 and the case-law cited).

121 Indeed, as can be seen from Article 52(1) of the Charter, that provision allows limitations to be placed on the exercise of those rights, provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

122 Thus, in order to interpret Article 15(1) of Directive 2002/58 in the light of the Charter, account must also be taken of the importance of the rights enshrined in Articles 3, 4, 6 and 7 of the Charter and of the importance of the objectives of protecting national security and combating serious crime in contributing to the protection of the rights and freedoms of others.

123 In that regard, Article 6 of the Charter, to which the Conseil d'État (Council of State, France) and the Cour constitutionnelle (Constitutional Court, Belgium) refer, lays down the right of every individual not only to liberty but also to security and guarantees rights corresponding to those guaranteed in Article 5 of the ECHR (see, to that effect, judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 47; of 28 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 48; and of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraph 42 and the case-law cited).

124 In addition, it should be recalled that Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union. Account must therefore be taken of the corresponding rights of the ECHR for the purpose of interpreting the Charter, as the minimum threshold of protection (see, to that effect, judgments of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, paragraph 57, and of 21 May 2019, *Commission* v *Hungary (Rights of usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72 and the case-law cited).

125 Article 5 of the ECHR, which enshrines the 'right to liberty' and the 'right to security', is intended, according to the case-law of the European Court of Human Rights, to ensure that individuals are protected from arbitrary or unjustified deprivations of liberty (see, to that effect, ECtHR, 18 March 2008, *Ladent v. Poland*, CE:ECHR:2008:0318JUD001103603, §§ 45 and 46; 29 March 2010, *Medvedyev and Others v. France*, CE:ECHR:2010:0329JUD000339403, §§ 76 and 77; and 13 December 2012, *El-Masri v. 'The former Yugoslav Republic of Macedonia'*, CE:ECHR:2012:1213JUD003963009, § 239). However, since that provision applies to deprivations of liberty by a public authority, Article 6 of the Charter cannot be interpreted as imposing an obligation on public authorities to take specific measures to prevent and punish certain criminal offences.

126 On the other hand, as regards, in particular, effective action to combat criminal offences committed against, inter alia, minors and other vulnerable persons, mentioned by the Cour constitutionnelle (Constitutional Court, Belgium), it should be pointed out that positive obligations of the public authorities may result from Article 7 of the Charter, requiring them to adopt legal measures to protect private and family life (see, to that effect, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 123 and the case-law cited of the European Court of Human Rights). Such obligations may also arise from Article 7, concerning the protection of an individual's home and communications, and Articles 3 and 4, as regards the protection

of an individual's physical and mental integrity and the prohibition of torture and inhuman and degrading treatment.

127 It is against the backdrop of those different positive obligations that the Court must strike a balance between the various interests and rights at issue.

128 The European Court of Human Rights has held that the positive obligations flowing from Articles 3 and 8 of the ECHR, whose corresponding safeguards are set out in Articles 4 and 7 of the Charter, require, in particular, the adoption of substantive and procedural provisions as well as practical measures enabling effective action to combat crimes against the person through effective investigation and prosecution, that obligation being all the more important when a child's physical and moral well-being is at risk. However, the measures to be taken by the competent authorities must fully respect due process and the other safeguards limiting the scope of criminal investigation powers, as well as other freedoms and rights. In particular, according to that court, a legal framework should be established enabling a balance to be struck between the various interests and rights to be protected (ECtHR, 28 October 1998, *Osman v. United Kingdom*, CE:ECHR:1998:1028JUD002345294, §§ 115 and 116; 4 March 2004, *M.C. v. Bulgaria*, CE:ECHR:2003:1204JUD003927298, § 151; 24 June 2004, *Von Hannover v. Germany*, CE:ECHR:2004:0624JUD005932000, §§ 57 and 58; and 2 December 2008, *K.U. v. Finland*, CE:ECHR:2008:1202JUD000287202, §§ 46, 48 and 49).

129 Concerning observance of the principle of proportionality, the first sentence of Article 15(1) of Directive 2002/58 provides that the Member States may adopt a measure derogating from the principle that communications and the related traffic data are to be confidential where such a measure is 'necessary, appropriate and proportionate … within a democratic society', in view of the objectives set out in that provision. Recital 11 of that directive specifies that a measure of that nature must be 'strictly' proportionate to the intended purpose.

130 In that regard, it should be borne in mind that the protection of the fundamental right to privacy requires, according to the settled case-law of the Court, that derogations from and limitations on the protection of personal data must apply only in so far as is strictly necessary. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue (see, to that effect, judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 56; of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 76, 77 and 86; and of 8 April 2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52; Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 140).

131 Specifically, it follows from the Court's case-law that the question whether the Member States may justify a limitation on the rights and obligations laid down, inter alia, in Articles 5, 6 and 9 of Directive 2002/58 must be assessed by measuring the seriousness of the interference entailed by such a limitation and by verifying that the importance of the public interest objective pursued by that limitation is proportionate to that seriousness (see, to that effect, judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 55 and the case-law cited).

132 In order to satisfy the requirement of proportionality, the legislation must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose personal data is affected have sufficient guarantees that data will be effectively protected against the risk of abuse. That legislation must be legally binding under domestic law and, in particular, must indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater where personal data is subjected to automated processing, particularly where there is a significant risk of unlawful access to that data. Those considerations apply especially where the protection of the particular category of personal data that is sensitive data is at stake (see, to that effect, judgments of 8 April 2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 54 and 55, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 117; Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 141).

133 Thus, legislation requiring the retention of personal data must always meet objective criteria that establish a connection between the data to be retained and the objective pursued (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 191 and the case-law cited, and judgment of 3 October 2019, *A and Others*, C-70/18, EU:C:2019:823, paragraph 63).

– *Legislative measures providing for the preventive retention of traffic and location data for the purpose of safeguarding national security*

134 It should be observed that the objective of safeguarding national security, mentioned by the referring courts and the governments which submitted observations, has not yet been specifically examined by the Court in its judgments interpreting Directive 2002/58.

135 In that regard, it should be noted, at the outset, that Article 4(2) TEU provides that national security remains the sole responsibility of each Member State. That responsibility corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society and encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities.

136 The importance of the objective of safeguarding national security, read in the light of Article 4(2) TEU, goes beyond that of the other objectives referred to in Article 15(1) of Directive 2002/58, inter alia the objectives of combating crime in general, even serious crime, and of safeguarding public security. Threats such as those referred to in the preceding paragraph can be distinguished, by their nature and particular seriousness, from the general risk that tensions or disturbances, even of a serious nature, affecting public security will arise. Subject to meeting the other requirements laid down in Article 52(1) of the Charter, the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives.

137 Thus, in situations such as those described in paragraphs 135 and 136 of the present judgment, Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, does not, in principle, preclude a legislative measure which permits the competent authorities to order providers of electronic communications services to retain traffic and location data of all users of electronic communications systems for a limited period of time, as long as there are sufficiently solid grounds for considering that the Member State concerned is confronted with a serious threat, as referred to in paragraphs 135 and 136 of the present judgment, to national security which is shown to be genuine and present or foreseeable. Even if such a measure is applied indiscriminately to all users of electronic communications systems, without there being at first sight any connection, within the meaning of the case-law cited in paragraph 133 of the present judgment, with a threat to the national security of that Member State, it must nevertheless be considered that the existence of that threat is, in itself, capable of establishing that connection.

138 The instruction for the preventive retention of data of all users of electronic communications systems must, however, be limited in time to what is strictly necessary. Although it is conceivable that an instruction requiring providers of electronic communications services to retain data may, owing to the ongoing nature of such a threat, be renewed, the duration of each instruction cannot exceed a foreseeable period of time. Moreover, such data retention must be subject to limitations and must be circumscribed by strict safeguards making it possible to protect effectively the personal data of the persons concerned against the risk of abuse. Thus, that retention cannot be systematic in nature.

139 In view of the seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter resulting from a measure involving the general and indiscriminate retention of data, it must be ensured that recourse to such a measure is in fact limited to situations in which there is a serious threat to national security as referred to in paragraphs 135 and 136 of the present judgment. For that purpose, it is essential that decisions giving an instruction to providers of electronic communications services to carry out such data retention be subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being

to verify that one of those situations exists and that the conditions and safeguards which must be laid down are observed.

– *Legislative measures providing for the preventive retention of traffic and location data for the purposes of combating crime and safeguarding public security*

140 As regards the objective of preventing, investigating, detecting and prosecuting criminal offences, in accordance with the principle of proportionality, only action to combat serious crime and measures to prevent serious threats to public security are capable of justifying serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, such as the interference entailed by the retention of traffic and location data. Accordingly, only non-serious interference with those fundamental rights may be justified by the objective of preventing, investigating, detecting and prosecuting criminal offences in general (see, to that effect, judgments of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 102, and of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraphs 56 and 57; Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 149).

141 National legislation providing for the general and indiscriminate retention of traffic and location data for the purpose of combating serious crime exceeds the limits of what is strictly necessary and cannot be considered to be justified, within a democratic society, as required by Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 107).

142 In view of the sensitive nature of the information that traffic and location data may provide, the confidentiality of that data is essential for the right to respect for private life. Thus, having regard, first, to the deterrent effect on the exercise of the fundamental rights enshrined in Articles 7 and 11 of the Charter, referred to in paragraph 118 above, which is liable to result from the retention of that data, and, second, to the seriousness of the interference entailed by such retention, it is necessary, within a democratic society, that retention be the exception and not the rule, as provided for in the system established by Directive 2002/58, and that the data not be retained systematically and continuously. That conclusion applies even having regard to the objectives of combating serious crime and preventing serious threats to public security and to the importance to be attached to them.

143 In addition, the Court has emphasised that legislation providing for the general and indiscriminate retention of traffic and location data covers the electronic communications of practically the entire population without any differentiation, limitation or exception being made in the light of the objective pursued. Such legislation, in contrast to the requirement mentioned in paragraph 133 above, is comprehensive in that it affects all persons using electronic communications services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings. It therefore applies even to persons with respect to whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with that objective of combating serious crime and, in particular, without there being any relationship between the data whose retention is provided for and a threat to public security (see, to that effect, judgments of 8 April 2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57 and 58, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 105).

144 In particular, as the Court has previously held, such legislation is not restricted to retention in relation to (i) data pertaining to a time period and/or geographical area and/or a group of persons likely to be involved, in one way or another, in a serious crime, or (ii) persons who could, for other reasons, contribute, through their data being retained, to combating serious crime (see, to that effect, judgments of 8 April 2014, *Digital Rights*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 59, and of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 106).

145 Even the positive obligations of the Member States which may arise, depending on the circumstances, from Articles 3, 4 and 7 of the Charter and relating, as pointed out in paragraphs 126 and 128 of the present judgment, to the establishment of rules to facilitate effective action to combat criminal offences cannot have the effect of justifying interference that is as serious as that entailed by legislation providing for the retention of traffic and location data with the fundamental rights, enshrined in

Articles 7 and 8 of the Charter, of practically the entire population, without there being a link, at least an indirect one, between the data of the persons concerned and the objective pursued.

146 By contrast, in accordance with what has been stated in paragraphs 142 to 144 of the present judgment, and having regard to the balance that must be struck between the rights and interests at issue, the objectives of combating serious crime, preventing serious attacks on public security and, a fortiori, safeguarding national security are capable of justifying – given their importance, in the light of the positive obligations mentioned in the preceding paragraph to which the Cour constitutionnelle (Constitutional Court, Belgium), referred, inter alia – the particularly serious interference entailed by the targeted retention of traffic and location data.

147 Thus, as the Court has previously held, Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, does not prevent a Member State from adopting legislation permitting, as a preventive measure, the targeted retention of traffic and location data for the purposes of combating serious crime, preventing serious threats to public security and equally of safeguarding national security, provided that such retention is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 108).

148 As regards the limits to which such a data retention measure must be subject, these may, in particular, be determined according to the categories of persons concerned, since Article 15(1) of Directive 2002/58 does not preclude legislation based on objective evidence which makes it possible to target persons whose traffic and location data is likely to reveal a link, at least an indirect one, with serious criminal offences, to contribute in one way or another to combating serious crime or to preventing a serious risk to public security or a risk to national security (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 111).

149 In that regard, it must be made clear that the persons thus targeted may, in particular, be persons who have been identified beforehand, in the course of the applicable national procedures and on the basis of objective evidence, as posing a threat to public or national security in the Member State concerned.

150 The limits on a measure providing for the retention of traffic and location data may also be set using a geographical criterion where the competent national authorities consider, on the basis of objective and non-discriminatory factors, that there exists, in one or more geographical areas, a situation characterised by a high risk of preparation for or commission of serious criminal offences (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 111). Those areas may include places with a high incidence of serious crime, places that are particularly vulnerable to the commission of serious criminal offences, such as places or infrastructure which regularly receive a very high volume of visitors, or strategic locations, such as airports, stations or tollbooth areas.

151 In order to ensure that the interference entailed by the targeted retention measures described in paragraphs 147 to 150 of the present judgment complies with the principle of proportionality, their duration must not exceed what is strictly necessary in the light of the objective pursued and the circumstances justifying them, without prejudice to the possibility of extending those measures should such retention continue to be necessary.

– *Legislative measures providing for the preventive retention of IP addresses and data relating to civil identity for the purposes of combating crime and safeguarding public security*

152 It should be noted that although IP addresses are part of traffic data, they are generated independently of any particular communication and mainly serve to identify, through providers of electronic communications services, the natural person who owns the terminal equipment from which an Internet communication is made. Thus, in relation to email and Internet telephony, provided that only the IP addresses of the source of the communication are retained and not the IP addresses of the recipient of the communication, those addresses do not, as such, disclose any information about third parties who were in contact with the person who made the communication. That category of data is therefore less sensitive than other traffic data.

153 However, since IP addresses may be used, among other things, to track an Internet user's complete clickstream and, therefore, his or her entire online activity, that data enables a detailed profile of the user to be produced. Thus, the retention and analysis of those IP addresses which is required for such tracking constitute a serious interference with the fundamental rights of the Internet user enshrined in Articles 7 and 8 of the Charter, which may have a deterrent effect as mentioned in paragraph 118 of the present judgment.

154 In order to strike a balance between the rights and interests at issue as required by the case-law cited in paragraph 130 of the present judgment, account must be taken of the fact that, where an offence is committed online, the IP address might be the only means of investigation enabling the person to whom that address was assigned at the time of the commission of the offence to be identified. To that consideration must be added the fact that the retention of IP addresses by providers of electronic communications services beyond the period for which that data is assigned does not, in principle, appear to be necessary for the purpose of billing the services at issue, with the result that the detection of offences committed online may therefore prove impossible without recourse to a legislative measure under Article 15(1) of Directive 2002/58, something which several governments mentioned in their observations to the Court. As those governments argued, that may occur, inter alia, in cases involving particularly serious child pornography offences, such as the acquisition, dissemination, transmission or making available online of child pornography, within the meaning of Article 2(c) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 2011 L 335, p. 1).

155 In those circumstances, while it is true that a legislative measure providing for the retention of the IP addresses of all natural persons who own terminal equipment permitting access to the Internet would catch persons who at first sight have no connection, within the meaning of the case-law cited in paragraph 133 of the present judgment, with the objectives pursued, and it is also true, in accordance with what has been stated in paragraph 109 of the present judgment, that Internet users are entitled to expect, under Articles 7 and 8 of the Charter, that their identity will not, in principle, be disclosed, a legislative measure providing for the general and indiscriminate retention of only IP addresses assigned to the source of a connection does not, in principle, appear to be contrary to Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, provided that that possibility is subject to strict compliance with the substantive and procedural conditions which should regulate the use of that data.

156 In the light of the seriousness of the interference entailed by that retention with the fundamental rights enshrined in Articles 7 and 8 of the Charter, only action to combat serious crime, the prevention of serious threats to public security and the safeguarding of national security are capable of justifying that interference. Moreover, the retention period must not exceed what is strictly necessary in the light of the objective pursued. Finally, a measure of that nature must establish strict conditions and safeguards concerning the use of that data, particularly via tracking, with regard to communications made and activities carried out online by the persons concerned.

157 Concerning, last, data relating to the civil identity of users of electronic communications systems, that data does not, in itself, make it possible to ascertain the date, time, duration and recipients of the communications made, or the locations where those communications took place or their frequency with specific people during a given period, with the result that it does not provide, apart from the contact details of those users, such as their addresses, any information on the communications sent and, consequently, on the users' private lives. Thus, the interference entailed by the retention of that data cannot, in principle, be classified as serious (see, to that effect, judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraphs 59 and 60).

158 It follows that, in accordance with what has been stated in paragraph 140 of the present judgment, legislative measures concerning the processing of that data as such, including the retention of and access to that data solely for the purpose of identifying the user concerned, and without it being possible for that data to be associated with information on the communications made, are capable of being justified by the objective of preventing, investigating, detecting and prosecuting criminal

offences in general, to which the first sentence of Article 15(1) of Directive 2002/58 refers (see, to that effect, judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 62).

159 In those circumstances, having regard to the balance that must be struck between the rights and interests at issue, and for the reasons set out in paragraphs 131 and 158 of the present judgment, it must be held that, even in the absence of a connection between all users of electronic communications systems and the objectives pursued, Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, does not preclude a legislative measure which requires providers of electronic communications services, without imposing a specific time limit, to retain data relating to the civil identity of all users of electronic communications systems for the purposes of preventing, investigating, detecting and prosecuting criminal offences and safeguarding public security, there being no need for the criminal offences or the threats to or acts having adverse effects on public security to be serious.

– *Legislative measures providing for the expedited retention of traffic and location data for the purpose of combating serious crime*

160 With regard to traffic and location data processed and stored by providers of electronic communications services on the basis of Articles 5, 6 and 9 of Directive 2002/58 or on the basis of legislative measures taken under Article 15(1) of that directive, as described in paragraphs 134 to 159 of the present judgment, it should be noted that that data must, in principle, be erased or made anonymous, depending on the circumstances, at the end of the statutory periods within which that data must be processed and stored in accordance with the national provisions transposing that directive.

161 However, during that processing and storage, situations may arise in which it becomes necessary to retain that data after those time periods have ended in order to shed light on serious criminal offences or acts adversely affecting national security; this is the case both in situations where those offences or acts having adverse effects have already been established and where, after an objective examination of all of the relevant circumstances, such offences or acts having adverse effects may reasonably be suspected.

162 In that regard, the Council of Europe's Convention on Cybercrime of 23 November 2001 (European Treaty Series – No. 185), which was signed by the 27 Member States and ratified by 25 of them and has as its objective to facilitate the fight against criminal offences committed using computer networks, provides, in Article 14, that the parties to the convention are to adopt, for the purpose of specific criminal investigations or proceedings, certain measures concerning traffic data already stored, such as the expedited preservation of that data. In particular, Article 16(1) of that convention stipulates that the parties to that convention are to adopt such legislative measures as may be necessary to enable their competent authorities to order or similarly obtain the expedited preservation of traffic data that has been stored by means of a computer system, in particular where there are grounds to believe that that data is particularly vulnerable to loss or modification.

163 In a situation such as the one described in paragraph 161 of the present judgment, in the light of the balance that must be struck between the rights and interests at issue referred to in paragraph 130 of the present judgment, it is permissible for Member States to provide, in legislation adopted pursuant to Article 15(1) of Directive 2002/58, for the possibility of instructing, by means of a decision of the competent authority which is subject to effective judicial review, providers of electronic communications services to undertake the expedited retention of traffic and location data at their disposal for a specified period of time.

164 To the extent that the purpose of such expedited retention no longer corresponds to the purpose for which that data was initially collected and retained and since any processing of data must, under Article 8(2) of the Charter, be consistent with specified purposes, Member States must make clear, in their legislation, for what purpose the expedited retention of data may occur. In the light of the serious nature of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter which such retention may entail, only action to combat serious crime and, a fortiori, the safeguarding of national security are such as to justify such interference. Moreover, in order to ensure that the interference entailed by a measure of that kind is limited to what is strictly necessary, first, the retention

obligation must relate only to traffic and location data that may shed light on the serious criminal offences or the acts adversely affecting national security concerned. Second, the duration for which such data is retained must be limited to what is strictly necessary, although that duration can be extended where the circumstances and the objective pursued by that measure justify doing so.

165 In that regard, such expedited retention need not be limited to the data of persons specifically suspected of having committed a criminal offence or acts adversely affecting national security. While it must comply with the framework established by Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, and taking into account the findings in paragraph 133 above, such a measure may, at the choice of the legislature and subject to the limits of what is strictly necessary, be extended to traffic and location data relating to persons other than those who are suspected of having planned or committed a serious criminal offence or acts adversely affecting national security, provided that that data can, on the basis of objective and non-discriminatory factors, shed light on such an offence or acts adversely affecting national security, such as data concerning the victim thereof, his or her social or professional circle, or even specified geographical areas, such as the place where the offence or act adversely affecting national security at issue was committed or prepared. Additionally, the competent authorities must be given access to the data thus retained in observance of the conditions that emerge from the case-law on how Directive 2002/58 is to be interpreted (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraphs 118 to 121 and the case-law cited).

166 It should also be added that, as is clear, in particular, from paragraphs 115 and 133 above, access to traffic and location data retained by providers in accordance with a measure taken under Article 15(1) of Directive 2002/58 may, in principle, be justified only by the public interest objective for which those providers were ordered to retain that data. It follows, in particular, that access to such data for the purpose of prosecuting and punishing an ordinary criminal offence may in no event be granted where the retention of such data has been justified by the objective of combating serious crime or, a fortiori, by the objective of safeguarding national security. However, in accordance with the principle of proportionality, as mentioned in paragraph 131 above, access to data retained for the purpose of combating serious crime may, provided that the substantive and procedural conditions associated with such access referred to in the previous paragraph are observed, be justified by the objective of safeguarding national security.

167 In that regard, it is permissible for Member States to specify in their legislation that access to traffic and location data may, subject to those same substantive and procedural conditions, be permitted for the purpose of combating serious crime or safeguarding national security where that data is retained by a provider in a manner that is consistent with Articles 5, 6 and 9 or Article 15(1) of Directive 2002/58.

168 In the light of all of the above considerations, the answer to question 1 in Cases C-511/18 and C-512/18 and questions 1 and 2 in Case C-520/18 is that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding legislative measures which, for the purposes laid down in Article 15(1), provide, as a preventive measure, for the general and indiscriminate retention of traffic and location data. By contrast, Article 15(1), read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, does not preclude legislative measures that:

– allow, for the purposes of safeguarding national security, recourse to an instruction requiring providers of electronic communications services to retain, generally and indiscriminately, traffic and location data in situations where the Member State concerned is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable, where the decision imposing such an instruction is subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that one of those situations exists and that the conditions and safeguards which must be laid down are observed, and where that instruction may be given only for a period that is limited in time to what is strictly necessary, but which may be extended if that threat persists;

– provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the targeted retention of traffic and location data

which is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended;

– provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the general and indiscriminate retention of IP addresses assigned to the source of an Internet connection for a period that is limited in time to what is strictly necessary;

– provide, for the purposes of safeguarding national security, combating crime and safeguarding public security, for the general and indiscriminate retention of data relating to the civil identity of users of electronic communications systems;

– allow, for the purposes of combating serious crime and, a fortiori, safeguarding national security, recourse to an instruction requiring providers of electronic communications services, by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention of traffic and location data in the possession of those service providers,

provided that those measures ensure, by means of clear and precise rules, that the retention of data at issue is subject to compliance with the applicable substantive and procedural conditions and that the persons concerned have effective safeguards against the risks of abuse.

Questions 2 and 3 in Case C-511/18

169 By questions 2 and 3 in Case C-511/18, the referring court asks, in essence, whether Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding national legislation which requires providers of electronic communications services to implement, on their networks, measures allowing, first, the automated analysis and real-time collection of traffic and location data and, second, real-time collection of technical data concerning the location of the terminal equipment used, but which makes no provision for the persons concerned by that processing and that collection to be notified thereof.

170 The referring court notes that the intelligence gathering techniques provided for in Articles L. 851-2 to L. 851-4 of the CSI do not impose on providers of electronic communications services a specific obligation to retain traffic and location data. With regard, in particular, to the automated analysis referred to in Article L. 851-3 of the CSI, the referring court observes that the aim of that processing is to detect, according to criteria established for that purpose, links that might constitute a terrorist threat. As for the real-time collection referred to in Article L. 851-2 of the CSI, that court notes that such collection concerns exclusively one or more persons who have been identified in advance as potentially having a link to a terrorist threat. According to that same court, those two techniques may be implemented only with a view to preventing terrorism and cover the data referred to in Articles L. 851-1 and R. 851-5 of the CSI.

171 As a preliminary point, it should be noted that the fact that, according to Article L. 851-3 of the CSI, the automated analysis that it provides for does not, as such, allow the users whose data is being analysed to be identified, does not prevent such data from being classified as ‘personal data’. Since the procedure provided for in point IV of that provision allows the person or persons concerned by the data, the automated analysis of which has shown that there may be a terrorist threat, to be identified at a later stage, all persons whose data has been the subject of automated analysis can still be identified from that data. According to the definition of personal data in Article 4(1) of Regulation 2016/679, information relating, inter alia, to an identifiable person constitutes personal data.

Automated analysis of traffic and location data

172 It is clear from Article L. 851-3 of the CSI that the automated analysis for which it provides corresponds, in essence, to a screening of all the traffic and location data retained by providers of electronic communications services, which is carried out by those providers at the request of the competent national authorities applying the parameters set by the latter. It follows that all data of users

of electronic communications systems is verified if it corresponds to those parameters. Therefore, such automated analysis must be considered as involving, for the providers of electronic communications services concerned, the undertaking on behalf of the competent authority of general and indiscriminate processing, in the form of the use of that data with the assistance of an automated operation, within the meaning of Article 4(2) of Regulation 2016/679, covering all traffic and location data of all users of electronic communications systems. That processing is independent of the subsequent collection of data relating to the persons identified following that automated analysis, such collection being authorised on the basis of Article L. 851-3, IV, of the CSI.

173 National legislation authorising such automated analysis of traffic and location data derogates from the obligation of principle, established in Article 5 of Directive 2002/58, to ensure the confidentiality of electronic communications and related data. Such legislation also constitutes interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, regardless of how that data is used subsequently. Finally, as was stated in the case-law cited in paragraph 118 of the present judgment, such legislation is likely to have a deterrent effect on the exercise of freedom of expression, which is enshrined in Article 11 of the Charter.

174 Moreover, the interference resulting from the automated analysis of traffic and location data, such as that at issue in the main proceedings, is particularly serious since it covers, generally and indiscriminately, the data of persons using electronic communication systems. That finding is all the more justified given that, as is clear from the national legislation at issue in the main proceedings, the data that is the subject of the automated analysis is likely to reveal the nature of the information consulted online. In addition, such automated analysis is applied generally to all persons who use electronic communication systems and, consequently, applies also to persons with respect to whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with terrorist activities.

175 With regard to the justification for such interference, the requirement, established in Article 52(1) of the Charter, that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits that interference with those rights must itself define the scope of the limitation on the exercise of the right concerned (see, to that effect, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 175 and the case-law cited).

176 In addition, in order to meet the requirement of proportionality recalled in paragraphs 130 and 131 of the present judgment, according to which derogations from and limitations on the protection of personal data must apply only in so far as is strictly necessary, national legislation governing the access of the competent authorities to retained traffic and location data must comply with the requirements that emerge from the case-law cited in paragraph 132 of the present judgment. In particular, such legislation cannot be limited to requiring that the authorities' access to such data should correspond to the objective pursued by that legislation, but must also lay down the substantive and procedural conditions governing that use (see, by analogy, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 192 and the case-law cited).

177 In that regard, it should be noted that the particularly serious interference that is constituted by the general and indiscriminate retention of traffic and location data, as referred to in the findings in paragraphs 134 to 139 of the present judgment, and the particularly serious interference constituted by the automated analysis of that data can meet the requirement of proportionality only in situations in which a Member State is facing a serious threat to national security which is shown to be genuine and present or foreseeable, and provided that the duration of that retention is limited to what is strictly necessary.

178 In situations such as those referred to in the previous paragraph, the implementation of automated analysis of the traffic and location data of all users of electronic communications systems, for a strictly limited period, may be considered to be justified in the light of the requirements stemming from Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter.

179 That being said, in order to guarantee that such a measure is actually limited to what is strictly necessary in order to protect national security and, more particularly, to prevent terrorism, in accordance with what was held in paragraph 139 of the present judgment, it is essential that the decision authorising automated analysis be subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that a situation justifying that measure exists and that the conditions and safeguards that must be laid down are observed.

180 In that regard, it should be noted that the pre-established models and criteria on which that type of data processing are based should be, first, specific and reliable, making it possible to achieve results identifying individuals who might be under a reasonable suspicion of participation in terrorist offences and, second, should be non-discriminatory (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 172).

181 In addition, it must be noted that any automated analysis carried out on the basis of models and criteria founded on the premiss that racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or information about a person's health or sex life could, in themselves and regardless of the individual conduct of that person, be relevant in order to prevent terrorism would infringe the rights guaranteed in Articles 7 and 8 of the Charter, read in conjunction with Article 21 thereof. Therefore, pre-established models and criteria for the purposes of an automated analysis that has as its objective the prevention of terrorist activities that constitute a serious threat to national security cannot be based on that sensitive data in isolation (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 165).

182 Furthermore, since the automated analyses of traffic and location data necessarily involve some margin of error, any positive result obtained following automated processing must be subject to an individual re-examination by non-automated means before an individual measure adversely affecting the persons concerned is adopted, such as the subsequent real-time collection of traffic and location data, since such a measure cannot be based solely and decisively on the result of automated processing. Similarly, in order to ensure that, in practice, the pre-established models and criteria, the use that is made of them and the databases used are not discriminatory and are limited to that which is strictly necessary in the light of the objective of preventing terrorist activities that constitute a serious threat to national security, a regular re-examination should be undertaken to ensure that those pre-established models and criteria and the databases used are reliable and up to date (see, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraphs 173 and 174).

Real-time collection of traffic and location data

183 The real-time collection of traffic and location data referred to in Article L. 851-2 of the CSI may be individually authorised in respect of a 'person previously identified as potentially having links to a [terrorist] threat'. Moreover, according to that description, and 'where there are substantial grounds for believing that one or more persons belonging to the circle of the person to whom the authorisation relates are capable of providing information in respect of the purpose for which the authorisation was granted, authorisation may also be granted individually for each of those persons'.

184 The data that is the subject of such a measure allows the national competent authorities to monitor, for the duration of the authorisation, continuously and in real time, the persons with whom those persons are communicating, the means that they use, the duration of their communications and their places of residence and movements. It may also reveal the type of information consulted online. Taken as a whole, as is clear from paragraph 117 of the present judgment, that data makes it possible to draw very precise conclusions concerning the private lives of the persons concerned and provides the means to establish a profile of the individuals concerned, information that is no less sensitive, from the perspective of the right to privacy, than the actual content of communications.

185 With regard to the real-time collection of data referred to in Article L. 851-4 of the CSI, that provision authorises technical data concerning the location of terminal equipment to be collected and transmitted in real time to a department reporting to the Prime Minister. It appears that such data allows the

department responsible, at any moment throughout the duration of that authorisation, to locate, continuously and in real time, the terminal equipment used, such as mobile telephones.

186 Like national legislation authorising the automated analysis of data, national legislation authorising such real-time collection derogates from the obligation of principle, established in Article 5 of Directive 2002/58, to ensure the confidentiality of electronic communications and related data. It therefore also constitutes interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter and is likely to have a deterrent effect on the exercise of freedom of expression, which is guaranteed in Article 11 of the Charter.

187 It must be emphasised that the interference constituted by the real-time collection of data that allows terminal equipment to be located appears particularly serious, since that data provides the competent national authorities with a means of accurately and permanently tracking the movements of users of mobile telephones. To the extent that that data must therefore be considered to be particularly sensitive, real-time access by the competent authorities to such data must be distinguished from non-real-time access to that data, the first being more intrusive in that it allows for monitoring of those users that is virtually total (see, by analogy, with regard to Article 8 of the ECHR, ECtHR, 8 February 2018, *Ben Faiza v. France* CE:ECHR:2018:0208JUD003144612, § 74). The seriousness of that interference is further aggravated where the real-time collection also extends to the traffic data of the persons concerned.

188 Although the objective of preventing terrorism pursued by the national legislation at issue in the main proceedings is liable, given its importance, to justify interference in the form of the real-time collection of traffic and location data, such a measure may be implemented, taking into account its particularly intrusive nature, only in respect of persons with respect to whom there is a valid reason to suspect that they are involved in one way or another in terrorist activities. With regard to persons falling outside of that category, they may only be the subject of non-real-time access, which may occur, in accordance with the Court's case-law, only in particular situations, such as those involving terrorist activities, and where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating terrorism (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 119 and the case-law cited).

189 In addition, a decision authorising the real-time collection of traffic and location data must be based on objective criteria provided for in the national legislation. In particular, that legislation must define, in accordance with the case-law cited in paragraph 176 of the present judgment, the circumstances and conditions under which such collection may be authorised and must provide that, as was pointed out in the previous paragraph, only persons with a link to the objective of preventing terrorism may be subject to such collection. In addition, a decision authorising the real-time collection of traffic and location data must be based on objective and non-discriminatory criteria provided for in national legislation. In order to ensure, in practice, that those conditions are observed, it is essential that the implementation of the measure authorising real-time collection be subject to a prior review carried out either by a court or by an independent administrative body whose decision is binding, with that court or body having to satisfy itself, inter alia, that such real-time collection is authorised only within the limits of what is strictly necessary (see, to that effect, judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 120). In cases of duly justified urgency, the review must take place within a short time.

Notification of persons whose data has been collected or analysed

190 The competent national authorities undertaking real-time collection of traffic and location data must notify the persons concerned, in accordance with the applicable national procedures, to the extent that and as soon as that notification is no longer liable to jeopardise the tasks for which those authorities are responsible. That notification is, indeed, necessary to enable the persons affected to exercise their rights under Articles 7 and 8 of the Charter to request access to their personal data that has been the subject of those measures and, where appropriate, to have the latter rectified or erased, as well as to avail themselves, in accordance with the first paragraph of Article 47 of the Charter, of an effective remedy before a tribunal, that right indeed being explicitly guaranteed in Article 15(2) of Directive 2002/58, read in conjunction with Article 79(1) of Regulation 2016/679 (see, to that effect, judgment

of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 121 and the case-law cited, and Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraphs 219 and 220).

191 With regard to the notification required in the context of automated analysis of traffic and location data, the competent national authority is obliged to publish information of a general nature relating to that analysis without having to notify the persons concerned individually. However, if the data matches the parameters specified in the measure authorising automated analysis and that authority identifies the person concerned in order to analyse in greater depth the data concerning him or her, it is necessary to notify that person individually. That notification must, however, occur only to the extent that and as soon as it is no longer liable to jeopardise the tasks for which those authorities are responsible (see, by analogy, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraphs 222 and 224).

192 In the light of all the foregoing, the answer to questions 2 and 3 in Case C-511/18 is that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as not precluding national rules which requires providers of electronic communications services to have recourse, first, to the automated analysis and real-time collection, inter alia, of traffic and location data and, second, to the real-time collection of technical data concerning the location of the terminal equipment used, where:

– recourse to automated analysis is limited to situations in which a Member State is facing a serious threat to national security which is shown to be genuine and present or foreseeable, and where recourse to such analysis may be the subject of an effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that a situation justifying that measure exists and that the conditions and safeguards that must be laid down are observed; and where

– recourse to the real-time collection of traffic and location data is limited to persons in respect of whom there is a valid reason to suspect that they are involved in one way or another in terrorist activities and is subject to a prior review carried out either by a court or by an independent administrative body whose decision is binding in order to ensure that such real-time collection is authorised only within the limits of what is strictly necessary. In cases of duly justified urgency, the review must take place within a short time.

Question 2 in Case C-512/18

193 By question 2 in Case C-512/18, the referring court seeks, in essence, to ascertain whether the provisions of Directive 2000/31, read in the light of Articles 6, 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding national legislation which requires providers of access to online public communication services and hosting service providers to retain, generally and indiscriminately, inter alia, personal data relating to those services.

194 While the referring court maintains that such services fall within the scope of Directive 2000/31 rather than within that of Directive 2002/58, it takes the view that Article 15(1) and (2) of Directive 2000/31, read in conjunction with Articles 12 and 14 of the same, does not, in itself, establish a prohibition in principle on data relating to content creation being retained, which can be derogated from only exceptionally. However, that court is uncertain whether that finding can be made given that the fundamental rights enshrined in Articles 6, 7, 8 and 11 of the Charter must necessarily be observed.

195 In addition, the referring court points out that its question is raised in reference to the obligation to retain provided for in Article 6 of the LCEN, read in conjunction with Decree No 2011-219. The data that must be retained by the service providers concerned on that basis includes, inter alia, data relating to the civil identity of persons who have used those services, such as their surname, forename, their associated postal addresses, their associated email or account addresses, their passwords and, where the subscription to the contract or account must be paid for, the type of payment used, the payment reference, the amount and the date and time of the transaction.

196 Furthermore, the data that is the subject of the obligation to retain covers the identifiers of subscribers, of connections and of terminal equipment used, the identifiers attributed to the content, the dates and times of the start and end of the connections and operations as well as the types of protocols used to connect to the service and transfer the content. Access to that data, which must be retained for one year, may be requested in the context of criminal and civil proceedings, in order to ensure compliance with the rules governing civil and criminal liability, and in the context of the intelligence collection measures to which Article L. 851-1 of the CSI applies.

197 In that regard, it should be noted that, in accordance with Article 1(2) of Directive 2000/31, that directive approximates certain national provisions on information society services that are referred to in Article 2(a) of that directive.

198 It is true that such services include those which are provided at a distance, by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of services, and normally in return for remuneration, such as services providing access to the Internet or to a communication network and hosting services (see, to that effect, judgments of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 40; of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, paragraph 34; of 15 September 2016, *Mc Fadden*, C-484/14, EU:C:2016:689, paragraph 55; and of 7 August 2018, *SNB-REACT*, C-521/17, EU:C:2018:639, paragraph 42 and the case-law cited).

199 However, Article 1(5) of Directive 2000/31 provides that that directive is not to apply to questions relating to information society services covered by Directives 95/46 and 97/66. In that regard, it is clear from recitals 14 and 15 of Directive 2000/31 that the protection of the confidentiality of communications and of natural persons with regard to the processing of personal data in the context of information society services are governed only by Directives 95/46 and 97/66, the latter of which prohibits, in Article 5 thereof, all forms of interception or surveillance of communications, in order to protect confidentiality.

200 Questions related to the protection of the confidentiality of communications and personal data must be assessed on the basis of Directive 2002/58 and Regulation 2016/679, which replaced Directive 97/66 and Directive 95/46 respectively, and it should be noted that the protection that Directive 2000/31 is intended to ensure cannot, in any event, undermine the requirements under Directive 2002/58 and Regulation 2016/679 (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 57).

201 The obligation imposed by the national legislation referred to in paragraph 195 of the present judgment on providers of access to online public communication services and hosting service providers requiring them to retain personal data relating to those services must, therefore – as the Advocate General proposed in point 141 of his Opinion in Joined Cases *La Quadrature du Net and Others* (C-511/18 and C-512/18, EU:C:2020:6) – be assessed on the basis of Directive 2002/58 or Regulation 2016/679.

202 Accordingly, depending on whether the provision of services covered by that national legislation falls within the scope of Directive 2002/58 or not, it is to be governed either by that directive, specifically by Article 15(1) thereof, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, or by Regulation 2016/679, specifically by Article 23(1) of that regulation, read in the light of the same articles of the Charter.

203 In the present instance, it is conceivable, as the European Commission submitted in its written observations, that some of the services to which the national legislation referred to in paragraph 195 of the present judgment is applicable constitute electronic communications services within the meaning of Directive 2002/58, which is for the referring court to verify.

204 In that regard, Directive 2002/58 covers electronic communications services that satisfy the conditions set out in Article 2(c) of Directive 2002/21, to which Article 2 of Directive 2002/58 refers and which defines an electronic communications service as ‘a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting’.

As regards information society services, such as those referred to in paragraphs 197 and 198 of the present judgment and covered by Directive 2000/31, they are electronic communications services to the extent that they consist wholly or mainly in the conveyance of signals on electronic communications networks (see, to that effect, judgment of 5 June 2019, *Skype Communications*, C-142/18, EU:C:2019:460, paragraphs 47 and 48).

205 Therefore, Internet access services, which appear to be covered by the national legislation referred to in paragraph 195 of the present judgment, constitute electronic communications services within the meaning of Directive 2002/21, as is confirmed by recital 10 of that directive (see, to that effect, judgment of 5 June 2019, *Skype Communications*, C-142/18, EU:C:2019:460, paragraph 37). That is also the case for web-based email services, which, it appears, could conceivably also fall under that national legislation, since, on a technical level, they also involve wholly or mainly the conveyance of signals on electronic communications networks (see, to that effect, judgment of 13 June 2019, *Google*, C-193/18, EU:C:2019:498, paragraphs 35 and 38).

206 With regard to the requirements resulting from Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, it is appropriate to refer back to all of the findings and assessments made in the context of the answer given to question 1 in each of Cases C-511/18 and C-512/18 and to questions 1 and 2 in Case C-520/18.

207 As regards the requirements stemming from Regulation 2016/679, it should be noted that the purpose of that regulation is, inter alia, as is apparent from recital 10 thereof, to ensure a high level of protection of natural persons within the European Union and, to that end, to ensure a consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of such natural persons with regard to the processing of personal data throughout the European Union (see, to that effect, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 101).

208 To that end, any processing of personal data must, subject to the derogations permitted in Article 23 of Regulation 2016/679, observe the principles governing the processing of personal data and the rights of the person concerned set out, respectively, in Chapters II and III of that regulation. In particular, any processing of personal data must, first, comply with the principles set out in Article 5 of that regulation and, second, satisfy the lawfulness conditions listed in Article 6 of that regulation (see, by analogy, with regard to Directive 95/46, judgment of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 33 and the case-law cited).

209 With regard, more specifically, to Article 23(1) of Regulation 2016/679, that provision, much like Article 15(1) of Directive 2002/58, allows Member States to restrict, for the purposes of the objectives that it provides for and by means of legislative measures, the scope of the obligations and rights that are referred to therein ‘when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard’ the objective pursued. Any legislative measure adopted on that basis must, in particular, comply with the specific requirements set out in Article 23(2) of that regulation.

210 Accordingly, Article 23(1) and (2) of Regulation 2016/679 cannot be interpreted as being capable of conferring on Member States the power to undermine respect for private life, disregarding Article 7 of the Charter, or any of the other guarantees enshrined therein (see, by analogy, with regard to Directive 95/46, judgment of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 91). In particular, as is the case for Article 15(1) of Directive 2002/58, the power conferred on Member States by Article 23(1) of Regulation 2016/679 may be exercised only in accordance with the requirement of proportionality, according to which derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (see, by analogy, with regard to Directive 95/46, judgment of 7 November 2013, *IPI*, C-473/12, EU:C:2013:715, paragraph 39 and the case-law cited).

211 It follows that the findings and assessments made in the context of the answer given to question 1 in each of Cases C-511/18 and C-512/18 and to questions 1 and 2 in Case C-520/18 apply, *mutatis mutandis*, to Article 23 of Regulation 2016/679.

212 In the light of the foregoing, the answer to question 2 in Case C-512/18 is that Directive 2000/31 must be interpreted as not being applicable in the field of the protection of the confidentiality of communications and of natural persons as regards the processing of personal data in the context of information society services, such protection being governed by Directive 2002/58 or by Regulation 2016/679, as appropriate. Article 23(1) of Regulation 2016/679, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding national legislation which requires that providers of access to online public communication services and hosting service providers retain, generally and indiscriminately, inter alia, personal data relating to those services.

Question 3 in Case C-520/18

213 By question 3 in Case C-520/18, the referring court seeks, in essence, to ascertain whether a national court may apply a provision of national law empowering it to limit the temporal effects of a declaration of illegality which it is bound to make under that law in respect of national legislation imposing on providers of electronic communications services – with a view to, inter alia, pursuing the objectives of safeguarding national security and combating crime – an obligation requiring the general and indiscriminate retention of traffic and location data, owing to the fact that that legislation is incompatible with Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter.

214 The principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgments of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, pp. 593 and 594, and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 157 and 158 and the case-law cited).

215 In the light of the primacy principle, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means (judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 43 and the case-law cited; of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 58; and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 160).

216 Only the Court may, in exceptional cases, on the basis of overriding considerations of legal certainty, allow the temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. Such a restriction on the temporal effects of the interpretation of that law, made by the Court, may be granted only in the actual judgment ruling upon the interpretation requested (see, to that effect, judgments of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraphs 89 and 91; of 23 April 2020, *Herst*, C-401/18, EU:C:2020:295, paragraphs 56 and 57; and of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 84 and the case-law cited).

217 The primacy and uniform application of EU law would be undermined if national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily (see, to that effect, judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 177 and the case-law cited).

218 However, the Court has held, in a case concerning the lawfulness of measures adopted in breach of the obligation under EU law to conduct a prior assessment of the impact of a project on the environment and on a protected site, that if domestic law allows it, a national court may, by way of exception, maintain the effects of such measures where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of interruption in the electricity supply in the

Member State concerned, which cannot be remedied by any other means or alternatives, particularly in the context of the internal market, and continues only for as long as is strictly necessary to remedy the breach (see, to that effect, judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraphs 175, 176, 179 and 181).

219 However, unlike a breach of a procedural obligation such as the prior assessment of the impact of a project in the specific field of environmental protection, a failure to comply with Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, cannot be remedied by a procedure comparable to the procedure referred to in the preceding paragraph. Maintaining the effects of national legislation such as that at issue in the main proceedings would mean that the legislation would continue to impose on providers of electronic communications services obligations which are contrary to EU law and which seriously interfere with the fundamental rights of the persons whose data has been retained.

220 Therefore, the referring court cannot apply a provision of national law empowering it to limit the temporal effects of a declaration of illegality which it is bound to make under that law in respect of the national legislation at issue in the main proceedings.

221 That said, in their observations submitted to the Court, VZ, WY and XX contend that question 3 implicitly yet necessarily asks whether EU law precludes the use, in criminal proceedings, of information and evidence obtained as a result of the general and indiscriminate retention of traffic and location data in breach of that law.

222 In that regard, and in order to give a useful answer to the referring court, it should be recalled that, as EU law currently stands, it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment, in criminal proceedings against persons suspected of having committed serious criminal offences, of information and evidence obtained by such retention of data contrary to EU law.

223 The Court has consistently held that, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish, in accordance with the principle of procedural autonomy, procedural rules for actions intended to safeguard the rights that individuals derive from EU law, provided, however, that those rules are no less favourable than the rules governing similar domestic actions (the principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness) (see, to that effect, judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraphs 26 and 27; of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraphs 21 and 22 and the case-law cited; and of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 33).

224 As regards the principle of equivalence, it is for the national court hearing criminal proceedings based on information or evidence obtained in contravention of the requirements stemming from Directive 2002/58 to determine whether national law governing those proceedings lays down less favourable rules on the admissibility and use of such information and evidence than those governing information and evidence obtained in breach of domestic law.

225 As for the principle of effectiveness, it should be noted that the objective of national rules on the admissibility and use of information and evidence is, in accordance with the choices made by national law, to prevent information and evidence obtained unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences. That objective may be achieved under national law not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighting of such material, or by factoring in whether that material is unlawful when determining the sentence.

226 That said, it is apparent from the Court's case-law that in deciding whether to exclude information and evidence obtained in contravention of the requirements of EU law, regard must be had, in particular, to the risk of breach of the adversarial principle and, therefore, the right to a fair trial entailed by the admissibility of such information and evidence (see, to that effect, judgment of 10 April 2003, *Steffensen*, C-276/01, EU:C:2003:228, paragraphs 76 and 77). If a court takes the view that a party is not in a position to comment effectively on evidence pertaining to a field of which the judges have no

knowledge and is likely to have a preponderant influence on the findings of fact, it must find an infringement of the right to a fair trial and exclude that evidence to avoid such an infringement (see, to that effect, judgment of 10 April 2003, *Steffensen*, C-276/01, EU:C:2003:228, paragraphs 78 and 79).

227 Therefore, the principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.

228 In the light of the foregoing, the answer to question 3 in Case C-520/18 is that a national court may not apply a provision of national law empowering it to limit the temporal effects of a declaration of illegality, which it is bound to make under that law, in respect of national legislation imposing on providers of electronic communications services – with a view to, inter alia, safeguarding national security and combating crime – an obligation requiring the general and indiscriminate retention of traffic and location data that is incompatible with Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter. Article 15(1), interpreted in the light of the principle of effectiveness, requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.

Costs

229 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding legislative measures which, for the purposes laid down in Article 15(1), provide, as a preventive measure, for the general and indiscriminate retention of traffic and location data. By contrast, Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, does not preclude legislative measures that:

– **allow, for the purposes of safeguarding national security, recourse to an instruction requiring providers of electronic communications services to retain, generally and indiscriminately, traffic and location data in situations where the Member State concerned is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable, where the decision imposing such an instruction is subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that one of those situations exists and that the conditions and safeguards which must be laid down are observed, and where that instruction may be given only for a period that is limited in time to what is strictly necessary, but which may be extended if that threat persists;**

– **provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the targeted retention of traffic and location data which is limited, on the basis of objective and non-discriminatory factors, according to the categories**

of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended;

– **provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the general and indiscriminate retention of IP addresses assigned to the source of an Internet connection for a period that is limited in time to what is strictly necessary;**

– **provide, for the purposes of safeguarding national security, combating crime and safeguarding public security, for the general and indiscriminate retention of data relating to the civil identity of users of electronic communications systems;**

– **allow, for the purposes of combating serious crime and, a fortiori, safeguarding national security, recourse to an instruction requiring providers of electronic communications services, by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention of traffic and location data in the possession of those service providers,**

provided that those measures ensure, by means of clear and precise rules, that the retention of data at issue is subject to compliance with the applicable substantive and procedural conditions and that the persons concerned have effective safeguards against the risks of abuse.

2. Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, must be interpreted as not precluding national rules which requires providers of electronic communications services to have recourse, first, to the automated analysis and real-time collection, inter alia, of traffic and location data and, second, to the real-time collection of technical data concerning the location of the terminal equipment used, where:

– **recourse to automated analysis is limited to situations in which a Member State is facing a serious threat to national security which is shown to be genuine and present or foreseeable, and where recourse to such analysis may be the subject of an effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that a situation justifying that measure exists and that the conditions and safeguards that must be laid down are observed; and where**

– **recourse to the real-time collection of traffic and location data is limited to persons in respect of whom there is a valid reason to suspect that they are involved in one way or another in terrorist activities and is subject to a prior review carried out either by a court or by an independent administrative body whose decision is binding in order to ensure that such real-time collection is authorised only within the limits of what is strictly necessary. In cases of duly justified urgency, the review must take place within a short time.**

3. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), must be interpreted as not being applicable in the field of the protection of the confidentiality of communications and of natural persons as regards the processing of personal data in the context of information society services, such protection being governed by Directive 2002/58, as amended by Directive 2009/136, or by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, as appropriate. Article 23(1) of Regulation 2016/679, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, must be interpreted as precluding national legislation which requires that providers of access to online public communication services and hosting service providers retain, generally and indiscriminately, inter alia, personal data relating to those services.

4. **A national court may not apply a provision of national law empowering it to limit the temporal effects of a declaration of illegality, which it is bound to make under that law, in respect of national legislation imposing on providers of electronic communications services – with a view to, inter alia, safeguarding national security and combating crime – an obligation requiring the general and indiscriminate retention of traffic and location data that is incompatible with Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights. Article 15(1), interpreted in the light of the principle of effectiveness, requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.**

[Signatures]

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* Language of the case: French.

JUDGMENT OF THE COURT (Grand Chamber)

15 April 2021 (*)

(Reference for a preliminary ruling – Equal treatment between persons irrespective of racial or ethnic origin – Directive 2000/43/EC – Article 7 – Protection of rights – Article 15 – Sanctions – Action for compensation based on an allegation of discrimination – Defendant acquiescing to claim for compensation without recognition on its part of the discrimination alleged – Connection between the compensation paid and the discrimination alleged – Article 47 of the Charter of Fundamental Rights of the European Union – Right to effective judicial protection – National procedural rules preventing the court seised from ruling on whether there was discrimination as alleged, despite the express request of the claimant)

In Case C-30/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta domstolen (Supreme Court, Sweden), made by decision of 20 December 2018, received at the Court on 10 January 2019, in the proceedings

Diskrimineringsombudsmannen

v

Braathens Regional Aviation AB,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan and N. Piçarra, Presidents of Chambers, T. von Danwitz (Rapporteur), C. Toader, M. Safjan, D. Šváby, K. Jürimäe, C. Lycourgos, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2020,

after considering the observations submitted on behalf of:

– the Diskrimineringsombudsmannen, by M. Mörk, T.A. Qureshi and A. Rosenmüller Nordlander,

– Braathens Regional Aviation AB, by J. Josjö and C. Gullikson Dock, advokater, and by J. Hettne,

– the Swedish Government, initially by H. Eklinder, C. Meyer-Seitz, H. Shev and J. Lundberg, and subsequently by H. Eklinder, C. Meyer-Seitz and H. Shev, acting as Agents,

– the Finnish Government, by M. Pere, acting as Agent,

– the European Commission, by K. Simonsson, E. Ljung Rasmussen, G. Tolstoy and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 7 and 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in the context of an action brought by the Diskrimineringsombudsmannen (Equality Ombudsman, Sweden), acting on behalf of an air passenger who considered himself to have been a victim of discrimination, against Braathens Regional Aviation AB ('Braathens'), a Swedish airline, which acquiesced to that passenger's claim for compensation without, however, recognising the existence of the discrimination alleged.

Legal context

European Union law

3 Recitals 19 and 26 of Directive 2000/43 state:

'(19) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

…

(26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.'

4 Under Article 1 of that directive, entitled 'Purpose':

'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Article 2 of that directive, entitled 'Concept of discrimination', provides, in paragraph 1 thereof:

'For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.'

6 Under the heading, 'Scope', Article 3(1)(h) of the same directive provides:

'Within the limits of the powers conferred upon the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(h) access to and supply of goods and services which are available to the public, including housing.'

7 Article 7 of Directive 2000/43, headed 'Defence of rights', states:

'1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

…'

8 Article 8 of that directive, entitled 'Burden of proof', provides:

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

…

3. Paragraph 1 shall not apply to criminal procedures.

…'

9 Article 15 of that directive, entitled 'Sanctions', provides:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …'

Swedish law

10 Paragraph 4(1) of Chapter 1 of the diskrimineringslagen (2008:567) (Law on discrimination (2008:567)), provides that discrimination includes, inter alia, a situation in which a person is placed at a disadvantage because he or she is treated less favourably than another person is or would be treated in a comparable situation, where the difference in treatment is based on sex, gender identity or expression, ethnicity, religion or opinions, disability, sexual orientation or age.

11 Paragraph 12 of Chapter 2 of that law prohibits discrimination, inter alia, by a person who, outside his or her own private or family circle, supplies goods, services or housing to the general public.

12 Chapter 5 of that law lays down the sanctions incurred by a person who discriminates, namely compensation to the victim, by payment of 'compensation for discrimination', the revision and annulment of contracts and other legal measures.

13 It is apparent from the second subparagraph of Paragraph 1 of Chapter 6 of the Law on discrimination that disputes concerning the application of Paragraph 12 of Chapter 2 of that law are to be examined by the ordinary courts in accordance with the provisions of the rättegångsbalken (Code of Judicial Procedure) relating to civil proceedings in which an amicable settlement of the dispute is permitted.

14 Under Paragraph 1 of Chapter 13 of that code, a claimant may, in the circumstances set out in that provision, bring an action for enforcement to obtain an order requiring a defendant to fulfil an obligation to act, such as the obligation to pay him or her a sum of money.

15 Paragraph 2 of the same chapter of that code governs actions for a declaration. The first subparagraph of that paragraph provides, in that regard, that such an action for a declaration of whether or not a particular legal relationship exists may be examined by the court if, as to the legal relationship, there is uncertainty which is prejudicial to the claimant.

16 Paragraph 7 of Chapter 42 of that code provides that a defendant must, at the hearing, immediately set out his or her defence. Failing that, a defendant may, at that stage, decide to acquiesce to the claimant's claim.

17 In accordance with Paragraph 18 of that Chapter 42 of the Code of Judicial Procedure, following acquiescence by the defendant to the claimant's claims, the court may deliver a judgment on the basis of that acquiescence.

The dispute in the main proceedings and the question referred for a preliminary ruling

18 In July 2015, a passenger of Chilean origin residing in Stockholm (Sweden), who held a reservation on an internal Swedish flight ('the passenger concerned in the main proceedings') operated by the Braathens airline, was subjected, by decision of the captain on board, to an additional security check.

19 The Equality Ombudsman brought a case before the Stockholms tingsrätt (District Court, Stockholm, Sweden) seeking an order that Braathens pay the passenger concerned in the main proceedings compensation for discrimination in the amount of 10 000 Swedish kronor (SEK) (approximately EUR 1 000) owing to the discriminatory conduct of the airline in respect of that passenger.

20 In support of his action, the Equality Ombudsman submitted, in essence, that the passenger concerned had been the subject of direct discrimination in breach of Paragraph 12 of Chapter 2 and Paragraph 4 of Chapter 1 of the Law on discrimination by Braathens, which associated him with an Arabic person and therefore subjected him to an additional security check on that ground. Braathens thus subjected the passenger concerned in the main proceedings to a disadvantage for reasons connected with his physical appearance and ethnicity, by treating him less favourably than other passengers in a comparable situation.

21 Before the Stockholms tingsrätt (District Court, Stockholm), Braathens agreed to pay the sum claimed by way of compensation for discrimination without however recognising the existence of any discrimination whatsoever. The Equality Ombudsman objected, before that court, to a ruling being given on the basis of Braathens' agreement, without the merits of the alleged discrimination being examined.

22 In its ruling, that court ordered Braathens to pay the sum claimed, together with interest, and to bear the costs. It considers that litigation concerning civil obligations and rights, which the parties may freely dispose of, such as the litigation at issue in the main proceedings, must, where liability for the claimant's claim for compensation is accepted, be decided without an examination of the merits and that it was bound by Braathens' acquiescence. Furthermore, that court, owing to that acquiescence, declared inadmissible the forms of order sought by the Equality Ombudsman seeking a declaration, principally, that that airline was required to pay the said sum owing to its discriminatory conduct or, in the alternative, that the passenger concerned in the main proceedings had been subject to discrimination by Braathens.

23 After having unsuccessfully appealed against the judgment of the Stockholms tingsrätt (District Court, Stockholm) before the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden), the Equality Ombudsman brought an appeal against the judgment of the latter court before the referring court, the Högsta domstolen (Supreme Court, Sweden). In that appeal, it asks that court to set aside the judgment appealed, and also the judgment of the Stockholms tingsrätt (District Court, Stockholm), and refer the case back to that court for an examination of the merits of at least one of the two forms of order sought, which seek a declaratory judgment. Braathens contended that the Equality Ombudsman's claims should be dismissed.

24 The referring court states that the law on discrimination has the objective, in particular, of transposing various EU acts, including Directive 2000/43, and aims to permit, as is clear from the legislative history, the imposition of robust and dissuasive penalties in the event of discrimination. In particular, compensation for discrimination constitutes a sanction, within the meaning of Article 15 of that directive, and should, in each individual case, be determined in such a way as to constitute reasonable

compensation for the victim and to help combat discrimination in society. It serves a dual function of compensation and prevention.

25 The referring court adds that, under the provisions of the Code of Judicial Procedure, the defendant may decide to acquiesce to the claim for compensation made by the applicant, without being required to give the reasons for that acquiescence or to base its decision on a ground relied on by the latter, or recognise the existence of the discrimination alleged. Such acquiescence has the intention, in practice, of bringing about the end of the proceedings, without it being necessary to proceed with the examination of the case, as the court is required to deliver a judgment with that acquiescence as its sole reasoning. As to a declaratory action, it may cover only whether or not there is a legal relationship between the parties to the litigation, to the exclusion, inter alia, of purely factual matters. It is, moreover, for the court to assess whether it is appropriate to examine that relationship.

26 The referring court states that, in the case in the main proceedings, the courts at first instance and on appeal delivered decisions ordering Braathens to pay the compensation claimed by the passenger concerned in the main proceedings on the basis of Braathens' acquiescence to that passenger's claim. As a result of that acquiescence, the question of whether there was discrimination as alleged could no longer, according to those courts, be examined in the context of claims seeking a declaratory judgment.

27 The Högsta domstolen (Supreme Court) questions whether the national legislation at issue in the main proceedings complies with the requirements of Article 15 of Directive 2000/43 read in the light of Article 47 of the Charter which guarantees every person the right to an effective judicial remedy. That court questions, in that regard, whether, where a defendant acquiesces to a claimant's claim for compensation, the court must nevertheless be able to examine – in order to ensure, in accordance with Article 7 of that directive, the protection of rights derived from it – the question of the existence of discrimination upon the request of the party who considers that he or she was subject to it, and whether the answer to that question depends on the recognition, or not, on the part of the alleged discriminator of the existence of that discrimination.

28 In those circumstances, the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In a case concerning an infringement of a prohibition laid down in [Directive 2000/43] where the person wronged claims compensation for discrimination, must a Member State, if so requested by the person wronged, always examine whether discrimination has occurred – and where appropriate conclude that that was the case – regardless of whether the person accused of discrimination has or has not admitted that discrimination has occurred, in order for the requirement in Article 15 [of that directive] for effective, proportionate and dissuasive sanctions to be regarded as satisfied?'

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter, must be interpreted as precluding a national law which prevents a court hearing an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim for a declaration of the existence of discrimination, where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination.

30 As a preliminary observation, it should be noted that the purpose of Directive 2000/43, as stated in Article 1 thereof, is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. That directive gives specific expression, in its field of application, to the principle of non-discrimination on grounds of race and ethnic origin which is enshrined in Article 21 of the Charter (judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria,* C-83/14, EU:C:2015:480, paragraph 72 and the case-law cited).

31 It is common ground that the dispute in the main proceedings falls within the material scope of Directive 2000/43, since it concerns conduct alleged to be discriminatory, on the grounds of racial or

ethnic origin, adopted in the context of access to a service made available to the public, within the meaning of Article 3(1)(h) of that directive.

32 As is clear from the recital 19 of Directive 2000/43, persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection and, to provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings. In addition, according to recital 26 of that directive, Member States should provide for effective, proportionate and dissuasive sanctions in the event of breaches of the obligations under that directive.

33 In that regard, Article 7(1) of Directive 2000/43 provides that Member States are to ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves to have been wronged by a failure to apply the principle of equal treatment to them. In that way, that provision reaffirms the right to an effective remedy enshrined in Article 47 of the Charter.

34 Furthermore, Article 7(2) of Directive 2000/43 provides that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of that directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the directive. Article 7(2) constitutes, therefore, a specific expression, in the field in question, of the right to effective judicial protection guaranteed by Article 47 of the Charter.

35 Compliance with the principle of equality therefore requires, so far as concerns persons who consider that they have been the subject of discrimination on grounds of racial or ethnic origin, that effective judicial protection of their right to equal treatment be guaranteed, whether those persons act directly or through the intermediary of an association, organisation or other legal entity, as referred to in the preceding paragraph (see, by analogy, judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 62).

36 Article 15 of Directive 2000/43 provides that Member States are to lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to that directive, and are to take all measures necessary to ensure that they are applied. Without requiring specific sanctions, that article provides that the sanctions laid down, which may include the payment of compensation to the victim, must be effective, proportionate and dissuasive.

37 Article 15 thus imposes on Member States the obligation to introduce into their national legal systems measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts, including by an association, organisation or legal entity, so that judicial protection is real and effective, while leaving Member States free to choose between the different solutions suitable for achieving that objective (see, to that effect, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 37 and 38).

38 In that regard, the rules on sanctions put in place in order to transpose Article 15 of Directive 2000/43 into the national legal order of a Member State must in particular ensure, in parallel with measures taken to implement Article 7 of that directive, real and effective judicial protection of the rights that are derived from it. The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while complying with the general principle of proportionality (see, by analogy, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 63).

39 If financial compensation is the measure chosen in cases where there is a finding that discrimination has occurred, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discrimination in question to be made good in full in accordance with the applicable national rules (see, by analogy, judgment of 17 December 2015, *Arjona Camacho*, C-407/14, EU:C:2015:831, paragraph 33 and the case-law cited). By contrast, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/43

(see, by analogy, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 64).

40 In the present case it is clear from the order for reference that, under national law transposing, inter alia, Directive 2000/43, any person who considers that he or she is a victim of discrimination on the grounds of racial or ethnic origin may bring an action for enforcement of the sanction constituted by 'compensation for discrimination'. The national law at issue in the main proceedings provides that, where the defendant acquiesces to the claimant's claim for compensation, the court hearing that action orders the defendant to pay the sum claimed by the applicant by way of compensation.

41 It is, nevertheless, also clear from the order for reference that such acquiescence – which under that national law, is legally binding on the court and results in the termination of the proceedings – may be given where the defendant does not however recognise the existence of the alleged discrimination, or even, as in the case in the main proceedings, where he or she explicitly contests it. In such a situation, the national court delivers a judgment on the basis of that acquiescence without, however, it's being possible for any conclusion to be drawn from that judgment as to the existence of the discrimination alleged.

42 It follows that, in such a situation, the defendant's acquiescence has the effect that the obligation for the latter to pay the compensation claimed by the claimant is not linked to recognition, by the defendant, of the existence of the alleged discrimination or to a finding thereof by the competent court. In addition, and in particular, such acquiescence has the consequence of preventing the court hearing the action from ruling on the reality of the discrimination alleged, even though that was the cause on which the claim for compensation was based and is, for that reason, an integral element of that action.

43 As regards the declaratory action provided for in the national law at issue in the main proceedings, it is clear from the order for reference that it does not ensure, for the person who considers himself or herself to have been a victim of discrimination prohibited by Directive 2000/43, the right to have the existence of the alleged discrimination examined and, if appropriate, upheld by a court. In accordance with that law, the action for a declaration cannot address purely factual elements, and its admissibility is subject to the court hearing the case deciding that it is appropriate to proceed, which depends on the balance of interests at issue, namely, inter alia, the claimant's interest in bringing proceedings and the inconvenience that the action might cause to the defendant.

44 It follows that, under the national law at issue in the main proceedings, in the event of the defendant's acquiescing to pay the compensation claimed by the claimant, without however recognising the discrimination alleged, the claimant is unable to obtain a ruling by a civil court on the existence of that discrimination.

45 It must be held that such a national law infringes the requirements imposed by Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter.

46 In the first place, as is clear from paragraphs 33 to 35 of this judgment, the procedures referred to in Article 7 of that directive have the aim of permitting the enforcement of rights derived from the principle of equal treatment of any person who considers himself or herself to be the victim of discrimination based on racial or ethnic origin and to ensure compliance. It therefore follows necessarily that where the defendant does not recognise the discrimination alleged that person must be able to obtain from the court a ruling on the possible breach of the rights that such procedures are intended to enforce.

47 Consequently, the payment of a sum of money alone, even where it is the sum claimed by the claimant, is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment derived from that directive, in particular where the primary interest of that person is not economic but rather to obtain a ruling on the reality of the facts alleged against the defendant and their legal classification.

48 In the second place, a national law such as that at issue in the main proceedings is contrary to both the compensatory function and the dissuasive function of sanctions laid down by the Member States in

accordance with Article 15 of Directive 2000/43 where there is a breach of national provisions transposing that directive.

49 In that regard, as the Advocate General observed, in essence, in points 83 and 84 of his Opinion, the payment of a sum of money is insufficient to meet the claims of a person who seeks primarily to obtain recognition, by way of compensation for the non-material damage suffered, of the fact that he or she has been the victim of discrimination, meaning that the payment cannot, for that purpose, be regarded as having a satisfactory compensatory function. Similarly, the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination by inducing him or her not to repeat the discriminatory behaviour and thereby preventing further discrimination on his or her part where, as in the present case, he or she contests the existence of any discrimination but considers it more advantageous, in terms of cost and reputation, to pay the compensation claimed by the claimant, while also thereby avoiding a finding by a national court that there had been discrimination.

50 The preceding analysis cannot be called into question by the possibility, relied on by the Swedish Government, of bringing criminal proceedings, which would permit the person who considers himself or herself to have been a victim of discrimination prohibited by Directive 2000/43 to have that discrimination found and punished by a criminal court. Such criminal proceedings, due to the specific purposes that they pursue and the constraints inherent therein, do not make it possible to remedy the failure of civil law remedies to comply with the requirements of that directive.

51 In particular, it should be observed, as the Advocate General notes in points 118 to 120 of his opinion, such criminal proceedings are based on rules regarding the burden of proof and the taking of evidence which do not correspond to those, more favourable to that person, that are laid down in Article 8 of Directive 2000/43. That Article 8 provides, in paragraph 1, that, when the said person establishes, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is to be for the defendant to prove that there has been no breach of the principle of equal treatment. By contrast, in paragraph 3, that same Article 8 provides that its paragraph 1 is not to apply to criminal procedures.

52 In the third place, and contrary to Braathens' submissions, procedural law principles or considerations, such as the principle that the subject matter of an action is defined by the parties, the principle of procedural economy, and the concern to promote the amicable settlement of disputes, are also not capable of justifying a different interpretation from that given in the preceding paragraphs.

53 First, unlike the amicable settlement of a dispute, as referred to in Article 7(1) of Directive 2000/43, which permits each party to retain the freedom to define its arguments, a national law, such as that at issue in the main proceedings has the effect of transferring the control of the dispute to the defendant by permitting that defendant to acquiesce to the claim for compensation made by the claimant, without however recognising the existence of the discrimination alleged or even despite the fact that the defendant contests it explicitly, in which case the claimant may no longer obtain from the court hearing the case a ruling on the cause on which the claim is based, nor may the claimant prevent the termination of the case brought on his or her initiative.

54 Second, a court hearing such an action would not in any way infringe the principle that the subject matter of an action is defined by the parties if, despite the defendant's acquiescence to pay the compensation claimed by the claimant, it examined, having regard to the allegation of the latter on the basis of which the action is brought, the existence or otherwise of that discrimination, where that defendant does not recognise it or even contests it. Such an examination would then consider the cause on which the claimant's claim for compensation is based, which relates to the subject matter of the proceedings as defined by that action, all the more so where, as in the present case, that claimant has expressly submitted, in the context of that action, a request for a finding of such discrimination.

55 In the fourth place, it should be recalled that it is true, as Braathens submits, that EU law does not as a general rule require Member States to create before their national courts remedies to ensure the protection of rights that parties derive from EU law other than those established by national law (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 40, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 51).

56 However, it suffices to observe that, in the present case, compliance with EU law does not go so far as requiring the creation of a new right of action, but merely that the referring court refuse to apply a procedural rule according to which the court seised, in accordance with domestic law, of a claim for compensation brought by a person considering himself or herself to be a victim of discrimination, cannot rule on the issue of whether there had been discrimination on the sole ground that the defendant agreed to pay the claimant the amount of compensation claimed, without however recognising the existence of the said discrimination; and that this is so owing to the incompatibility of that rule not only with Articles 7 and 15 of Directive 2000/43 but also with Article 47 of the Charter.

57 In that regard, it must be recalled, first, that, as has been established in paragraph 38 of this judgment, Articles 7 and 15 of Directive 2000/43 seek to ensure the real and effective judicial protection of the right to equal treatment between persons irrespective of racial or ethnic origin derived from that directive. It follows that those articles merely give specific expression to the right to effective judicial protection, as guaranteed by Article 47 of the Charter, which is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 76 to 78).

58 Second, by virtue of the principle of the primacy of EU law, if it is impossible for national law to be interpreted consistently with the requirements of EU law, any national court hearing a case within its jurisdiction is, as an organ of a Member State, under an obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 53 and 61 and the case-law cited).

59 Having regard to all the foregoing considerations, the answer to the question referred is that Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter, must be interpreted as precluding a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination. It is for the national court hearing a dispute between private persons to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter by disapplying as necessary any contrary provision of national law.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Articles 7 and 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination. It is for the national court hearing a dispute between private persons to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter of Fundamental Rights by disapplying as necessary any contrary provision of national law.

[Signatures]

* Language of the case: Swedish.

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2019 (*)

(Reference for a preliminary ruling — Common policy on asylum and subsidiary protection — Common procedures for granting international protection — Directive 2013/32/EU — Article 46(3) — Full and ex nunc examination — Article 47 of the Charter of Fundamental Rights of the European Union — Right to an effective remedy — Extent of the powers of the first-instance court or tribunal — No power to vary — Refusal by the competent administrative or quasi-judicial body to comply with a decision of that court or tribunal)

In Case C–556/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Pécsi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Pécs, Hungary), made by decision of 5 September 2017, received at the Court on 22 September 2017, in the proceedings

Alekszij Torubarov

v

Bevándorlási és Menekültügyi Hivatal,

THE COURT (Grand Chamber),

K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal and M. Vilaras, Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič (Rapporteur), M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda, N. Piçarra, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: M. Bobek,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 8 January 2019,

after considering the observations submitted on behalf of

– Mr Torubarov, by T. Fazekas and I. Bieber, ügyvédek,

– the Hungarian Government, by M.Z. Fehér, G. Koós, and M. Tátrai, acting as Agents,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by M. Condou-Durande and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2019,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60), read in the light of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between Mr Alekszij Torubarov and Bevándorlási és Menekültügyi Hivatal (Immigration and Asylum Office, Hungary) ('the Immigration Office') concerning the rejection by that office of his application for international protection.

Legal context

EU law

Directive 2011/95/EU

3 Article 1 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), provides:

'The purpose of this Directive is to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.'

4 Article 2 of Directive 2011/95 provides:

'For the purpose of this Directive the following definitions shall apply:

(a) "international protection" means refugee status and subsidiary protection status …

…

(d) "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

…

(f) "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

…'

5 Chapters II to VI of that directive cover, respectively, the assessment of applications for international protection; qualification for being a refugee; refugee status; qualification for subsidiary protection; and subsidiary protection status.

6 Article 13 of that directive, entitled 'Granting of refugee status' and coming within Chapter IV thereof, provides:

'Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.'

7 Article 14 of Directive 2011/95, entitled 'Revocation of, ending of or refusal to renew refugee status' and coming within the same Chapter IV, states:

‘1. Concerning applications for international protection …, Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body …

…

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, …

…’

8 Article 15 of that directive, entitled ‘Serious harm’ and coming within Chapter V thereof, lists types of harm that give rise to the right to subsidiary protection.

9 Article 18 of that directive, entitled ‘Granting of subsidiary protection status’ and coming within Chapter VI thereof, is worded as follows:

‘Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.’

10 Article 19 of Directive 2011/95, entitled ‘Revocation of, ending of or refusal to renew subsidiary protection status’ and coming within the same Chapter VI, provides:

‘1. Concerning applications for international protection …, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body …

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body …

…’

Directive 2013/32

11 Recitals 18, 50 and 60 of Directive 2013/32 are worded as follows:

‘(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(50) It reflects a basic principle of Union law that the decisions taken on an application for international protection … are subject to an effective remedy before a court or tribunal.

…

(60) This Directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter and has to be implemented accordingly.’

12 The aim of Directive 2013/32, according to Article 1 thereof, is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95.

13 Article 2(f) of Directive 2013/32 defines ‘determining authority’ as ‘any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases’.

14 Article 46(1), (3) and (4) of that directive provides:

‘1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

…

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95], at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. …’

15 Article 51(1) of that directive provides:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with … Articles 32 to 46 … by 20 July 2015 at the latest. …’

16 Under the first paragraph of Article 52 of Directive 2013/32:

‘Member States shall apply the laws, regulations and administrative provisions referred to in Article 51(1) to applications for international protection lodged … after 20 July 2015 or an earlier date. Applications lodged before 20 July 2015 … shall be governed by the laws, regulations and administrative provisions adopted pursuant to [Council] Directive 2005/85/EC [of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13)].’

Hungarian law

The legislation applicable to proceedings concerning international protection in force before 15 September 2015

17 Article 339(1) and (2)(j) of the polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 establishing the Code for Civil Procedure), in the version in force before 15 September 2015, provided:

‘1. Unless otherwise provided by the relevant legislation, the court shall annul any administrative decision it finds unlawful — with the exception of any violation of a procedural rule that does not affect the merits of the case — and, if necessary, shall order the authority that adopts the administrative decision to conduct a new procedure.

2. The court may vary the following administrative decisions:

…

(j) decision as to the grant of refugee status.’

18 An analogous provision to Article 339(2)(j) appears in Article 68(5) of the menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum) (‘the Law on the right to asylum’).

The legislation applicable to proceedings concerning international protection in force after 15 September 2015

19 On 15 September 2015, the egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról szóló 2015. évi CXL. törvény (Law No CXL of 2015 amending certain laws in the context of managing mass immigration) ('the Law on the management of mass immigration') entered into force. Article 1(3)(a) of that law repealed Article 339(2)(j) of Law No III of 1952 establishing the Code for Civil Procedure. Article 14 of the Law on the management of mass immigration amended Article 68(5) of the Law on the right to asylum.

20 Following that amendment, Article 68(3), (5) and (6) of the Law on the right to asylum, which was made applicable also to cases that were pending at the time of its entry into force, reads as follows:

'3. … The Court shall carry out a full examination of both the facts and law at the date of the court's decision.

…

5. The court may not overturn the decision of the authority competent in matters of asylum. The court shall annul any administrative decision it finds unlawful — with the exception of any violation of a procedural rule that does not affect the merits of the case — and, if necessary, shall order the authority competent in matters of asylum to conduct a new procedure.

6. The court's decision adopted in conclusion of the proceedings is final, no appeal lies against it.'

21 Article 109(4) of the közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény (Law No CXL of 2004 laying down general provisions on administrative services and procedure) ('the Law on administrative procedure') provides:

'The administrative authority shall be bound by the operative part and by the justification of the decision adopted by the court of jurisdiction for administrative actions, and shall proceed accordingly in the new proceedings and when adopting a new decision.'

22 Article 121(1)(f) of that law provides:

'In proceedings governed by this Chapter, the decision shall be annulled:

…

(f) if the content of the decision is contrary to the provisions of [Article 109(4)].'

The dispute in the main proceedings and the question referred for a preliminary ruling

23 Mr Torubarov, a Russian national, was a businessperson who participated, as a member, in the activities of a Russian opposition political party and of a non-governmental organisation representing the interests of businesspersons. Several sets of criminal proceedings have been brought against him in Russia since 2008. Mr Torubarov therefore left Russian territory and established himself first in Austria and then in the Czech Republic, from where he was extradited to Russia on 2 May 2013.

24 After his return to Russia he was once again charged but released to prepare his defence. On 9 December 2013, he illegally crossed the Hungarian border and was immediately apprehended by the police force of that Member State. Since Mr Torubarov was not able to demonstrate the legality of his stay in Hungary, the police arrested him. Mr Torubarov made an application for international protection on the same day.

25 By a decision of 15 August 2014, the Immigration Office rejected that application for international protection. In support of its decision, it found that the statements made by Mr Torubarov and the information gathered regarding the situation in his country of origin confirmed that it was unlikely that

he would be the subject of persecution there, whether for political or other reasons, or that he would suffer serious harm within the meaning of Article 15 of Directive 2011/95.

26 Mr Torubarov brought an appeal against that decision before the Pécsi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Pécs, Hungary). That court, by judgment of 6 May 2015, annulled the said decision and ordered the Immigration Office to conduct a new procedure and make a new decision. The decision was annulled on the grounds that it contained inconsistencies and that the Immigration Office had failed generally to examine the facts that had been submitted for its assessment and, as regards those facts that it had taken into account, had assessed them in a biased manner, with the result that the decision was unfounded and was not amenable to a review by the court. In its decision, that court also provided the Immigration Office with detailed guidance as to the factors that it was required to examine in the new procedure that was to be undertaken.

27 Following that second administrative procedure, the Immigration Office, by a decision of 22 June 2016, again rejected Mr Torubarov's application for international protection, finding in particular that the right to independent judicial proceedings would be guaranteed to him in his country of origin and that he would not be exposed to any risk of persecution there. In support of that new decision, and in accordance with the guidelines provided by the referring court, the Immigration Office, having regard to the documents that Mr Torubarov had sent to it, identified, in particular, the information in respect of corruption in Russia and the conditions of detention in Russian prisons as well as the way in which the justice system operates in Russia.

28 In that second decision, the Immigration Office also relied on a position statement of the Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary). The latter considered that the presence of Mr Torubarov on Hungarian territory was contrary to the interests of national security because the person concerned was guilty of activity contrary to the aims and principles of the United Nations, within the meaning of Article 1(F)(c) of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954 and was completed and amended by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which itself entered into force on 4 October 1967.

29 Mr Torubarov brought an appeal against the decision of the Immigration Office of 22 June 2016 before the referring court. That court, by judgment of 25 February 2017, annulled the said decision and ordered the Immigration Office to conduct a new procedure and take a new decision. It considered that the decision of 22 June 2016 was unlawful owing to a manifestly incorrect assessment, first, of the information relating to the country concerned and, second, of the position statement of the Constitutional Protection Office.

30 In that regard, the referring court stated that it was clear from the facts described in that decision that, contrary to the assessment made by the Immigration Office, Mr Torubarov had reasons to fear persecution and serious harm in Russia on account of his political opinions. In addition, it noted that the content and the operative part of the Constitutional Protection Office's position statement, which contained classified national information, were inconsistent and that the Immigration Office had not assessed the content of that position statement from which it could clearly be deduced that the facts stated there were not evidence against Mr Torubarov but, on the contrary, evidence showing that his application for international protection was well founded.

31 By decision of 15 May 2017 ('the decision at issue'), the Immigration Office rejected, for the third time, the application for international protection by Mr Torubarov concerning the grant both of refugee status and of subsidiary protection status on the ground, inter alia, that it could not be established that he would suffer any persecution on political grounds. That office no longer relied, however, on the position statement of the Constitutional Protection Office in support of its decision.

32 The referring court is now seised of a third appeal, this time against the decision at issue, by which Mr Torubarov seeks the variation of that decision to the effect that the referring court grants him, principally, the status of refugee or, in the alternative, that of a beneficiary of subsidiary protection.

33 In that regard the referring court states, however, that since the entry into force on 15 September 2015 of the Law on the management of mass immigration, the power of the administrative courts to vary administrative decisions on the grant of international protection has been withdrawn.

34 According to the referring court, that legislation effectively deprives applicants for international protection of an effective judicial remedy. The only consequence provided for by the national law in the event of infringement by the administration of its obligation to comply with the operative part and justification of a first judgment annulling a first administrative decision rejecting an application for international protection, consists of the annulment of the new administrative decision. In such circumstances, the court seised therefore has no remedy other than to order the administration to conduct a new procedure and adopt a new decision. Thus, it has no power either to order the administration to grant international protection to the applicant concerned or to impose a penalty for the failure by the administration to comply with its first judgment, which entails the risk that the procedure can be prolonged indefinitely, contrary to the rights of the applicant.

35 That is precisely the situation in the case before the referring court, which has already given rise to the annulment of decisions of the Immigration Office on two occasions, and in which that office has adopted a third decision, namely the decision at issue, which does not comply with the referring court's judgment of 25 February 2017, in which that court had concluded that international protection had to be granted to Mr Torubarov, unless there was a proven threat to public security. As a result, since making his application for international protection in December 2013, Mr Torubarov has lived, in the absence of a final decision on that application, in a situation of legal uncertainty without the benefit of any status whatsoever on Hungarian territory.

36 In such a situation, the referring court considers that Hungarian law does not guarantee the right to an effective remedy enshrined in Article 46(3) of Directive 2013/32 and Article 47 of the Charter. It asks, therefore, whether those provisions of EU law allow it to vary a decision such as the decision at issue through the disapplication of the national legislation that denies it that power.

37 In those circumstances, the Pécsi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Pécs) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 46(3) of [Directive 2013/32], in conjunction with Article 47 of [the Charter], to be interpreted as meaning that the Hungarian courts have the power to vary administrative decisions of the competent asylum authority refusing international protection, and also to grant such protection?'

Consideration of the question referred

38 By its question the referring court asks, in essence, whether Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as conferring, in circumstances such as those in the main proceedings, on a first-instance court seised of an appeal against a decision rejecting an application for international protection, the power to vary that administrative decision and to substitute its own decision for that of the original administrative body that adopted it.

39 As a preliminary matter, it must be observed that, pursuant to the first sentence of the first paragraph of Article 52 of Directive 2013/32, Member States are to apply the laws, regulations and administrative provisions referred to in Article 51(1) to applications for international protection lodged 'after 20 July 2015 or an earlier date'.

40 It is clear from the *travaux préparatoires* of Directive 2013/32 that, by adding the words 'or at an earlier date' to the first sentence of the first paragraph of Article 52, the EU legislature intended to enable Member States to apply their provisions implementing that directive with immediate effect to applications for international protection lodged before 20 July 2015 (see, to that effect, judgments of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 71 and 72, and of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraphs 63 and 64).

41 Since the first paragraph of Article 52 of Directive 2013/32 offers various possibilities as regards temporal applicability, it is important, in order for the principles of legal certainty and equality before the law to be observed in the implementation of EU law and for applicants for international protection to be protected from arbitrariness, that each Member State bound by that directive examines applications for international protection lodged within the same period on its territory in a predictable and uniform manner (see, to that effect, judgments of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 73, and of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 66).

42 In the present case, it is clear from the order for reference that Mr Torubarov's application for international protection was submitted on 9 December 2013, which was after the entry into force of Directive 2013/32 on 19 July 2013 but earlier than the latest date by which that directive had to be transposed into national law, namely 20 July 2015.

43 In addition, the referring court stated, in response to a request for information that had been sent to it by the Court, that under national law it is required to comply with the national legislation transposing Directive 2013/32 that entered into force on 15 September 2015 and that prohibits a court from varying an administrative decision on an application for international protection also in the context of legal proceedings that, although they concern an application for international protection lodged before 20 July 2015, were, as is the case in the action in the main proceedings, brought after that date. That information was confirmed by the Hungarian Government in its written observations.

44 In that regard, it is clear, first, from the case-law recalled in paragraph 40 above that a Member State may freely decide whether to make the legislation transposing Directive 2013/32 immediately applicable to such proceedings.

45 Second, the Court has already clarified that a provision of national law providing that a court must base its decision on the situation in fact and law obtaining on the date of its decision ensures that applications for international protection which have been lodged in the same period on national territory and on which no final decision has yet been made are examined in a predictable and uniform manner (see, to that effect, judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraphs 67 and 68).

46 In those circumstances, the first paragraph of Article 52 of Directive 2013/32 does not preclude a national court, such as the referring court, from applying the national legislation transposing Directive 2013/32 in proceedings pending before it, even though those proceedings relate to an application for international protection lodged before 20 July 2015.

47 Having made those preliminary observations, it should be noted that the aim of Directive 2013/32, according to Article 1 thereof, is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95.

48 That directive lays down, in accordance with Article 1, standards, first, for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, secondly, for a uniform status for refugees or for persons eligible for subsidiary protection and, lastly, for the content of the protection granted.

49 As the Court has already held, it is clear from Articles 13 and 18 of Directive 2011/95, read in conjunction with the definitions of 'refugee' and 'person eligible for subsidiary protection' set out in Article 2(d) and (f) thereof, that the international protection referred to in that directive must, in principle, be granted to a third-country national or stateless person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, or faces a real risk of suffering serious harm, within the meaning of Article 15 of the directive (see, to that effect, judgments of 4 October 2018, *Ahmedbekova*, C-652/16, EU:C:2018:801, paragraph 47, and of 23 May 2019, *Bilali*, C-720/17, EU:C:2019:448, paragraph 36).

50 Therefore, where a person meets the minimum standards set by EU law to qualify for one of those statuses because he or she fulfils the conditions laid down in Chapters II and III or Chapters II and V of Directive 2011/95 respectively, Member States are required, subject to the grounds for exclusion

provided for by that directive, to grant the international protection status sought, since those Member States have no discretion in that respect (see, to that effect, judgments of 24 June 2015, *T., C*-373/13, EU:C:2015:413, paragraph 63; of 12 April 2018, *A and S*, C-550/16, EU:C:2018:248, paragraph 52; and of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 89).

51 Article 46(1) of Directive 2013/32 guarantees applicants for international protection the right to an effective remedy before a court or tribunal against decisions taken on their application. Article 46(3) of that directive defines the scope of the right to an effective remedy by specifying that Members States bound by it must ensure that the court or tribunal before which the decision relating to the application for international protection is contested carries out 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95]' (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 105 and 106).

52 The expression '*ex nunc*' points to the court or tribunal's obligation to make an assessment that takes into account, should the need arise, new evidence which has come to light after the adoption of the decision being challenged. As for the word 'full', that adjective confirms that the court or tribunal is required to examine both the evidence which the determining authority took into account or could have taken into account and that which has arisen following the adoption of the decision by that authority (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 111 and 113).

53 It follows that Member States are required, pursuant to Article 46(3) of Directive 2013/32, to order their national law in such a way that the processing of the appeals referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-date assessment of the case at hand, so that the application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority. That interpretation furthers the aim pursued by Directive 2013/32 of guaranteeing that such applications are processed as rapidly as possible, without prejudice to an adequate and complete examination being carried out (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 109 to 112).

54 However, Article 46(3) of that directive only concerns the examination of the appeal brought and does not therefore govern what happens after any annulment of the decision under appeal. Thus, by adopting Directive 2013/32, the EU legislature did not intend to introduce any common rule to the effect that the quasi-judicial or administrative body referred to in Article 2(f) of that directive should be deprived of its powers following the annulment of its initial decision concerning an application for international protection, so that it remains open to the Member States to provide that the file must, following such an annulment, be referred back to that body for a new decision (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 145 and 146).

55 While Directive 2013/32 affords Member States some discretion inter alia in the determination of rules for thus dealing with an application for international protection where the original decision of such a body is annulled by a court or tribunal, it is important however to note, in the first place, that notwithstanding that discretion Member States are required, when implementing that directive, to comply with Article 47 of the Charter which enshrines the right to an effective remedy before a tribunal for everyone whose rights and freedoms guaranteed by EU law are infringed (see, to that effect, judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 30 and the case-law cited). The characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection (see, to that effect, judgments of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 31, and of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 114).

56 In the second place, it should be recalled that Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such (judgment of 17 April 2018, *Egenberger*, C-414/16,

EU:C:2018:257, paragraph 78). In view, in particular, of the matters recalled in the preceding paragraph, the same must hold true for Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter.

57 In the third place, the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party (see, to that effect, judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 43).

58 It is in that context that the Court held that Article 46(3) of Directive 2013/32 would be deprived of any practical effect if it were accepted that, after delivery of a judgment in which the court or tribunal of first instance conducted, in accordance with that provision, a full and *ex nunc* assessment of the international protection of the applicant by virtue of Directive 2011/95, the quasi-judicial or administrative body referred to in Article 2(f) of Directive 2013/32 could take a decision that ran counter to that assessment.

59 Consequently, even though the purpose of Directive 2013/32 is not to render uniform, in a specific and exhaustive manner, the procedural rules that must be applied within Member States where the power to adopt a new decision on an application for international protection after the annulment of the original decision rejecting such an application, it nevertheless follows from its purpose of ensuring the fastest possible processing of applications of that nature, from the obligation to ensure that Article 46(3) is effective, and from the need, arising from Article 47 of the Charter, to ensure an effective remedy, that each Member State bound by that directive must order its national law in such a way that, following annulment of the initial decision and in the event of the file being referred back to the quasi-judicial or administrative body, a new decision is adopted within a short period of time and that it complies with the assessment contained in the judgment annulling the initial decision (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 148).

60 The question referred must be examined in the light of those considerations.

61 In that regard, it must be observed, first of all, that the text of Article 109(4) of the Law on administrative procedure appears, subject to verification by the referring court, to satisfy the obligation on the part of Member States pursuant to Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, and recalled in paragraph 59 above, of guaranteeing that, following the annulment of a decision on an application for international protection and in the event of the referral of the case file back to the administrative body that had adopted it, the new decision of that body is to comply with the determination contained in the judgment declaring the annulment.

62 At the hearing before the Court however, the Hungarian Government submitted that that provision must be interpreted as meaning, in order to preserve the division of competences between, on the one hand, the administration, which must play a central role in procedures concerning an application for international protection and, on the other hand, the court hearing an appeal under Article 46(3) of Directive 2013/32, that that court may give instructions as to the facts to be examined and the new evidence to be admitted, provide an interpretation of the law and indicate the relevant matters that the administrative authority must take into account, but it may not bind the latter as to the specific determination of the case at hand, which may rest on other matters of law or fact than those taken into account by the said court, such as new matters arising after the court's decision.

63 Article 46(3) of Directive 2013/32, read in the light of the Court's case-law, precludes such an interpretation.

64 It is true that the Court has already recognised that the examination of the application for international protection by the competent administrative or quasi-judicial body, which has specific resources and staff specialised in the matter, is a vital stage of the common procedures established by Directive 2013/32 (see, to that effect, judgments of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 116, and of 4 October 2018, *Ahmedbekova*, C-652/16, EU:C:2018:801, paragraph 96).

65 The fact remains however that, by providing that the court or tribunal with jurisdiction to rule on an appeal against a decision rejecting an application for international protection is required to examine,

where applicable, the 'international protection needs' of the applicant, the EU legislature, through the adoption of Article 46(3) of Directive 2013/32, intended to confer on that court or tribunal, where it considers that it has available to it all the elements of fact and law necessary in that regard, the power to give a binding ruling following a full and *ex nunc* — that is to say exhaustive and up-to-date — examination of those elements, as to whether the applicant concerned satisfies the conditions laid down in Directive 2011/95 to be granted international protection.

66 It follows from the foregoing, as the Advocate General observed in essence in points 102 to 105, 107 and 108 of his Opinion, that where a court or tribunal rules exhaustively on an appeal by an applicant for international protection and makes, on that occasion, an up-to-date examination of the 'international protection needs' of that applicant on the basis of all the relevant elements of fact and law, following which it reaches the conclusion that the applicant must be granted the status of refugee or person eligible for subsidiary protection status, in accordance with the criteria laid down in Directive 2011/95, for the reasons that he or she relies on in support of his or her application and that court or tribunal annuls the decision of the administrative or quasi-judicial body rejecting that application and refers the case file back to that body, the latter is, subject to matters of fact or law arising that objectively require a new up-to-date assessment, bound by the decision of that court or tribunal and the grounds that support it. Therefore, in the context of such a referral back, that body no longer has a discretionary power as to the decision to grant or refuse the protection sought in the light of the same grounds as those that were submitted to that court or tribunal, otherwise Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, as well as Articles 13 and 18 of Directive 2011/95, would be deprived of all their practical effect.

67 In the present case, the referring court asks itself the question whether, where such an administrative or quasi-judicial body to which the case file has been referred back has not complied with its annulment decision, and the applicant for international protection brings before it an appeal against the decision of that body again refusing to grant such protection without setting out, in support of that refusal, a ground for excluding it that had arisen in the meantime or any new elements of fact or law requiring a new assessment, that court has the power, pursuant to EU law, to substitute its own decision for that of the Immigration Office, by varying that decision in a manner that complies with its previous judgment, notwithstanding a national provision prohibiting it from proceeding in that way.

68 The referring court emphasises, in that context, the fact that national law does not provide a remedy enabling it to ensure that its judgment is complied with, since the only penalty provided for under that law is the annulment of the Immigration Office's decision, which is liable to lead to a succession of annulments of administrative decisions and appeals before the courts that will prolong the applicant's situation of legal uncertainty, as Mr Torubarov's case illustrates in the present proceedings.

69 In that regard, as is clear from paragraphs 54 and 59 above, while Article 46(3) of Directive 2013/32 does not require Member States to confer the power referred to in paragraph 67 above on courts or tribunals with jurisdiction to hear appeals covered by that provision, it remains the case that Member States are required to ensure, in each case, that the right to an effective remedy enshrined in Article 47 of the Charter is complied with (see, to that effect, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 65 and the case-law cited).

70 Whether there is an infringement of the rights enshrined in that provision must be examined in relation to the specific circumstances of each case (see, to that effect, judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 102, and of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 41).

71 In the present case it must be noted that, at the hearing before the Court, the Hungarian Government provided details of a new law on administrative procedure that entered into force on 1 January 2018, namely after the date of the request for a preliminary ruling. That law is said to establish certain procedures and remedies whose purpose is to enable the administrative courts to require administrative bodies to comply with their judgments. Nevertheless, that government also pointed out that that legislative amendment does not apply *ratione temporis* to the case in the main proceedings and that, in any event, those remedies may not be used in the field of international protection, such that the

situation that the referring court faces, namely that of being deprived of any remedy enabling it to ensure that its judgment in that field is complied with, remains unchanged.

72 A national law that results in such a situation in practice deprives the applicant for international protection of an effective remedy, within the meaning of Article 46(3) of Directive 2013/32, and fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter, since the judgment of a court, delivered after an assessment complying with the requirements of Article 46(3) and following which that court decided that the applicant satisfied the conditions laid down by Directive 2011/95 to be granted the status of refugee or person eligible for subsidiary protection, remains ineffective, for lack of any remedy whatsoever by means of which that court may ensure compliance with its judgment.

73 In such circumstances, any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply that law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules which have direct effect, such as Article 46(3) of Directive 2013/32 read in conjunction with Article 47 of the Charter, from having full force and effect are incompatible with those requirements, which are the very essence of EU law (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22, and of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 52 to 62).

74 Therefore, in order to guarantee that an applicant for international protection has an effective judicial remedy within the meaning of Article 47 of the Charter, and in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, a national court or tribunal seised of an appeal is required to vary a decision of the administrative or quasi-judicial body, in the present case the Immigration Office, that does not comply with its previous judgment and to substitute is own decision on the application by the person concerned for international protection by disapplying, if necessary, the national law that prohibits it from proceeding in that way (see, by analogy, judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 62).

75 Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted in that way in the first place because, as is clear from paragraph 50 of this judgment, where an applicant for international protection fulfils the conditions laid down by Directive 2011/95 to qualify for the status of refugee or person eligible for subsidiary protection, Member States are required to grant the person that status and do not have any discretion in that regard, it being possible for, inter alia, a judicial body to grant that status, according to the wording of Article 14(1) and (4), and Article 19(1) and (2) of that directive.

76 In the second place, while it is true that the Court has held that, by adopting Directive 2013/32, the EU legislature did not intend to introduce any common rule to the effect that the quasi-judicial or administrative body referred to in Article 2(f) of that directive should be deprived of its powers following the annulment of its initial decision concerning an application for international protection (judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraph 146), it remains the case that if that body, in circumstances such as those at issue in the main proceedings, has not complied with the judgment of the national court hearing the appeal, it is for that court to vary the decision of that body and to substitute its own decision for that body's decision.

77 Consequently, it is necessary, in the present case, to find that, where, as it appears from the indications given in the order for reference, the referring court in fact conducted, in its judgment of 25 February 2017, a full and *ex nunc* examination of the 'international protection needs' of Mr Torubarov in accordance with Directive 2011/95 in view of all the relevant elements of fact and law, following which the court held that such protection must be granted to him, but that judgment has not been complied with by the Immigration Office, without it being established in the decision at issue, in that respect, that new elements had arisen which required a new assessment, which it is for the national court to verify, that court must, pursuant to Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, vary the decision at issue that does not comply with its previous judgment, and substitute its own decision as to the international protection that Mr Torubarov must benefit from under Directive 2011/95, while disapplying the national law prohibiting it from proceeding in that way

(see, by analogy, judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79, and of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 66).

78 It follows from all the foregoing considerations that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that, in circumstances, such as those at issue in the main proceedings, where a first-instance court or tribunal has found — after making a full and *ex nunc* examination of all the relevant elements of fact and law submitted by an applicant for international protection — that, under the criteria laid down by Directive 2011/95, that applicant must be granted such protection on the ground that he or she relied on in support of his or her application, but after which the administrative or quasi-judicial body adopts a contrary decision without establishing that new elements have arisen that justify a new assessment of the international protection needs of the applicant, that court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in circumstances, such as those at issue in the main proceedings, where a first-instance court or tribunal has found — after making a full and *ex nunc* examination of all the relevant elements of fact and law submitted by an applicant for international protection — that, under the criteria laid down by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, that applicant must be granted such protection on the ground that he or she relied on in support of his or her application, but after which the administrative or quasi-judicial body adopts a contrary decision without establishing that new elements have arisen that justify a new assessment of the international protection needs of the applicant, that court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way.

[Signatures]

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* Language of the case: Hungarian.

JUDGMENT OF THE COURT (Grand Chamber)

17 December 2020 (1)

(Reference for a preliminary ruling – Protection of animals at the time of killing – Regulation (EC) No 1099/2009 – Article 4(1) – Obligation to stun animals before they are killed – Article 4(4) – Derogation in the context of ritual slaughter – Article 26(2) – Power of Member States to adopt national rules aimed at ensuring more extensive protection of animals in the case of ritual slaughter – Interpretation – National legislation requiring, in the case of ritual slaughter, stunning which is reversible and cannot cause death – Article 13 TFEU – Charter of Fundamental Rights of the European Union – Article 10 – Freedom of religion – Freedom to manifest religion – Limitation – Proportionality – Lack of consensus among the Member States of the European Union – Discretion afforded to Member States – Principle of subsidiarity – Validity – Differing treatment of ritual slaughter and the killing of animals during hunting or recreational fishing activities and cultural or sporting events – No discrimination – Articles 20, 21 and 22 of the Charter of Fundamental Rights)

In Case C-336/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Grondwettelijk Hof (Constitutional Court, Belgium), made by decision of 4 April 2019, received at the Court on 18 April 2019, in the proceedings

Centraal Israëlitisch Consistorie van België and Others,

Unie Moskeeën Antwerpen VZW,

Islamitisch Offerfeest Antwerpen VZW,

JG,

KH,

Executief van de Moslims van België and Others,

Coördinatie Comité van Joodse Organisaties van België – Section belge du Congrès juif mondial et Congrès juif européen VZW and Others,

v

Vlaamse Regering,

intervening parties:

LI,

Waalse Regering,

Kosher Poultry BVBA and Others,

Global Action in the Interest of Animals VZW (GAIA),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, E. Regan, M. Ilešič, L. Bay Larsen and A. Kumin, Presidents of Chambers, T. von Danwitz, C. Toader,

M. Safjan, D. Šváby (Rapporteur), L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: G. Hogan,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 July 2020,

after considering the observations submitted on behalf of:

– the Centraal Israëlitisch Consistorie van België and Others and Kosher Poultry BVBA and Others, by E. Maes and C. Caillet, advocaten, and by E. Jacubowitz, avocat,

– the Unie Moskeeën Antwerpen VZW and the Islamitisch Offerfeest Antwerpen VZW, by I. Akrouh, advocaat,

– the Executief van de Moslims van België and Others, by J. Roets, advocaat,

– the Coördinatie Comité van Joodse Organisaties van België – Section belge du Congrès juif mondial et Congrès juif européen VZW and Others, by E. Cloots, advocaat,

– LI, by himself,

– the Vlaamse Regering, by V. De Schepper and J.-F. De Bock, advocaten,

– the Waalse Regering, by X. Drion, advocaat,

– Global Action in the Interest of Animals VZW (GAIA), by A. Godfroid, advocaat,

– the Danish Government, by J. Nymann-Lindegren, P. Jespersen, P. Ngo and M. Wolff, acting as Agents,

– the Finnish Government, by J. Heliskoski and H. Leppo, acting as Agents,

– the Swedish Government, by H. Eklinder, C. Meyer-Seitz, H. Shev, J. Lundberg and A. Falk, acting as Agents,

– the Council of the European Union, by F. Naert and E. Karlsson, acting as Agents,

– the European Commission, by H. Krämer, A. Bouquet and B. Eggers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point (c) of the first subparagraph of Article 26(2) of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1) and the validity of that provision in the light of Articles 10, 20, 21 and 22 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between, on the one hand, the Centraal Israëlitisch Consistorie van België and Others (together, ‘the CICB and Others’), the Unie Moskeeën Antwerpen VZW and the Islamitisch Offerfeest Antwerpen VZW, JG and KH, the Executief van de Moslims van België and Others, and the Coördinatie Comité van Joodse Organisaties van België – Section belge du Congrès juif mondial et Congrès juif européen VZW and Others and, on the other, the Vlaamse Regering (Flemish Government, Belgium) concerning the validity of the decreet houdende wijziging

van de wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren, wat de toegelaten methodes voor het slachten van dieren betreft (decree amending the Law of 14 August 1986 on the protection and welfare of animals, regarding permitted methods of slaughtering animals), of 7 July 2017 (*Belgisch Staatsblad*, 18 July 2017, p. 73318).

Legal context

EU law

3 Recitals 2, 4, 6, 11, 14 to 16, 18, 20, 21, 43, 57 and 58 of Regulation No 1099/2009 state:

‘(2) Killing animals may induce pain, distress, fear or other forms of suffering to the animals even under the best available technical conditions. Certain operations related to the killing may be stressful and any stunning technique presents certain drawbacks. Business operators or any person involved in the killing of animals should take the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process, taking into account the best practices in the field and the methods permitted under this Regulation. Therefore, pain, distress or suffering should be considered as avoidable when business operators or any person involved in the killing of animals breach one of the requirements of this Regulation or use permitted practices without reflecting the state of the art, thereby inducing by negligence or intention, pain, distress or suffering to the animals.

…

(4) Animal welfare is [an EU] value that is enshrined in the Protocol (No 33) on protection and welfare of animals annexed to the [EC Treaty]. The protection of animals at the time of slaughter or killing is a matter of public concern that affects consumer attitudes towards agricultural products. In addition, improving the protection of animals at the time of slaughter contributes to higher meat quality and indirectly has a positive impact on occupational safety in slaughterhouses.

…

(6) The European Food Safety Authority (EFSA), established by Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [(OJ 2002 L 31, p. 1)], has adopted two opinions on the welfare aspects of the main systems of stunning and killing of certain species of animals, namely on the welfare aspects of the main systems of stunning and killing the main commercial species of animals, in 2004, and on the welfare aspects of the main systems of stunning and killing applied to commercially farmed deer, goats, rabbits, ostriches, ducks, geese and quail, in 2006. [EU] law in this area should be updated to take into account those scientific opinions. … Recommendations on farm fish are not included in this Regulation because there is a need for further scientific opinion and economic evaluation in this field.

…

(11) Fish present substantial physiological differences from terrestrial animals and farmed fish are slaughtered and killed in a very different context, in particular as regards the inspection process. Furthermore, research on the stunning of fish is far less developed than for other farmed species. Separate standards should be established on the protection of fish at killing. Therefore, provisions applicable to fish should, at present, be limited to the key principle. Further initiatives by the [European Union] should be based on a scientific risk assessment for the slaughter and killing of fish performed by EFSA and taking into account the social, economic and administrative implications.

…

(14) Hunting or recreational fishing activities take place in a context where conditions of killing are very different from the ones used for farmed animals and hunting is subject to specific legislation. It is therefore appropriate to exclude killings taking place during hunting or recreational fishing from the scope of this Regulation.

(15) Protocol No (33) underlines the need to respect the legislative or administrative provisions and customs of the Member States relating, in particular, to religious rites, cultural traditions and regional heritage when formulating and implementing the [European Union's] policies on, *inter alia*, agriculture and the internal market. It is therefore appropriate to exclude from the scope of this Regulation cultural events, where compliance with animal welfare requirements would adversely affect the very nature of the event concerned.

(16) In addition, cultural traditions refer to an inherited, established, or customary pattern of thought, action or behaviour which includes in fact the concept of something transmitted by, or acquired from, a predecessor. They contribute to fostering long-standing social links between generations. Provided that those activities do not affect the market of products of animal origin and are not motivated by production purposes, it is appropriate to exclude the killing of animals taking place during those events from the scope of this Regulation.

…

(18) Derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by [Council] Directive 93/119/EC [of 22 December 1993 on the protection of animals at the time of slaughter or killing (OJ 1993 L 340, p. 21)]. Since [EU] provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the [Charter].

…

(20) Many killing methods are painful for animals. Stunning is therefore necessary to induce a lack of consciousness and sensibility before, or at the same time as, the animals are killed. Measuring the lack of consciousness and sensibility of an animal is complex and needs to be performed under scientifically approved methodology. Monitoring through indicators, however, should be carried out to evaluate the efficiency of the procedure under practical conditions.

(21) Monitoring stunning efficiency is mainly based on the evaluation of consciousness and sensibility of the animals. The consciousness of an animal is essentially its ability to feel emotions and control its voluntary mobility. Despite some exceptions, such as electro-immobilisations or other provoked paralysis, an animal can be presumed to be unconscious when it loses its natural standing position, is not awake and does not show signs of positive or negative emotions such as fear or excitement. Sensibility of an animal is essentially its ability to feel pain. In general, an animal can be presumed to be insensitive when it does not show any reflexes or reactions to stimulus such as sound, odour, light or physical contact.

…

(43) Slaughter without stunning requires an accurate cut of the throat with a sharp knife to minimise suffering. In addition, animals that are not mechanically restrained after the cut are likely to endure a slower bleeding process and, thereby, prolonged unnecessary suffering. Animals of bovine, ovine and caprine species are the most common species slaughtered under this procedure. Therefore, ruminants slaughtered without stunning should be individually and mechanically restrained.

…

(57) European citizens expect a minimum of welfare rules to be respected during the slaughter of animals. In certain areas, attitudes towards animals also depend on national perceptions and there is a demand in some Member States to maintain or adopt more extensive animal welfare rules than those agreed upon at [EU] level. In the interest of the animals and provided that it does not affect the functioning of the internal market, it is appropriate to allow Member States certain flexibility to maintain or, in certain specific fields, adopt more extensive national rules.

It is important to ensure that such national rules are not used by Member States in a way to prejudice the correct functioning of the internal market.

(58) In some areas within the scope of this Regulation, the Council needs further scientific, social and economic information before establishing detailed rules, in particular, in the case of farmed fish and concerning the restraint by inversion of cattle. As a consequence, it is necessary that the Commission provide this information to the Council before proposing any amendment in those areas of this Regulation.'

4 Article 1 of that regulation, entitled 'Subject matter and scope', provides:

'1. This Regulation lays down rules for the killing of animals bred or kept for the production of food, wool, skin, fur or other products as well as the killing of animals for the purpose of depopulation and for related operations.

However as regards fish, only the requirements laid down in Article 3(1) shall apply.

…

3. This Regulation shall not apply:

(a) where animals are killed:

(i) during scientific experiments carried out under the supervision of a competent authority;

(ii) during hunting or recreational fishing activities;

(iii) during cultural or sporting events;

(b) to poultry, rabbits and hares slaughtered outside of a slaughterhouse by their owner for his/her private domestic consumption.'

5 Article 2 of Regulation No 1099/2009, entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(b) "related operations" means operations such as handling, lairaging, restraining, stunning and bleeding of animals taking place in the context and at the location where they are to be killed;

…

(f) "stunning" means any intentionally induced process which causes loss of consciousness and sensibility without pain, including any process resulting in instantaneous death;

(g) "religious rite" means a series of acts related to the slaughter of animals and prescribed by a religion;

(h) "cultural or sporting events" means events which are essentially and predominantly related to long established cultural traditions or sporting activities, including racing or other forms of competitions, where there is no production of meat or other animal products or where that production is marginal compared to the event as such and not economically significant;

…

(j) “slaughtering” means the killing of animals intended for human consumption;

…’

6 Article 3 of that regulation, entitled ‘General requirements for killing and related operations’, provides in paragraph 1 thereof:

‘Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations.’

7 Article 4 of Regulation No 1099/2009, which is devoted to ‘stunning methods’, provides:

‘1. Animals shall only be killed after stunning in accordance with the methods and specific requirements related to the application of those methods set out in Annex I. The loss of consciousness and sensibility shall be maintained until the death of the animal.

The methods referred to in Annex I which do not result in instantaneous death … shall be followed as quickly as possible by a procedure ensuring death such as bleeding, pithing, electrocution or prolonged exposure to anoxia.

…

4. In the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse.’

8 Article 5 of that regulation, entitled ‘Checks on stunning’, provides in paragraph 2 thereof:

‘Where, for the purpose of Article 4(4), animals are killed without prior stunning, persons responsible for slaughtering shall carry out systematic checks to ensure that the animals do not present any signs of consciousness or sensibility before being released from restraint and do not present any sign of life before undergoing dressing or scalding.’

9 Article 26 of Regulation No 1099/2009, entitled ‘Stricter national rules’, states:

‘1. This Regulation shall not prevent Member States from maintaining any national rules aimed at ensuring more extensive protection of animals at the time of killing in force at the time of entry into force of this Regulation.

Before 1 January 2013, Member States shall inform the Commission about such national rules. The Commission shall bring them to the attention of the other Member States.

2. Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in this Regulation in relation to the following fields:

…

(c) the slaughtering and related operations of animals in accordance with Article 4(4).

Member States shall notify the Commission of any such national rules. The Commission shall bring them to the attention of the other Member States.

…

4. A Member State shall not prohibit or impede the putting into circulation within its territory of products of animal origin derived from animals that have been killed in another Member State on the grounds that the animals concerned have not been killed in accordance with its national rules aimed at a more extensive protection of animals at the time of killing.’

10 Article 27 of that regulation, entitled ‘Reporting’, provides in paragraph 1 thereof:

‘No later than 8 December 2014, the Commission shall submit to the European Parliament and to the Council a report on the possibility of introducing certain requirements regarding the protection of fish at the time of killing taking into account animal welfare aspects as well as the socioeconomic and environmental impacts. This report shall, if appropriate, be accompanied by legislative proposals with a view to amending this Regulation, by including specific rules regarding the protection of fish at the time of killing.

Pending the adoption of these measures, Member States may maintain or adopt national rules regarding the protection of fish at the time of slaughter or killing and shall inform the Commission thereof.’

Belgian law

11 The first subparagraph of Article 16(1) of the Wet betreffende de bescherming en het welzijn der dieren (Law on the protection and welfare of animals) of 14 August 1986 (*Belgisch Staatsblad*, 3 December 1986, p. 16382), in the version in force before the decree at issue in the main proceedings was adopted, laid down the obligation not to slaughter an animal without prior stunning or, in the event of *force majeure*, to use the least painful method. However, the second subparagraph of Article 16(1) stated that, by way of derogation, that obligation did not apply to ‘slaughter prescribed by a religious rite’.

12 The decree at issue in the main proceedings, which entered into force on 1 January 2019, brought that derogation to an end in the case of the Flemish Region. Article 15(2) of the Law on the protection and welfare of animals, in the version amended by Article 3 of that decree, provides that ‘if the animals are slaughtered according to special methods required for religious rites, the stunning must be reversible and the animal’s death must not be caused by stunning’.

13 The preparatory documents for that decree state as follows:

‘Flanders attaches great importance to animal welfare. The objective is, therefore, to eliminate all avoidable animal suffering in Flanders. The slaughter of animals without stunning is incompatible with that principle. Although other measures, less drastic than a ban on slaughtering without prior stunning, could somewhat limit the negative impact of that method of slaughter on animal welfare, such measures cannot prevent a very serious impairment of that welfare from continuing to exist. The gap between eliminating animal suffering, on the one hand, and slaughtering without prior stunning, on the other, will always be very considerable, even if less radical measures were taken to minimise the impairment of animal welfare.

Nevertheless, a balance must be sought between the protection of animal welfare and freedom of religion.

Both Jewish and Islamic religious rites require the animal to be drained of as much of its blood as possible. Scientific research has shown that the fear that stunning would adversely affect bleeding out is unfounded …

Furthermore, both rites require that the animal be intact and healthy at the time of slaughter and that it die from bleeding. … Electronarcosis is a reversible (non-lethal) method of stunning in which the animal, if it has not had its throat cut in the meantime, regains consciousness after a short period and does not feel any negative effects of stunning. If the animal’s throat is cut immediately after stunning, its death will be purely due to bleeding. In view of this, the conclusion set out in Mr Vanthemsche’s report may be followed. According to that conclusion, the application of reversible, non-lethal stunning during the practice of ritual slaughter constitutes a proportionate measure which respects the spirit of ritual slaughter in the framework of freedom of religion and takes maximum account of the welfare of the animals concerned. At the very least, the obligation to use electronarcosis for slaughter carried out in accordance with special methods required by religious rites does not, therefore, constitute a disproportionate interference with freedom of religion.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 By applications lodged on 17 and 18 January 2018, the applicants in the main proceedings brought actions before the Grondwettelijk Hof (Constitutional Court, Belgium), the referring court, seeking the annulment of the decree at issue in the main proceedings, on the ground that it infringes, inter alia, Article 4(4) and Article 26(2) of Regulation No 1099/2009, in that it deprives Jewish and Muslim believers of the guarantee that ritual slaughtering may not be subject to a requirement of prior stunning. That decree, it is argued, prevents all those believers, not just a minority of them, from practising their religion, in not allowing them to obtain meat from animals slaughtered in accordance with their religious precepts, since those precepts preclude the reversible stunning technique.

15 As is apparent from the order for reference, the applicants in the main proceedings explain that, under Article 4(1) of Regulation No 1099/2009, read in conjunction with recital 20 of that regulation, animals should, as a rule, be stunned before being slaughtered, that is to say, the loss of consciousness and sensibility should be maintained until the animal's death.

16 However, in accordance with Article 4(4) of that regulation, the obligation to stun does not apply to the slaughter of animals carried out in accordance with particular methods prescribed by religious rites. According to recital 18 of that regulation, that exception is dictated by the objective of respecting freedom of religion, guaranteed in Article 10(1) of the Charter, as the Court noted in the judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* (C-426/16, EU:C:2018:335, paragraphs 56 and 57).

17 The Grondwettelijk Hof (Constitutional Court) observes in that regard that since the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), the Court of Justice inferred from this that the concept of 'religion' may cover both the *forum internum*, that is, the holding of beliefs, and the *forum externum*, that is, the manifestation of religious faith in public.

18 According to the Grondwettelijk Hof (Constitutional Court), the particular methods of slaughter prescribed by religious rites and the respect for religious dietary rules fall within the scope of freedom of religion and can be regarded as a manifestation of a religious belief in public, as provided for in Article 9 of the ECHR and Article 10(1) of the Charter. In particular, ritual slaughter is intended to provide the faithful concerned with meat from animals slaughtered in accordance with their religious beliefs. The European Court of Human Rights has indeed held, in that regard, in the judgment of 27 June 2000, *Cha'are Shalom V^e Tsedek v. France* (CE:ECHR:2000:0627JUD002741795, § 82), that, where believers are not deprived of the possibility of obtaining and consuming meat from animals slaughtered in accordance with their religious beliefs, the right to freedom of religion cannot extend to the right to take part in person in the performance of ritual slaughter.

19 However, the applicants in the main proceedings submit that the Member States cannot use point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 to render meaningless the derogation from the obligation to stun, during ritual slaughter, provided for in Article 4(4) of that regulation.

20 In addition, the applicants submit that the decree at issue in the main proceedings disproportionately restricts freedom of religion, particularly because meat from bovine animals slaughtered in accordance with religious precepts represents only 0.1% of the total amount of meat produced in Belgium and the cases in which prior stunning fails exceed that percentage. In addition, it is argued that the Jewish community is not certain of being able to obtain sufficient meat from animals slaughtered in accordance with the precepts of the Jewish religion. The Legislation Division of the Raad van State (Council of State, Belgium) has moreover deduced from this that the prohibition on slaughter without prior stunning interferes disproportionately with freedom of religion.

21 The applicants further submit that the decree at issue in the main proceedings also infringes freedom of religion in that it prevents adherents to the Jewish religion from slaughtering animals in accordance with the *shechita*, namely the rite of slaughter specific to that religion. In that regard, the fact that meat

from animals slaughtered in accordance with religious precepts may be imported from abroad cannot be taken into consideration.

22 Lastly, the applicants dispute the Flemish legislature's premiss that the reversible stunning procedure which does not result in the animal's death complies with ritual slaughter requirements.

23 Conversely, the Flemish and Walloon Governments consider that point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 expressly empowers Member States to depart from Article 4(4) of that regulation.

24 The referring court notes, first, that the derogation from the obligation in principle to stun prior to killing, provided for in Article 4(4) of Regulation No 1099/2009, is intended to ensure respect for freedom of religion, guaranteed in Article 10(1) of the Charter and, secondly, that point (c) of the first subparagraph of Article 26(2) of that regulation, read in conjunction with recitals 18 and 57 thereof, authorises Member States, with a view to promoting animal welfare, to derogate from Article 4(4) of that regulation, without however specifying the limits which Member States must observe in that regard.

25 The question therefore arises whether point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 may be interpreted as authorising Member States to adopt national rules such as those at issue in the main proceedings and, if so, whether that provision is compatible with freedom of religion as guaranteed in Article 10(1) of the Charter.

26 In that regard, the referring court states that the decree at issue in the main proceedings brought to an end, with effect from 1 January 2019, the derogation, in the case of ritual slaughter, from the obligation of prior stunning. It is also apparent from the preparatory documents for that decree that the Flemish legislature started from the position that slaughtering without stunning causes an animal avoidable suffering. It therefore sought to promote animal welfare and to strike a balance between the objective of promoting animal welfare and the objective of guaranteeing freedom of religion.

27 From that point of view, in order to reflect the wishes of the religious communities concerned as far as possible, Article 15(2) of the Law of 14 August 1986, as amended by the decree at issue in the main proceedings, now requires, in the context of ritual slaughter, reversible stunning which cannot result in the animal's death. The preparatory documents for that decree thus show that the Flemish legislature considered that that provision reflects the wishes of the religious communities concerned, since where reversible stunning is applied, the religious precepts requiring that the animal not be dead at the time of slaughter and that its blood be completely drained are respected.

28 The legislative amendment made cannot, however, be interpreted as requiring all religious communities to accept the reversible stunning technique. In addition, as is apparent from the preparatory documents for the decree at issue in the main proceedings, that decree does not affect the possibility for the members of those communities of obtaining meat from animals slaughtered without prior stunning, given that there is no provision prohibiting the importation of such meat into the Flemish Region. In any event, such a ban on imports would be contrary to Article 26(4) of Regulation No 1099/2009.

29 The applicants in the main proceedings submit, however, that an increasing number of Member States, following the example of the Flemish Region, prohibit the slaughter of animals without stunning or, at the very least, the export of meat from animals slaughtered in accordance with religious precepts, which jeopardises the supply of that type of meat to the Flemish Region. Furthermore, certification of the imported meat does not provide certainty that the meat actually comes from animals slaughtered in accordance with religious precepts.

30 The Flemish and Walloon Governments counter that a number of Member States do not have a general prohibition of that sort on killing without prior stunning and that trade in meat does not stop at the borders of the European Union.

31 Lastly, the applicants in the main proceedings submit that if point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 were to be interpreted as authorising Member States to take

measures such as those provided for by the decree at issue in the main proceedings, it would infringe the principles of equality, non-discrimination and religious diversity, guaranteed in Articles 20, 21 and 22 of the Charter respectively. In that context, the applicants observe that the above decree, adopted pursuant to that regulation, treats differently, without any reasonable justification, those who kill animals while hunting or fishing or in the context of pest control and those who kill animals in accordance with particular methods of slaughter prescribed by a religious rite.

32 In those circumstances the Grondwettelijk Hof (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should point (c) of the first subparagraph of Article 26(2) of [Regulation No 1099/2009] be interpreted as meaning that Member States are permitted, by way of derogation from … Article 4(4) of that regulation and with a view to promoting animal welfare, to adopt rules such as those contained in the decree [at issue in the main proceedings], rules which provide, on the one hand, for a prohibition on the slaughter of animals without stunning that also applies to the slaughter carried out in the context of a religious rite and, on the other hand, for an alternative stunning procedure for the slaughter carried out in the context of a religious rite, based on reversible stunning and on the requirement that the stunning should not result in the death of the animal?

(2) If the first question referred for a preliminary ruling is to be answered in the affirmative, does point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009, in the interpretation referred to in the first question, infringe Article 10(1) of the [Charter]?

(3) If the first question referred for a preliminary ruling is to be answered in the affirmative, does point (c) of the first subparagraph of Article 26(2) read in conjunction with Article 4(4) of Regulation No 1099/2009, in the interpretation referred to in the first question, infringe Articles 20, 21 and 22 of the [Charter], since, in the case of the killing of animals by particular methods prescribed by religious rites, provision is only made for a conditional exception to the obligation to stun the animal (Article 4(4), read in conjunction with Article 26(2) [of that regulation]), whereas in the case of the killing of animals during hunting and fishing and during sporting and cultural events, for the reasons stated in the recitals of the regulation, the relevant provisions stipulate that those activities do not fall within the scope of the regulation, or are not subject to the obligation to stun the animal when it is killed (Article 1(1), second subparagraph, and Article 1(3) [of that regulation])?’

The application for the oral procedure to be reopened

33 By document lodged at the Court Registry on 2 October 2020, the CICB and Others and Kosher Poultry and Others applied for the oral procedure to be reopened pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

34 In support of their application, the CICB and Others and Kosher Poultry and Others submit, in essence, that on 18 September 2020 the Sejm (lower house of parliament, Poland) adopted a draft law prohibiting the export of meat from animals killed in the context of ritual slaughter. Since that Member State represents, for the Belgian Jewish community, the largest supplier of kosher meat and there is no practical alternative solution available, the adoption of such a draft law further establishes the disproportionate nature of the decree at issue in the main proceedings and, consequently, constitutes a new fact which is of such a nature as to be a decisive factor for the Court’s decision.

35 Under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the Court’s decision, or where the case must be decided on the basis of an argument which has not been debated between the interested parties.

36 That is not the case here.

37 At the hearing, the Court, by means of a question put to the Flemish Region, to which all the participants were able to respond, envisaged the hypothetical situation, which goes beyond that relied on by the CICB and Others and Kosher Poultry and Others in their application for the oral procedure be reopened, in which all the Member States were to adopt a measure which, like the decree at issue in the main proceedings, prohibited the killing of animals without prior stunning in the context of ritual slaughter.

38 In the light of the foregoing, since the draft law mentioned in paragraph 34 above cannot constitute either a new fact which is of such a nature as to be a decisive factor for the Court's decision or a fact relating to an argument which has not been debated between the interested parties, within the meaning of Article 83 of the Rules of Procedure, the Court finds, after hearing the Advocate General, that there is no need to order the reopening of the oral procedure.

Consideration of the questions referred

The first and second questions

39 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009, read in the light of Article 13 TFEU and Article 10(1) of the Charter, must be interpreted as precluding the legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.

40 As a preliminary point, it should be noted that Regulation No 1099/2009, which has its legal basis in Article 37 EC (now Article 43 TFEU) and forms part of the Community Action Plan on the Protection and Welfare of Animals 2006-2010 (COM (2006) 13 final of 23 January 2006), seeks to define common rules for the protection of animal welfare at the time of slaughter or killing in the European Union, and, as stated in recital 4 of that regulation, is based on the idea that the protection of animals at the time of slaughter is a matter of general concern.

41 In that regard, it should be borne in mind, first of all, that Article 4(1) of Regulation No 1099/2009, read in conjunction with recital 20 of that regulation, lays down the principle that an animal should be stunned prior to being killed and goes so far as to establish this as an obligation, since scientific studies have shown that prior stunning is the technique that compromises animal welfare the least at the time of killing (see, to that effect, judgment of 26 February 2019, *Œuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137, paragraph 47). As follows from recital 4 of that regulation, the principle of prior stunning provided for in that provision reflects an EU value, namely animal welfare, as now enshrined in Article 13 TFEU, according to which the European Union and the Member States must pay full regard to the welfare requirements of animals, when formulating and implementing animal welfare policy.

42 That principle of prior stunning meets the main objective of the protection of animal welfare pursued by Regulation No 1099/2009, as is clear from the very title of that regulation and from recital 2 thereof, in accordance with Article 13 TFEU (see, to that effect, judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335, paragraphs 63 and 64).

43 Next, Article 4(4) of Regulation No 1099/2009 provides that the principle of prior stunning does not apply to animals subject to particular methods of slaughter prescribed by religious rites, provided that slaughter takes place in a slaughterhouse. Although that provision, read in the light of recital 18 of Regulation No 1099/2009, permits the practice of ritual slaughter in accordance with which an animal may be killed without first being stunned, that form of slaughter is, however, authorised only by way of derogation in the European Union and solely in order to ensure observance of freedom of religion. This is because that form of slaughter cannot eliminate any pain, distress and suffering on the part of the animal as effectively as slaughter with prior stunning, which, in accordance with Article 2(f) of that regulation, read in the light of recital 20 thereof, is necessary to cause the animal to lose consciousness and sensibility in order significantly to reduce its suffering (see, to that effect, judgment of 26 February 2019, *Œuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137, paragraph 48).

44 That derogation is based, as is apparent from recital 15 of Regulation No 1099/2009, on the need to respect the legislative or administrative provisions and customs of the Member States relating, in particular, to religious rites, cultural traditions and regional heritage when formulating and implementing the European Union's policies on, inter alia, agriculture and the internal market. It thus gives expression, in accordance with Article 10(1) of the Charter, to the positive commitment of the EU legislature to ensure effective observance of freedom of religion and the right to manifest religion or beliefs in practice and observance, in particular for practising Muslims and Jews (see, to that effect, judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335, paragraphs 56 and 57).

45 In addition, it is apparent from recital 18 of that regulation that, in view of the fact that '[EU] provisions applicable to religious slaughter[, stemming from Directive 93/119,] have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation', the EU legislature decided that 'derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State'. To that effect, Article 26(1) of Regulation No 1099/2009 authorises Member States to maintain any national rules aimed at ensuring more extensive protection of animals, at the time of killing, in force at the time of entry into force of that regulation, while point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 provides that Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in that regulation in relation, in particular, to 'the slaughtering and related operations of animals in accordance with Article 4(4)'. Under Article 2(b) of that regulation, the related operations thus referred to include stunning.

46 Lastly, Article 26(4) of Regulation No 1099/2009 provides that a Member State must not prohibit or impede the putting into circulation within its territory of products of animal origin derived from animals that have been killed in another Member State on the ground that the animals concerned have not been killed in accordance with its national rules aimed at ensuring more extensive protection of animals at the time of killing.

47 Thus, the framework established by Regulation No 1099/2009 reflects the requirements of Article 13 TFEU, according to which 'the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage'. That framework shows that the regulation does not itself effect the necessary reconciliation between animal welfare and the freedom to manifest religion, but merely provides a framework for the reconciliation which Member States must achieve between those two values.

48 It follows from the considerations set out in paragraphs 44 to 47 above (i) that point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 does not fail to have regard to the freedom to manifest religion, as guaranteed in Article 10(1) of the Charter, and (ii) that in the context of the power afforded Member States, under that provision of Regulation No 1099/2009, to adopt additional rules designed to ensure greater protection for animals than provided for by that regulation, those States may, inter alia, impose an obligation to stun animals prior to killing which also applies in the case of slaughter prescribed by religious rites, subject, however, to respecting the fundamental rights enshrined in the Charter.

49 Indeed, in accordance with Article 51(1) of the Charter, Member States are required to respect the fundamental rights enshrined in the Charter when they are implementing that power.

50 As regards the compatibility of national measures adopted on the basis of point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 with freedom to manifest religion, it should be borne in mind that Article 10(1) of the Charter provides that everyone has the right to freedom of thought, conscience and religion, and specifies that that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief in worship, teaching, practice and observance.

51 In that regard, national legislation adopted on the basis of point (c) of the first subparagraph of Article 26(2) of that regulation and requiring, in the context of ritual slaughter, reversible stunning which cannot result in the animal's death, falls within the scope of the freedom to manifest religion, guaranteed in Article 10(1) of the Charter.

52 The Charter uses the word 'religion', referred to in that provision, in a broad sense, covering both the *forum internum*, that is, the fact of having a belief, and the *forum externum*, that is, the manifestation of religious faith in public, and the Court has already held that ritual slaughter falls within the scope of freedom to manifest religion, guaranteed in Article 10(1) of the Charter (judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335, paragraphs 44 and 49).

53 As the applicants in the main proceedings submit, by imposing the obligation to stun the animal beforehand during ritual slaughter, while stipulating that that stunning should be reversible and not cause the animal's death, the decree at issue in the main proceedings, adopted on the basis of point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009, appears to be incompatible with certain Jewish and Islamic religious precepts.

54 In that regard, it is apparent from the request for a preliminary ruling that, in the view of the applicants in the main proceedings, ritual slaughter is governed by specific religious precepts which require, in essence, that believers consume only meat from animals slaughtered without prior stunning, in order to ensure that those animals are not subjected to any procedure which may result in their death before they are slaughtered and that their blood is drained.

55 Consequently, the decree at issue in the main proceedings entails a limitation on the exercise of the right of Jewish and Muslim believers to the freedom to manifest their religion, as guaranteed in Article 10(1) of the Charter.

56 In that regard, it should be borne in mind that Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union. Account must, therefore, be taken of the corresponding rights of the ECHR for the purpose of interpreting the Charter, as the minimum threshold of protection (see, to that effect, judgments of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72 and the case-law cited, and of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 124). Since it is apparent from the explanations relating to Article 10 of the Charter that the freedom guaranteed in paragraph 1 thereof corresponds to the freedom guaranteed in Article 9 of the ECHR, that freedom must be taken into account for the purpose of interpreting Article 10(1) of the Charter.

57 According to the case-law of the European Court of Human Rights, freedom of thought, conscience and religion protected by Article 9 ECHR is one of the foundations of a 'democratic society' within the meaning of that convention, since pluralism, which is integral to any such society, depends on that freedom (see, to that effect, ECtHR, 18 February 1999, *Buscarini and Others v. Saint-Marino*, CE:ECHR:1999:0218JUD002464594, § 34 and the case-law cited, and 17 February 2011, *Wasmuth v. Germany*, CE:ECHR:2011:0217JUD001288403, § 50). Thus, Article 9(2) ECHR provides that 'freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

58 To the same effect, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. The second sentence of Article 52(1) states that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

59 It is in the light of those considerations that it must be examined whether national legislation, which lays down the obligation to stun the animal beforehand during ritual slaughter, while stipulating that

that stunning should be reversible and not cause the animal's death, fulfils the conditions laid down in Article 52(1) and (3) of the Charter, read in conjunction with Article 13 TFEU.

60 In the first place, since it flows from the decree at issue in the main proceedings, the limitation on the exercise of the right to the freedom to manifest religion identified in paragraph 55 above is provided for by law, within the meaning of Article 52(1) of the Charter.

61 In the second place, national legislation which lays down the obligation to stun the animal beforehand during ritual slaughter, while stipulating that that stunning should be reversible and not cause the animal's death, respects the essence of Article 10 of the Charter, since, according to the information in the documents before the Court, set out in paragraph 54 above, the interference resulting from such legislation is limited to one aspect of the specific ritual act of slaughter, and that act of slaughter is not, by contrast, prohibited as such.

62 In the third place, as regards whether the limitation of the right guaranteed in Article 10 of the Charter resulting from national legislation such as that at issue in the main proceedings meets an objective of general interest, it is apparent from the information in the request for a preliminary ruling that the Flemish legislature intended to promote animal welfare. It is stated in the preparatory documents for the decree at issue in the main proceedings that 'Flanders attaches great importance to animal welfare', that 'the objective is, therefore, to eliminate all avoidable animal suffering in Flanders', that 'the slaughter of animals without stunning is incompatible with that principle' and that 'although other measures, less drastic than a ban on slaughtering without prior stunning, could somewhat limit the negative impact of that method of slaughter on animal welfare, such measures cannot prevent a very serious impairment of that welfare from continuing to exist'.

63 It is clear both from the case-law of the Court (see, to that effect, judgments of 17 January 2008, *Viamex Agrar Handel and ZVK*, C-37/06 and C-58/06, EU:C:2008:18, paragraph 22; of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353, paragraph 27; of 10 September 2009, *Commission* v *Belgium*, C-100/08, not published, EU:C:2009:537, paragraph 91; and of 23 April 2015, *Zuchtvieh-Export*, C-424/13, EU:C:2015:259, paragraph 35), and from Article 13 TFEU that the protection of animal welfare is an objective of general interest recognised by the European Union.

64 In the fourth place, as regards observance of the principle of proportionality, that principle requires that the limitations on freedom to manifest religion, brought about by the decree at issue in the main proceedings, do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by that legislation; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 46 and the case-law cited, and of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332 paragraph 55).

65 Where several fundamental rights and principles enshrined in the Treaties are at issue, such as, in the present case, the right guaranteed in Article 10 of the Charter and animal welfare enshrined in Article 13 TFEU, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them (see, to that effect, judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 50 and the case-law cited).

66 In that regard, it should be noted that national legislation which lays down the obligation to stun the animal beforehand during ritual slaughter, while stipulating that that stunning should be reversible and not cause the animal's death, is appropriate for achieving the objective of promoting animal welfare referred to in paragraph 62 above.

67 It is apparent from the case-law of the European Court of Human Rights that where matters of general policy, such as the determination of relations between the State and religions, are at stake, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. The State should thus, in principle, be afforded, within the scope of Article 9 of the ECHR, a wide margin of appreciation in deciding whether, and to what extent, a

limitation of the right to manifest religion or beliefs is 'necessary'. The margin of appreciation thus afforded to the Member States in the absence of a consensus at EU level must, however, go hand in hand with a European supervision consisting in determining whether the measures taken at national level were justified in principle and proportionate (see, to that effect, ECtHR, 1 July 2014, *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511, §§ 129 and 131 and the case-law cited).

68 As may be seen from recitals 18 and 57 of Regulation No 1099/2009, it is precisely the lack of consensus among Member States as to how they perceive ritual slaughter which led to the adoption of Articles 4 and 26 of that regulation.

69 Recital 18 of Regulation No 1099/2009 states, as noted in paragraph 45 above, that it is important that the derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State.

70 After referring to the fact that European citizens expect a minimum of welfare rules to be respected during the slaughter of animals, recital 57 of that regulation states, for its part, that in certain areas attitudes towards animals also depend on national perceptions and there is a demand in some Member States to maintain or adopt more extensive animal welfare rules than those agreed upon at EU level. Recital 57 further states that, in the interest of the animals and provided that it does not affect the functioning of the internal market, it is appropriate to allow Member States a certain flexibility to maintain or, in certain specific fields, adopt more extensive national rules.

71 Consequently, by referring to the existence of different 'national perceptions' in relation to animals and to the need to leave a 'certain flexibility' or 'a certain degree of subsidiarity' to Member States, the EU legislature intended to preserve the specific social context of each Member State in that respect and to give each Member State a broad discretion in the context of the need to reconcile Article 13 TFEU with Article 10 of the Charter, for the purposes of striking a fair balance between, on the one hand, the protection of the welfare of animals when they are killed and, on the other, respect for the freedom to manifest religion.

72 As regards, more specifically, the necessity of the interference with the freedom to manifest religion resulting from the decree at issue in the main proceedings, it is apparent from the scientific opinions of the European Food Safety Authority (EFSA), cited in recital 6 of Regulation No 1099/2009, that a scientific consensus has emerged that prior stunning is the optimal means of reducing the animal's suffering at the time of killing.

73 It was in that perspective that the Flemish legislature stated, in the preparatory documents for the decree at issue in the main proceedings, that 'the gap between eliminating animal suffering, on the one hand, and slaughtering without prior stunning, on the other, will always be very considerable, even if less radical measures were taken to minimise the impairment of animal welfare'.

74 It follows that the Flemish legislature was entitled, without exceeding the discretion referred to in paragraph 67 above, to consider that the limitations placed by the decree at issue in the main proceedings on freedom to manifest religion, by requiring prior stunning which is reversible and cannot result in the animal's death, meet the condition of necessity.

75 As regards, lastly, whether the interference with the freedom to manifest religion resulting from the decree at issue in the main proceedings is proportionate, first, as is apparent from the preparatory documents for that decree, as cited in paragraph 13 above, the Flemish legislature relied on scientific research which demonstrated that the fear that stunning would adversely affect bleeding out is unfounded. In addition, those same preparatory documents show that electronarcosis is a non-lethal, reversible method of stunning, with the result that if the animal's throat is cut immediately after stunning, its death will be solely due to bleeding.

76 Furthermore, by requiring, in the context of ritual slaughter, prior stunning which is reversible and cannot result in the animal's death, the Flemish legislature also intended to be guided by recital 2 of Regulation No 1099/2009 – in the light of which Article 4 of that regulation, taken as a whole, must be read – which states, in essence, that, in order to spare animals avoidable pain, distress or suffering during the killing process, preference should be given to the most up-to-date method of killing that is

authorised, where significant scientific progress has made it possible to reduce the animal's suffering at the moment of killing.

77 Secondly, like the ECHR, the Charter is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, by analogy, ECtHR, 7 July 2011, *Bayatyan v. Armenia* [GC], CE:ECHR:2011:0707JUD002345903, § 102 and the case-law cited), with the result that regard must be had to changes in values and ideas, both in terms of society and legislation, in the Member States. Animal welfare, as a value to which contemporary democratic societies have attached increasing importance for a number of years, may, in the light of changes in society, be taken into account to a greater extent in the context of ritual slaughter and thus help to justify the proportionality of legislation such as that at issue in the main proceedings.

78 Thirdly, in accordance with the rule laid down in Article 26(4) of Regulation No 1099/2009, the decree at issue in the main proceedings neither prohibits nor impedes the putting into circulation, within the territory in which it applies, of products of animal origin derived from animals which have undergone ritual slaughter, without prior stunning, in another Member State. The Commission indeed stated, in that regard, in its written observations submitted to the Court, that the majority of Member States authorise, pursuant to Article 4(4) of that regulation, slaughter without prior stunning. Moreover, as the Flemish and Walloon Governments have, in essence, argued, national legislation such as the decree at issue in the main proceedings neither prohibits nor hinders the putting into circulation of products of animal origin derived from animals which have undergone ritual slaughter, where those products originate in a non-Member State.

79 Thus, in an evolving societal and legislative context, which is characterised, as pointed out in paragraph 77 above, by an increasing awareness of the issue of animal welfare, the Flemish legislature was entitled to adopt, following a wide-ranging debate organised at the level of the Flemish Region, the decree at issue in the main proceedings, without exceeding the discretion which EU law confers on Member States as regards the need to reconcile Article 10(1) of the Charter with Article 13 TFEU.

80 Consequently, it must be found that the measures contained in the decree at issue in the main proceedings allow a fair balance to be struck between the importance attached to animal welfare and the freedom of Jewish and Muslim believers to manifest their religion and are, therefore, proportionate.

81 In those circumstances, the answer to the first and second questions is that point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009, read in the light of Article 13 TFEU and Article 10(1) of the Charter, must be interpreted as not precluding legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.

The third question

82 By its third question, the referring court in essence raises the validity of point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 in the light of the principles of equality, non-discrimination and cultural, religious and linguistic diversity, as guaranteed by Articles 20, 21 and 22 of the Charter respectively. Indeed, if that provision of Regulation No 1099/2009 were to authorise Member States to adopt measures such as compulsory stunning for animals killed in the context of ritual slaughter, that regulation would contain no similar provision governing the killing of animals in the context of hunting and recreational fishing activities or during cultural or sporting events.

83 It follows from the wording of that question that the referring court is uncertain whether point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009 complies with Articles 20, 21 and 22 of the Charter, inasmuch as, while that regulation provides for only a conditional exception to the prior stunning of animals, in the context of ritual slaughter, it excludes from the regulation's scope, or exempts from the obligation of prior stunning laid down therein, the killing of animals during hunting, recreational fishing, and sporting and cultural events.

84 In that regard, first, it is necessary to assess the argument that ritual slaughter is subject to discriminatory treatment in Regulation No 1099/2009 compared with the killing of animals during cultural and sporting events.

85 First of all, it must be borne in mind that the prohibition on discrimination is merely a specific expression of the general principle of equality which is one of the fundamental principles of EU law, and that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgments of 19 October 1977, *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7, and of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23).

86 In the present case, the first subparagraph of Article 1(1) of Regulation No 1099/2009 states that the purpose of that regulation is to lay down 'rules for the killing of animals bred or kept for the production of food, wool, skin, fur or other products as well as the killing of animals for the purpose of depopulation and for related operations', and Article 1(3)(a)(iii) of Regulation No 1099/2009 states that that regulation does not apply to a number of activities, which include the killing of animals during cultural or sporting events.

87 Article 2(h) of that regulation defines 'cultural or sporting events' as 'events which are essentially and predominantly related to long established cultural traditions or sporting activities, including racing or other forms of competitions, where there is no production of meat or other animal products or where that production is marginal compared to the event as such and not economically significant'.

88 It is apparent from that definition that cultural and sporting events, within the meaning of Article 2(h) of that regulation, result at most in a marginal production of meat or animal products compared to the event as such and that such production is not economically significant.

89 That interpretation is borne out by recital 16 of Regulation No 1099/2009, according to which the fact that those events do not affect the market for products of animal origin and are not motivated by production purposes justifies their being excluded from the scope of that regulation.

90 In those circumstances, a cultural or sporting event cannot reasonably be understood as a food production activity for the purposes of Article 1(1) of Regulation No 1099/2009. Consequently, in the light of that difference, the EU legislature did not disregard the prohibition on discrimination, in not treating cultural or sporting events in the same way as slaughtering, which must, as such, be subject to stunning, and in thus treating those situations differently.

91 Secondly, if the concepts of 'hunting' and 'recreational fishing' are not to be rendered meaningless, it cannot be argued that those activities are capable of being carried out in respect of animals which have been stunned beforehand. As stated in recital 14 of Regulation No 1099/2009, those activities take place in a context where conditions of killing are very different from those employed for farmed animals.

92 In those circumstances, the EU legislature also did not infringe the principle of non-discrimination in excluding from the scope of that regulation the non-comparable situations of killing referred to in the preceding paragraph.

93 Thirdly, in Article 27(1) of Regulation No 1099/2009 and recitals 6, 11 and 58 thereof, the EU legislature made it abundantly clear that scientific opinions on farmed fish were insufficient and that there was also a need for further economic evaluation in that field, which justified the separate treatment of farmed fish.

94 Fourthly, in the light of the considerations set out in paragraphs 84 to 93 above, it must be held that Regulation No 1099/2009 does not disregard the cultural, religious and linguistic diversity guaranteed in Article 22 of the Charter, in providing only for a conditional exception to the prior stunning of animals, in the context of ritual slaughter, while excluding from that regulation's scope, or exempting from the obligation of prior stunning laid down therein, the killing of animals during hunting, recreational fishing, and sporting and cultural events.

95 It follows that the examination of the third question referred for a preliminary ruling has disclosed nothing capable of affecting the validity of point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009.

Costs

96 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Point (c) of the first subparagraph of Article 26(2) of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, read in the light of Article 13 TFEU and Article 10(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.

2. The examination of the third question referred for a preliminary ruling has disclosed nothing capable of affecting the validity of point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009.

[Signatures]

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1 Language of the case: Dutch.

JUDGMENT OF THE COURT (Grand Chamber)

19 November 2019 (*)

(Reference for a preliminary ruling — Social policy — Article 153 TFEU — Minimum safety and health requirements for the organisation of working time — Directive 2003/88/EC — Article 7 — Right to paid annual leave of at least 4 weeks — Article 15 — Provisions of national legislation and collective agreements more favourable to the protection of the safety and health of workers — Workers incapable of working during a period of paid annual leave due to illness — Refusal to carry over that leave where not carrying over that leave does not reduce the actual duration of the paid annual leave below 4 weeks — Article 31(2) of the Charter of Fundamental Rights of the European Union — Inapplicable where there is no implementation of EU law for the purposes of Article 51(1) of the Charter of Fundamental Rights)

In Joined Cases C-609/17 and C-610/17,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the työtuomioistuin (Labour Court, Finland), made by decisions of 18 October 2017, received at the Court on 24 October 2017, in the proceedings

Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry

v

Hyvinvointialan liitto ry,

intervener:

Fimlab Laboratoriot Oy (C-609/17),

and

Auto- ja Kuljetusalan Työntekijäliitto AKT ry

v

Satamaoperaattorit ry,

intervener:

Kemi Shipping Oy (C-610/17),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Prechal (Rapporteur), E. Regan and P.G. Xuereb, Presidents of Chambers, M. Ilešič, J. Malenovský, L. Bay Larsen, T. von Danwitz, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 26 February 2019,

after considering the observations submitted on behalf of:

– Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry, by J. Kasanen and M. Nyman,

– Hyvinvointialan liitto ry and Fimlab Laboratoriot Oy, by M. Kärkkäinen and I. Kallio,

– Auto- ja Kuljetusalan Työntekijäliitto AKT ry, by J. Tutti and J. Hellsten,

– Satamaoperaattorit ry and Kemi Shipping Oy, by M. Kärkkäinen and I. Kallio,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the French Government, by A.-L. Desjonquères and R. Coesme, acting as Agents,

– the European Commission, by M. van Beek and M. Huttunen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2019,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 7 of 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) and of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in two sets of proceedings between, in Case C-609/17, Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry ('TSN') and Hyvinvointialan liitto ry and, in Case C-610/17, Auto- ja Kuljetusalan Työntekijäliitto AKT ry ('AKT') and Satamaoperaattorit ry, concerning the refusal to carry over, for two workers who were incapable of working during a period of paid annual leave due to illness, paid annual leave corresponding to all or some of the sick days concerned.

Legal context

European Union law

3 Directive 2003/88 was adopted on the basis of Article 137(2) EC, now Article 153(2) TFEU.

4 Under recitals 1, 2 and 5 of Directive 2003/88:

'(1) Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time [(OJ 1993 L 307, p. 18)], which lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has been significantly amended. In order to clarify matters, a codification of the provisions in question should be drawn up.

(2) Article 137 [EC] provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

…

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. …'

5 Article 1 of Directive 2003/88, entitled 'Purpose and scope', provides:

‘1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of … annual leave …

…’

6 Article 7 of that directive provides:

‘1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

7 Article 15 of that directive, entitled ‘More favourable provisions’, states:

‘This Directive shall not affect Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.’

8 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. However, no derogation is permitted in respect of Article 7 thereof.

Finnish law

The Law on annual leave

9 The vuosilomalaki (162/2005) (Law (162/2005) on annual leave; ‘the Law on annual leave’) is intended, inter alia, to transpose Article 7 of Directive 2003/88 into Finnish law. Under the first subparagraph of Paragraph 5 of that law, a worker is entitled to 2½ working days of paid leave for each complete monthly reference period. However, if, at the end of the annual reference period, the employment relationship has lasted less than 1 year without interruption, the worker is entitled to 2 days of leave for each complete monthly reference period.

10 The annual reference period, which runs from 1 April of a given year to 31 March of the following year, may include, at most, 12 monthly reference periods. If, during an annual reference period, a worker has 12 complete monthly reference periods, he is entitled, under the Law on annual leave, to 24 or 30 days of leave, depending on the duration of the employment relationship.

11 Under point 3 of the first subparagraph of Paragraph 4 of the Law on annual leave, working days are weekdays apart from Sundays, religious feast days, Independence Day, Christmas Eve, St John’s Eve (Midsummer Eve), Easter Saturday and 1 May. Therefore, 6 days of annual leave are imputed to 1 week which does not include any of the abovementioned days.

12 Point 2 of the first subparagraph of Paragraph 4 of the Law on annual leave states that the ‘leave period’ is the period from 2 May to 30 September inclusive. The second subparagraph of Paragraph 20 of that law provides that 24 working days of annual leave (summer leave) must be taken during the leave period. The remaining leave (winter leave) must be granted no later than the beginning of the following leave period.

13 The first subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (276/2013), in force from 1 October 2013 to 31 March 2016, provided:

‘Where a worker, on commencement of his or her annual leave, or a part thereof, is incapable of working owing to maternity, sickness or accident, the leave shall, upon application by the worker, be

carried over to a later date. The worker shall also be entitled, upon application, to carry over leave or a part thereof where it is established that he or she must, during his or her leave, undergo treatment for an illness or other treatment to be assimilated thereto during the period in which he or she is incapable of working.'

14 The second subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (182/2016), which entered into force on 1 April 2016, is worded as follows:

'Should the incapacity for work owing to maternity, sickness or accident commence during annual leave, or a part thereof, the worker shall, upon application, be entitled to carry over the days of incapacity for work falling within the annual leave, provided that they exceed 6 days of leave. The aforementioned days of absence may not reduce the worker's entitlement to 4 weeks' annual leave.'

The applicable collective agreements

15 In Finland, collective agreements often grant a longer period of paid annual leave than that provided for by the Law on annual leave. This is the case, in particular, as regards the collective agreement concluded between Terveyspalvelualan liitto ry, which has been succeeded by Hyvinvointialan liitto, and TSN for the period between 1 March 2014 and 31 January 2017 for the health sector ('the health sector collective agreement') and the collective agreement concluded between Satamaoperaattorit and AKT for the period between 1 February 2014 and 31 January 2017 for the freight transport sector ('the freight transport sector collective agreement').

16 Under Paragraph 16(1) of the health sector collective agreement, 'annual leave shall be determined in accordance with the Law on annual leave and the following provisions'. Under Paragraph 16(7) of that collective agreement, 'annual leave shall be granted in accordance with the Law on annual leave'.

17 Under Paragraph 10(1) and (2) of the freight transport sector collective agreement, 'the period of a worker's annual leave shall be determined in accordance with the Law on annual leave in force' and 'annual leave shall be granted in accordance with the Law on annual leave, unless provision to the contrary is made'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-609/17

18 Ms Marika Luoma has been employed since 14 November 2011 by Fimlab Laboratoriot Oy as a laboratory assistant, under an employment contract of indefinite duration.

19 Pursuant to the health sector collective agreement and having regard to her age, Ms Luoma was entitled to 42 working days, or 7 weeks, of paid annual leave in respect of the annual reference period ending on 31 March 2015.

20 Ms Luoma was granted 6 days of paid annual leave for the period from Monday 7 September to Sunday 13 September 2015. On 10 August 2015 she informed her employer that she had to undergo a surgical operation on 2 September 2015 and requested that her abovementioned annual leave be carried over to a later date. Following that operation, Ms Luoma was on sick leave until 23 September 2015. Of the 42 working days' annual leave to which she was entitled, the person concerned had also previously taken 22 days of leave, that is to say, 3 weeks and 4 working days. Fimlab Laboratoriot carried over the first 2 days of leave still owing under the Law on annual leave, but not the remaining 4 days of leave resulting from the health sector collective agreement, relying, in that regard, on Paragraph 16(1) and (7) of that collective agreement and on the first subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (276/2013).

21 TSN, in its capacity as a workers' representative organisation which had signed the health sector collective agreement, brought an action before the työtuomioistuin (Labour Court, Finland), seeking a declaration that Ms Luoma was entitled, having regard to her incapacity for work in connection with the abovementioned surgical operation, to carry over to a later date the entirety of the leave that she

had been granted for the period between 9 September and 13 September 2015. In support of that action, TSN argued that the first subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (276/2013), made applicable in this case through the health sector collective agreement, is contrary to Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter, in so far as it provides for the carrying over of leave on the grounds of, inter alia, illness, only in respect of the leave guaranteed by that law and not that resulting from collective agreements.

22 Hyvinvointialan liitto, as the employers' representative organisation which has succeeded Terveyspalvelualan liitto, itself a signatory to the health sector collective agreement, and Fimlab Laboratoriot contend that the first subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (276/2013), does not infringe those provisions of EU law, given that, in their opinion, those provisions are not applicable to the part of the entitlement to paid annual leave granted by national law or by collective agreements beyond the minimum leave period of 4 weeks prescribed in Article 7(1) of Directive 2003/88.

23 In that context, the referring court questions whether the application of the first subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (276/2013), thus carried out through the health sector collective agreement meets the requirements stemming from Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter. With regard to the latter provision, the referring court questions, in particular, whether it is likely to have direct effect in a dispute such as that in the main proceedings, which concerns employment relationships between private persons.

24 In those circumstances the työtuomioistuin (Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 7(1) of Directive [2003/88] preclude a national provision in a collective agreement, or its interpretation, under which an employee who was incapacitated for work at the beginning of his annual leave or part thereof is not entitled, irrespective of any application by him, to carry over annual leave falling within the period in question and to which he is entitled under the collective agreement, if the employee's entitlement to 4 weeks of annual leave is not reduced by reason of the fact that the leave under the collective agreement is not carried over?

(2) Does Article 31(2) of the [Charter] have direct effect in an employment relationship between private legal subjects, that is to say, horizontal direct effect?

(3) Does Article 31(2) of the [Charter] protect accrued leave, in so far as the duration of the leave exceeds the minimum annual leave of 4 weeks provided for in Article 7(1) of [Directive 2003/88], and does that provision of the [Charter] preclude a national provision in a collective agreement, or its interpretation, under which an employee who was incapacitated for work at the beginning of his annual leave or part thereof is not entitled, irrespective of any application by him, to carry over annual leave falling within the period in question and to which he is entitled under the collective agreement, if the employee's entitlement to 4 weeks of annual leave is not reduced by reason of the fact that the leave under the collective agreement is not carried over?'

Case C-610/17

25 Mr Tapio Keränen is employed by Kemi Shipping Oy.

26 Under the freight transport sector collective agreement, Mr Keränen was entitled to 30 working days, or 5 weeks, of paid annual leave in respect of the annual reference period ending on 31 March 2016.

27 After his paid annual leave began on 22 August 2016, Mr Keränen was taken ill on 29 August 2016. The occupational doctor whom he consulted then prescribed sick leave between that date and 4 September 2016. Mr Keränen's request for 6 working days of his annual leave to be carried over as a result was refused by Kemi Shipping on the basis of Paragraph 10(1) and (2) of the freight transport sector collective agreement and of the second subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (182/2016), and that company imputed those 6 days of sick leave to the paid annual leave to which Mr Keränen was entitled.

28 As a workers' representative organisation which had signed the freight transport sector collective agreement, AKT brought an action before the työtuomioistuin (Labour Court) seeking a declaration that the application of Paragraph 10(1) and (2) of that collective agreement could not lead to the application of the second subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (182/2016), in so far as the latter provision is, according to that organisation, contrary to Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter.

29 Satamaoperaattorit, as an employers' representative organisation which had signed the freight transport sector collective agreement, and Kemi Shipping contend, for reasons similar to those mentioned in paragraph 22 above, that the second subparagraph of Paragraph 25 of the Law on annual leave does not infringe those provisions of EU law.

30 In that context, the referring court questions whether the application of the second subparagraph of Paragraph 25 of the Law on annual leave, as amended by Law (182/2016), carried out through the freight transport sector collective agreement meets the requirements stemming from Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter and questions the possible horizontal direct effect of the latter provision in a dispute such as that in the main proceedings.

31 In those circumstances the työtuomioistuin (Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 7(1) of Directive [2003/88] preclude a national provision in a collective agreement, or its interpretation, under which an employee whose incapacity for work on account of illness commences during his annual leave, or a part thereof, is not entitled, irrespective of any application by him, to carry over the first 6 days of incapacity for work falling within the annual leave, where those days of absence on account of illness do not reduce the employee's entitlement to be granted 4 weeks' annual leave?

(2) Does Article 31(2) of the [Charter] have direct effect in an employment relationship between private legal subjects, that is to say, horizontal direct effect?

(3) Does Article 31(2) of the [Charter] protect accrued leave, in so far as the duration of the leave exceeds the minimum annual leave of 4 weeks provided for in Article 7(1) of [Directive 2003/88] and does that provision of the [Charter] preclude a national provision in a collective agreement, or its interpretation, under which an employee whose incapacity for work on account of illness commences during his annual leave, or a part thereof, is not entitled, irrespective of any application by him, to carry over the first 6 days of incapacity for work falling within the annual leave, where those days of absence on account of illness do not reduce the employee's entitlement to be granted 4 weeks' annual leave?'

Consideration of the questions referred

The first question

32 By its first question in Cases C-609/17 and C-610/17, the referring court asks, in essence, whether Article 7(1) of Directive 2003/88 is to be interpreted as precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness.

33 In that regard, it should be borne in mind that, according to settled case-law, Directive 2003/88 does not preclude domestic provisions granting a right to a period of paid annual leave longer than the 4 weeks laid down in Article 7(1) of that directive, under the conditions for entitlement to, and granting of, the right to paid annual leave laid down by national law (see, to that effect, judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 47; of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraph 34; of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 38; and of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 31).

34 Indeed, it is expressly apparent from the wording of Article 1(1) and (2)(a), Article 7(1) and Article 15 of Directive 2003/88 that the purpose of that directive is simply to lay down minimum safety and health requirements for the organisation of working time and it does not affect the Member States' right to apply provisions of national law that are more favourable to the protection of workers (judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 48; of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraph 35; and of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 30).

35 In such a situation, the rights to paid annual leave thus granted beyond the minimum required by Article 7(1) of Directive 2003/88 are governed not by that directive, but by national law, outside the regime established by that directive, it being nonetheless borne in mind that such provisions of national law which are more favourable to workers cannot be used to compensate for a possible infringement of the minimum protection guaranteed by that provision of EU law, such as that resulting from, inter alia, a reduction in the remuneration due by virtue of the minimum paid annual leave thus guaranteed by that provision (see, to that effect, judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraphs 42 and 43, and, by analogy, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraphs 43 and 44).

36 As the Advocate General noted in point 58 of his Opinion, it is thus for the Member States, first, to decide whether or not to grant workers additional days of paid annual leave which go beyond the minimum period of 4 weeks guaranteed by Article 7(1) of Directive 2003/88 and, second, to determine, where appropriate, the conditions for granting and extinguishing those additional days of leave, without being required, in that regard, to comply with the protective rules which the Court has laid down in respect of that minimum period.

37 The Court has thus held, in particular, where there is a national rule or collective agreement providing that no paid annual leave entitlement is to be given in a particular year in respect of absences as a result of illness or prolonged illness that have resulted in a break in work of 12 consecutive months or more, that it is permissible for Member States to provide that entitlement to paid annual leave under national law may vary according to the reason for the worker's absence on health grounds, provided that the entitlement is always equal to or exceeds the minimum period of 4 weeks laid down in Article 7 of Directive 2003/88 (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 49).

38 Similarly, the Court has held that, when deciding to grant workers rights to paid annual leave beyond that minimum period of 4 weeks, the Member States continue to have the freedom, in particular, to grant or not to grant an allowance in lieu to a worker who is retiring, where that worker has been unable to enjoy leave rights which so exceed that minimum period, because he has been prevented from performing his duties due to illness and, in the case of the former, to determine the conditions for the grant of such an allowance (see, to that effect, judgments of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraph 36, and of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 39).

39 A similar solution must prevail where there are national rules or collective agreements which, like those at issue in the main proceedings, grant workers a right to a period of paid annual leave longer than the minimum period of 4 weeks laid down in Article 7(1) of Directive 2003/88, and yet exclude the right to carry over all or some of the days of paid annual leave which exceed that minimum period, where the worker has been incapable of working due to illness during all or part of a period of paid annual leave. It is still possible for the Member States to make provision for such a right of carrying over or to refuse to do so and, in the case of the former, to determine the conditions for such a carrying over, provided that the right to paid annual leave actually enjoyed by the worker, when he is not incapable of working due to illness, remains at least equal to the abovementioned minimum period of 4 weeks.

40 In the light of the foregoing considerations, the answer to the first question in Cases C-609/17 and C-610/17 is that Article 7(1) of Directive 2003/88 must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the

minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness.

The third question

41 By its third question in Cases C-609/17 and C-610/17, which must be examined second, the referring court asks, in essence, whether Article 31(2) of the Charter is to be interpreted as precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of Directive 2003/88, and yet exclude the carrying over of those days of leave on the grounds of illness.

42 The scope of the Charter is defined in Article 51(1) thereof, according to which, so far as action by the Member States is concerned, the provisions of the Charter are addressed to those States only when they are implementing EU law (judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 44 and the case-law cited). According to Article 51(2) thereof, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

43 It should also be borne in mind that, according to settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 52 and the case-law cited).

44 In that regard, it should be borne in mind that, under Article 94 of the Rules of Procedure of the Court of Justice, the referring court is called on to explain the relationship between the provisions of EU law of which it seeks interpretation and the national legislation applicable to the dispute brought before it. The order for reference does not contain any element permitting a finding that the dispute in the main proceedings concerns the interpretation or the application of provisions of EU law other than Directive 2003/88 and Article 31(2) of the Charter.

45 It is therefore necessary to verify whether national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of Directive 2003/88 and yet exclude the carrying over of those days of leave on the grounds of illness are to be regarded as implementing that directive for the purposes of Article 51(1) of the Charter and whether, as a result, Article 31(2) thereof is intended to apply to situations such as those at issue in the main proceedings (see, to that effect, judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 53 and the case-law cited).

46 In that regard, it should be borne in mind that the mere fact that domestic measures come, as is the situation in the present case, within an area in which the European Union has powers cannot bring those measures within the scope of EU law, and, therefore, cannot render the Charter applicable (see, to that effect, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 36 and the case-law cited).

47 It should also be borne in mind, first, that, under Article 4(2)(b) TFEU, the Union and the Member States have, in the area of social policy, in respect of the aspects defined in that treaty, a shared competence for the purposes of Article 2(2) thereof. Second, and as is specified in Article 153(1) TFEU and recalled in recital 2 of Directive 2003/88, the Union is to support and complement the activities of the Member States in the field of improvement of the working environment to protect the safety and health of workers.

48 In that regard, it should be emphasised that Directive 2003/88, the purpose of which, as recalled in paragraph 34 above, is simply to lay down minimum safety and health requirements for the organisation of working time, was adopted on the basis of Article 137(2) EC, now Article 153(2) TFEU. As is apparent from the case-law of the Court, the expression ‘minimum requirements’ in those provisions of primary law which is reproduced in Article 1(1) of that directive must be read in the light of Article 137(4) EC, now Article 153(4) TFEU, which specifies that such minimum requirements are not to prevent any Member State from maintaining or introducing more stringent protective measures that are compatible with the Treaties. Accordingly, the Member States remain free, in exercising the

powers they have retained, to adopt such measures, which are more stringent than those which form the subject matter of action by the EU legislature, provided that those measures do not undermine the coherence of that action (see, to that effect, judgment of 17 December 1998, *IP*, C-2/97, EU:C:1998:613, paragraphs 35, 37 and 40).

49 Thus, Article 15 of Directive 2003/88, pursuant to which that directive 'shall not affect' Member States' 'right' to apply provisions of national legislation that are more favourable to the protection of the safety and health of workers, does not grant the Member States an option of legislating by virtue of EU law, but merely recognises the power which they have to provide for such more favourable provisions in national law, outside the framework of the regime established by that directive (see, by analogy, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 44).

50 Therefore, the situations at issue in the main proceedings are different from the situation in which an act of the Union gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act, and from the situation in which such an act authorises the adoption, by the Member States, of specific measures intended to contribute to the achievement of the objective of that act (see, in those various respects, judgments of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 64 to 68; of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 53; of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraphs 46, 47, 52 and 53 and the case-law cited; and of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 48).

51 Lastly, in the present case, it should be noted that the fact of granting workers days of paid annual leave which exceed the minimum period of 4 weeks guaranteed in Article 7(1) of Directive 2003/88 and of providing that those days are not to be carried over on the grounds of illness, pursuant to national rules or collective agreements such as those at issue in the main proceedings, is not, as such, capable of affecting or limiting the minimum protection thus guaranteed to those workers under that provision (see, by analogy, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 43); nor is it capable of infringing other provisions of that directive, or adversely affecting its coherence or the objectives pursued thereby.

52 It follows from all of the foregoing that, where the Member States grant, or permit their social partners to grant, rights to paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of that directive, such rights, or the conditions for a possible carrying over of those rights in the event of illness which has occurred during the leave, fall within the exercise of the powers retained by the Member States, without being governed by that directive or falling within its scope (see, by analogy, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 45).

53 Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter (see, to that effect, judgments of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 35; of 14 December 2017, *Miravitlles Ciurana and Others*, C-243/16, EU:C:2017:969, paragraph 34; and of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi*, C-152/17, EU:C:2018:264, paragraphs 34 and 35).

54 Accordingly, by adopting national rules or authorising the negotiation of collective agreements which, like those at issue in the main proceedings, grant workers rights to days of paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of Directive 2003/88 and lay down the conditions for any carrying over of such additional rights in the event of the worker's illness, the Member States are not implementing that directive for the purposes of Article 51(1) of the Charter.

55 In the light of all of the foregoing, the answer to the third question in Cases C-609/17 and C-610/17 is that Article 31(2) of the Charter, read in conjunction with Article 51(1) thereof, must be interpreted as

meaning that it is not intended to apply where national rules or collective agreements exist which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of Directive 2003/88, and yet exclude the carrying over of those days of leave on the grounds of illness.

The second question

56 In view of the answer to the third question in Cases C-609/17 and C-610/17, there is no need to examine the second question raised in each of those cases.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 7(1) of 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 must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness.**

2. **Article 31(2) of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 51(1) thereof, must be interpreted as meaning that it is not intended to apply where such national rules or collective agreements exist.**

[Signatures]

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* Language of the case: Finnish.

JUDGMENT OF THE COURT (Grand Chamber)

2 February 2021 (*)

(Reference for a preliminary ruling – Approximation of laws – Directive 2003/6/EC – Article 14(3) – Regulation (EU) No 596/2014 – Article 30(1)(b) – Market abuse – Administrative sanctions of a criminal nature – Failure to cooperate with the competent authorities – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – Right to remain silent and to avoid self-incrimination)

In Case C-481/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte costituzionale (Constitutional Court, Italy), made by decision of 6 March 2019, received at the Court on 21 June 2019, in the proceedings

DB

v

Commissione Nazionale per le Società e la Borsa (Consob),

intervening parties:

Presidente del Consiglio dei ministri,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, M. Safjan (Rapporteur), F. Biltgen, K. Jürimäe, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2020,

after considering the observations submitted on behalf of:

– DB, by R. Ristuccia and A. Saitta, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili and P.G. Marrone, avvocati dello Stato,

– the Spanish Government, initially by A. Rubio González, and subsequently by L. Aguilera Ruiz, acting as Agents,

– the European Parliament, by L. Visaggio, C. Biz and L. Stefani, acting as Agents,

– the Council of the European Union, by M. Chavrier, E. Rebasti, I. Gurov and E. Sitbon, acting as Agents,

– the European Commission, by V. Di Bucci, P. Rossi, T. Scharf and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2020,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') as well as the interpretation and validity of Article 14(3) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16), and Article 30(1)(b) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6 and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

2 The request has been made in proceedings between DB and the Commissione Nazionale per le Società e la Borsa (Consob) (National Companies and Stock Exchange Commission, Italy) concerning the lawfulness of penalties imposed on DB for offences of insider dealing and failure to cooperate in the context of an investigation conducted by Consob.

Legal context

EU law

Directive 2003/6

3 Recitals 37, 38 and 44 of Directive 2003/6 are worded as follows:

'(37) A common minimum set of effective tools and powers for the competent authority of each Member State will guarantee supervisory effectiveness. Market undertakings and all economic actors should also contribute at their level to market integrity. …

(38) In order to ensure that a Community framework against market abuse is sufficient, any infringement of the prohibitions or requirements laid down pursuant to this Directive will have to be promptly detected and sanctioned. To this end, sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied.

…

(44) This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter] and in particular by Article 11 thereof and Article 10 of the European Convention [for the Protection of] Human Rights [and Fundamental Freedoms]. …'

4 Article 12 of that directive provides:

'1. The competent authority shall be given all supervisory and investigatory powers that are necessary for the exercise of its functions. …

2. Without prejudice to Article 6(7), the powers referred to in paragraph 1 of this Article shall be exercised in conformity with national law and shall include at least the right to:

(a) have access to any document in any form whatsoever, and to receive a copy of it;

(b) demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person;

…

3. This Article shall be without prejudice to national legal provisions on professional secrecy.'

5 As set out in Article 14 of the directive:

'1. Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. In accordance with the procedure laid down in Article 17(2), the Commission shall, for information, draw up a list of the administrative measures and sanctions referred to in paragraph 1.

3. Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12.

…'

Regulation No 596/2014

6 Recitals 62, 63, 66 and 77 of Regulation No 596/2014, which repealed and replaced Directive 2003/6 with effect from 3 July 2016, are worded as follows:

'(62) A set of effective tools and powers and resources for the competent authority of each Member State guarantees supervisory effectiveness. Accordingly, this Regulation, in particular, provides for a minimum set of supervisory and investigative powers competent authorities of Member States should be entrusted with under national law. …

(63) Market undertakings and all economic actors should also contribute to market integrity. …

…

(66) While this Regulation specifies a minimum set of powers competent authorities should have, those powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. …

…

(77) This Regulation respects the fundamental rights and observes the principles recognised in the [Charter]. Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles. …'

7 Under Article 14 of that regulation, headed 'Prohibition of insider dealing and of unlawful disclosure of inside information':

'A person shall not:

(a) engage or attempt to engage in insider dealing;

(b) recommend that another person engage in insider dealing or induce another person to engage in insider dealing; or

(c) unlawfully disclose inside information.'

8 Article 23 of that regulation, headed 'Powers of competent authorities', provides in paragraphs 2 and 3 thereof:

‘2. In order to fulfil their duties under this Regulation, competent authorities shall have, in accordance with national law, at least the following supervisory and investigatory powers:

(a) to access any document and data in any form, and to receive or take a copy thereof;

(b) to require or demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information;

…

3. Member States shall ensure that appropriate measures are in place so that competent authorities have all the supervisory and investigatory powers that are necessary to fulfil their duties.

…’

9 Article 30 of that regulation, headed ‘Administrative sanctions and other administrative measures’, provides:

‘1. Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

(a) infringements of Articles 14 and 15 … and

(b) failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23(2).

Member States may decide not to lay down rules for administrative sanctions as referred to in the first subparagraph where the infringements referred to in point (a) or point (b) of that subparagraph are already subject to criminal sanctions in their national law by 3 July 2016. Where they so decide, Member States shall notify, in detail, to the Commission and to [the European Securities and Markets Authority (ESMA)], the relevant parts of their criminal law.

…

2. Member States shall, in accordance with national law, ensure that competent authorities have the power to impose at least the following administrative sanctions and to take at least the following administrative measures in the event of the infringements referred to in point (a) of the first subparagraph of paragraph 1:

(a) an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;

(b) the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;

(c) a public warning which indicates the person responsible for the infringement and the nature of the infringement;

(d) withdrawal or suspension of the authorisation of an investment firm;

(e) a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;

(f) in the event of repeated infringements of Article 14 or 15, a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person

who is held responsible for the infringement, from exercising management functions in investment firms;

(g) a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;

(h) maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined;

(i) in respect of a natural person, maximum administrative pecuniary sanctions of at least:

(i) for infringements of Articles 14 and 15, EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;

…

References to the competent authority in this paragraph are without prejudice to the ability of the competent authority to exercise its functions in any ways referred to in Article 23(1).

…

3. Member States may provide that competent authorities have powers in addition to those referred to in paragraph 2 and may provide for higher levels of sanctions than those established in that paragraph.'

Italian law

10 The Italian Republic transposed Directive 2003/6 by means of Article 9 of legge n. 62 – Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – Legge comunitaria 2004 (Law No 62 laying down provisions to implement obligations resulting from Italy's membership of the European Communities, Community law of 2004) of 18 April 2005 (Ordinary Supplement to GURI No 76 of 27 April 2005). That article incorporated in decreto legislativo n. 58 – Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No 58 consolidating all provisions in the field of financial intermediation, within the meaning of Articles 8 and 21 of the Law of 6 February 1996, No 52) of 24 February 1998 ('the consolidated text'), numerous provisions, including Article 187*bis* of that consolidated text, relating to the administrative offence of insider dealing and Article 187*quindecies* of that consolidated text, relating to the penalties for failing to cooperate with an investigation conducted by Consob.

11 Article 187*bis* of the consolidated text, headed 'Insider dealing', was, in the version in force at the material time, worded as follows:

'1. Without prejudice to criminal sanctions where the act constitutes an offence, any person who, being in possession of inside information by virtue of his or her membership of the administrative, management or supervisory bodies of the issuer, by virtue of his or her holding in the capital of the issuer, or by virtue of the exercise of his or her employment, profession, office, including public office, or duties:

(a) acquires, sells or performs other transactions involving financial instruments, directly or indirectly, for his or her own account or for the account of a third party, using that information;

(b) discloses such information to other persons unless such disclosure is made in the normal course of the exercise of his or her employment, profession, office or duties;

(c) recommends or induces others, on the basis of such information, to carry out any of the transactions referred to in subparagraph (a)

shall be liable to an administrative financial penalty of between EUR 20 000 and EUR 3 000 000.

2. The penalty referred to in paragraph 1 shall also apply to any person who, being in possession of inside information by virtue of the preparation or perpetration of criminal acts, carries out any of the acts referred to in paragraph 1.

3. For the purposes of this Article, "financial instruments" shall also mean the financial instruments referred to in Article 1(2) whose value depends on a financial instrument referred to in Article 180(1)(a).

4. The penalty provided for in paragraph 1 shall also apply to anyone who, being in possession of inside information and, exercising ordinary care, knows, or is in a position to know, that it is inside information, commits one of the acts referred to in paragraph 1.

5. The administrative financial penalties provided for in paragraphs 1, 2 and 4 shall be increased by up to 3 times their amount or up to a greater amount equivalent to 10 times the proceeds or profit derived from the offence where, owing to the perpetrator's identity or the amount of proceeds or profit derived from the offence, those penalties appear inadequate even where the maximum amount is applied.

6. For the cases referred to in this article, attempt shall be treated in the same way as perpetration.'

12 In the version in force at the material time, Article 187*quindecies* of the consolidated text was headed 'Protection of Consob's supervisory activities' and provided:

'1. Apart from the cases provided for in Article 2638 of the Codice civile [(Italian Civil Code)], anyone who fails to comply with Consob's requests within the time limits or who delays Consob in the performance of its functions shall be liable to an administrative financial penalty of between EUR 10 000 and EUR 200 000.'

13 Article 187*quindecies* was amended by decreto legislativo n. 129 del 2017 (Legislative Decree No 129 of 2017). In the version currently in force, Article 187*quindecies*, headed 'Protection of the supervisory activity of the Banca d'Italia [(Bank of Italy)] and Consob', is worded as follows:

'1. Apart from in the cases provided for in Article 2638 of the Civil Code, anyone who fails to comply with requests of the Bank of Italy or Consob within the time limits, or who does not cooperate with those authorities in the exercise of their supervisory functions, or who delays the exercise of those functions, shall be punished in accordance with this article.

1*bis*. If the offence is committed by a natural person, that person shall be liable to an administrative financial penalty of between EUR 10 000 and EUR 5 000 000.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 By decision of 2 May 2012, Consob, on the basis of Article 187*bis* of the consolidated text, imposed on DB two financial penalties of EUR 200 000 and EUR 100 000 respectively, for an administrative offence of insider trading committed between 19 February and 26 February 2009, under two heads, namely insider dealing and the unlawful disclosure of inside information.

15 It also imposed on him a financial penalty of EUR 50 000 for the administrative offence referred to in Article 187*quindecies* of the consolidated text, on the ground that the person concerned, after applying on several occasions for postponement of the date of the hearing to which he had been summoned in his capacity as a person aware of the facts, had declined to answer the questions put to him when he appeared at that hearing.

16 In addition, Consob imposed the ancillary penalty of temporary loss of fit and proper person status provided for in Article 187*quater*(1) of the consolidated text for a period of 18 months and ordered confiscation of assets of equivalent value to the profit or the means employed to obtain it under Article 187*sexies* of the consolidated text.

17 DB brought an appeal against those penalties before the Corte d'appello di Roma (Court of Appeal, Rome, Italy), which dismissed them. He brought an appeal on a point of law against that court's decision before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). By order of 16 February 2018, that court referred two interlocutory questions of constitutionality to the Corte costituzionale (Constitutional Court, Italy), of which only the first is relevant in the context of the present reference for a preliminary ruling.

18 That question concerns Article 187*quindecies* of the consolidated text, in so far as that provision penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of that body's supervisory functions, including with regard to the person in respect of whom Consob, in the performance of those duties, alleges an offence of insider dealing.

19 In its order for reference, the Corte costituzionale (Constitutional Court) observes that the question of the constitutionality of Article 187*quindecies* of the consolidated text is raised by reference to a number of rights and principles, certain of which are established in national law, namely the rights of the defence and the principle of equality of the parties in the proceedings, provided for by the Italian Constitution, and others in international and EU law.

20 In that court's view, the right to remain silent and to avoid self-incrimination (hereinafter 'the right to silence'), based on the provisions of the Constitution, of EU law and of international law relied on, cannot justify a refusal by the person concerned to appear at the hearing ordered by Consob nor delay on the part of that person in appearing at that hearing, provided that the latter's right not to answer the questions put to him or her at that hearing is guaranteed. However, there was said to be no such guarantee in the present case.

21 According to the referring court, it is necessary, first, to take into consideration the risk that, as a result of the obligation to cooperate with the competent authority, the suspected perpetrator of an administrative offence liable to be the subject of a penalty of a criminal nature could, as a matter of fact, contribute to the substantiation of a criminal charge against him or her. The referring court notes, in that regard, that, under Italian law, the insider dealing alleged against DB constitutes both an administrative offence and a criminal offence, and that proceedings relating to both may be brought and prosecuted in parallel, in so far as compatible with the *ne bis in idem* principle enshrined in Article 50 of the Charter (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 42 to 63).

22 However, the referring court points out that, according to the case-law of the European Court of Human Rights, the right to silence arising from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), is infringed where persons are penalised under national law for failing to answer questions put by administrative authorities in proceedings seeking to ascertain whether an administrative offence that is punishable by penalties of a criminal nature has been committed (ECtHR, 3 May 2001, *J.B. v. Switzerland*, CE:ECHR:2001:0503JUD003182796, §§ 63 to 71; 4 October 2005, *Shannon v. the United Kingdom*, CE:ECHR:2005:1004JUD000656303, §§ 38 to 41; and 5 April 2012, *Chambaz v. Switzerland*, CE:ECHR:2012:0405JUD001166304, §§ 50 to 58).

23 According to the referring court, since Article 187*quindecies* of the consolidated text was introduced into the Italian legal system in performance of a specific obligation under Article 14(3) of Directive 2003/6 and now implements Article 30(1)(b) of Regulation No 596/2014, a declaration that Article 187*quindecies* is unconstitutional would be likely to conflict with EU law, if those provisions of secondary EU legislation were to be understood as requiring Member States to penalise the silence, at a hearing before the competent authority, of a person suspected of insider dealing. In its view, it is questionable whether those provisions, understood in this way, are compatible with Articles 47 and 48

of the Charter, which also seem to recognise the right to silence within the same limits as those resulting from Article 6 of the ECHR and the Italian Constitution.

24 The referring court further notes that the case-law of the Court of Justice according to which a person who is the subject of an investigation in proceedings for infringement of EU competition rules is obliged to answer purely factual questions, nevertheless amounts to a significant limitation on the scope of that person's right not to self-incriminate by his or her statements, even indirectly.

25 That case-law, which was established in relation to legal persons and not natural persons, and to a large extent before the adoption of the Charter, seems difficult to reconcile with the criminal nature, acknowledged by the Court of Justice in the judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192), of the administrative sanctions laid down in the Italian legal system in respect of insider dealing.

26 Since the question of whether Articles 47 and 48 of the Charter require, in the light of the case-law of the European Court of Human Rights concerning Article 6 of the ECHR, compliance with the right to silence in administrative proceedings which may lead to the imposition of a penalty of a criminal nature has not yet been addressed by the Court or by the EU legislature, the referring court considers it necessary, before it rules on the question of constitutionality that has been submitted to it, to refer the matter to the Court for interpretation and, as the case may be, an assessment of the validity, in view of Articles 47 and 48 of the Charter, of Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014.

27 In those circumstances, the Corte costituzionale (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are Article 14(3) of Directive 2003/6, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation No 596/2014 to be interpreted as permitting Member States to refrain from penalising individuals who refuse to answer questions put to them by the competent authorities and which might establish their liability for an offence that is punishable by administrative sanctions of a "punitive" nature?

(2) If the answer to the first question is in the negative, are Article 14(3) of Directive 2003/6, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation No 596/2014 compatible with Articles 47 and 48 of the [Charter] – including in the light of the case-law of the European Court of Human Rights on Article 6 of the ECHR and the constitutional traditions common to the Member States – in so far as they require sanctions to be applied even to individuals who refuse to answer questions put to them by the competent authorities and which might establish their liability for an offence that is punishable by administrative sanctions of a "punitive" nature?'

Admissibility of the questions referred

28 In its written observations, the Council of the European Union questions the relevance, for the purposes of giving a decision in the main proceedings, of Regulation No 596/2014, which, in the light of the date of its entry into force, is not applicable to the facts in the main proceedings.

29 According to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law or the assessment of its validity that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it and to understand the reasons for the referring court's view that it needs answers to those questions in order to rule in the dispute before it (see, to that effect, judgments of 19 November 2009, *Filipiak*, C-314/08, EU:C:2009:719, paragraphs 40 to 42, and of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 24).

30 In the present case, the Corte costituzionale (Constitutional Court) considers that it must rule on the constitutionality of Article 187*quindecies* of the consolidated text not only in the version in force at the material time, which transposed Article 14(3) of Directive 2003/6, but also in the version currently in force, which implements Article 30(1)(b) of Regulation No 596/2014. It refers, in that regard, to the consistency and relationship of continuity between the provisions of Directive 2003/6 and those of Regulation No 596/2014, which justify an overall examination of the analogous provisions of Article 14(3) of the directive and Article 30(1)(b) of the regulation.

31 Furthermore, as is apparent from the file submitted to the Court, a declaration that Article 187*quindecies* of the consolidated text is unconstitutional would also have an impact on the version currently in force of that article, which implements Article 30(1)(b) of Regulation No 596/2014.

32 In that context, it is not obvious that the interpretation of the latter provision that is sought bears no relation to the actual facts of the main action or its purpose.

33 Consequently, the questions as referred must be declared admissible.

Consideration of the questions referred

34 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014, read in the light of Articles 47 and 48 of the Charter, must be interpreted as allowing Member States not to penalise natural persons who, in the context of an investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature.

35 In that regard, it should be recalled, as a preliminary point, that, according to Article 51(1) of the Charter, the provisions of the Charter are addressed to the EU institutions and to the Member States when they are implementing EU law.

36 Furthermore, while the questions referred mention Articles 47 and 48 of the Charter, which enshrine, inter alia, the right to a fair trial and the presumption of innocence, the request for a preliminary ruling also refers to the rights guaranteed in Article 6 of the ECHR. Whilst the ECHR does not constitute, for as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into the EU legal order, it must nevertheless be recalled that, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law. Furthermore, Article 52(3) of the Charter, which provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, is intended to ensure the necessary consistency between those respective rights without adversely affecting the autonomy of EU law and that of the Court of Justice (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 24 and 25).

37 According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR and Article 48 of the Charter is ‘the same’ as Article 6(2) and (3) of the ECHR. When interpreting the rights guaranteed by the second paragraph of Article 47 and of Article 48 of the Charter, the Court must, therefore, take account of the corresponding rights guaranteed by Article 6 of the ECHR, as interpreted by the European Court of Human Rights, as the minimum threshold of protection (see, to that effect, judgments of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72; of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 124; and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 56).

38 In that regard, the European Court of Human Rights has observed that, even though Article 6 of the ECHR does not explicitly mention the right to silence, that right is a generally recognised international

standard which lies at the heart of the notion of a fair trial. By providing the accused with protection against improper coercion by the authorities, that right contributes to avoiding miscarriages of justice and to securing the aims of Article 6 ECHR (see, to that effect, ECtHR, 8 February 1996, *John Murray v. the United Kingdom*, CE:ECHR:1996:0208JUD001873191, § 45).

39 Since protection of the right to silence is intended to ensure that, in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, to that effect, ECtHR, 17 December 1996, *Saunders v. the United Kingdom*, CE:ECHR:1996:1217JUD001918791, § 68), this right is infringed, inter alia, where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify (see, to that effect, ECtHR, 13 September 2016, *Ibrahim and Others v. the United Kingdom*, CE:ECHR:2016:0913JUD005054108, § 267).

40 The right to silence cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person (see, to that effect, ECtHR, 17 December 1996, *Saunders v. United Kingdom*, CE:ECHR:1996:1217JUD001918791, § 71, and 19 March 2015, *Corbet and Others v. France*, CE:ECHR:2015:0319JUD000749411, § 34).

41 That said, the right to silence cannot justify every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it.

42 As regards the conditions under which that right must also be respected in proceedings seeking to ascertain whether an administrative offence has been committed, it must be pointed out that that right is intended to apply in the context of proceedings which may lead to the imposition of administrative sanctions of a criminal nature. Three criteria are relevant to assess whether penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 28).

43 While it is for the referring court to assess, in the light of those criteria, whether the administrative sanctions at issue in the main proceedings are criminal in nature, that court nevertheless rightly points out that, according to the case-law of the Court of Justice, some of the administrative sanctions imposed by Consob appear to pursue a punitive purpose and to present a high degree of severity such that they are liable to be regarded as being criminal in nature (see, to that effect, judgments of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 38, and of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 34 and 35). The European Court of Human Rights, for its part, reached, in essence, the same conclusion (ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy*, CE:ECHR:2014:0304JUD001864010, § 101).

44 Furthermore, even if, in the present case, the penalties imposed on DB by the supervisory authority at issue in the main proceedings were not to be criminal in nature, the need to respect the right to silence in an investigation procedure conducted by that authority could also stem from the fact, noted by the referring court, that, in accordance with national legislation, the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed.

45 In the light of the considerations set out in paragraphs 35 to 44 above, it must be held that the safeguards afforded by the second paragraph of Article 47 and Article 48 of the Charter, with which EU institutions as well as Member States must comply when they implement EU law, include, inter alia, the right to silence of natural persons who are ‘charged’ within the meaning of the second of those provisions. That right precludes, inter alia, penalties being imposed on such persons for refusing to provide the competent authority under Directive 2003/6 or Regulation No 596/2014 with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

46 That analysis is not called into question by the case-law of the Court of Justice on the EU competition rules, from which it is apparent, in essence, that, in proceedings seeking to establish an infringement of those rules, the undertaking concerned may be compelled to provide all necessary information concerning such facts as may be known to it and to disclose, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, inter alia in its regard, the existence of anti-competitive conduct (see, to that effect, judgments of 18 October 1989, *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 34; of 29 June 2006, *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraph 41; and of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 34).

47 First, the Court has further held, in this context, that that undertaking cannot be compelled to provide answers which might involve an admission on its part of the existence of such an infringement (see, to that effect, judgments of 18 October 1989, *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 35, and of 29 June 2006, *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraph 42).

48 Second, as the referring court itself states, the case-law referred to in the two preceding paragraphs above concerns procedures that may lead to the imposition of penalties on undertakings and associations of undertakings. It cannot apply by analogy when determining the scope of the right to silence of natural persons who, like DB, are the subject of proceedings for an offence of insider dealing.

49 In the light of the doubts expressed by the referring court as to the validity, in the light of the right to silence enshrined in the second paragraph of Article 47 and in Article 48 of the Charter, of Article 14(3) of Directive 2003/6 and of Article 30(1)(b) of Regulation No 596/2014, it is necessary further to ascertain whether those provisions of secondary EU legislation lend themselves to an interpretation which is consistent with that right to silence, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority under that directive or that regulation with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

50 In that regard, it should be noted at the outset that, in accordance with a general principle of interpretation, the wording of secondary EU legislation must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if such wording is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with primary law (judgment of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 77). Both recital 44 of Directive 2003/6 and recital 77 of Regulation No 596/2014 emphasise, moreover, that those two acts respect the fundamental rights and observe the principles recognised in the Charter.

51 As regards, first of all, Article 14(3) of Directive 2003/6, that provision provides that Member States are to determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12 of that directive. The latter states that, in that context, the competent authority must be able to demand information from any person and, if necessary, to summon and hear any such person.

52 While the wording of those two provisions does not explicitly rule out the possibility that the Member States' obligation to determine the penalties to be applied in such a case also applies to the situation where a person so heard refuses to provide the said authority with answers that are capable of establishing that person's liability for an offence that is punishable by administrative sanctions of a criminal nature, or that person's criminal liability, neither is there anything in the wording of Article 14(3) of Directive 2003/6 that precludes an interpretation of that provision to the effect that that obligation does not apply in such a case.

53 As regards, next, Article 30(1)(b) of Regulation No 596/2014, that provision requires that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with

inspection or with a request as referred to in Article 23(2) of that regulation, subparagraph (b) of which specifies that this includes questioning a person with a view to obtaining information.

54 It must nevertheless be observed that, although Article 30(1) of Regulation No 596/2014 requires Member States to ensure that the competent authorities have the power to take appropriate sanctions and other measures, inter alia in the situations referred to in point (b) of that provision, it does not require those Member States to provide for the application of such sanctions or measures to natural persons who, in an investigation concerning an offence that is punishable by administrative sanctions of a criminal nature, refuse to provide the competent authority with answers which might establish their liability for such an offence, or their criminal liability.

55 It follows that both Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 lend themselves to an interpretation which is consistent with Articles 47 and 48 of the Charter, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

56 Interpreted in this way, the validity of those provisions of secondary EU legislation cannot be undermined, having regard to Articles 47 and 48 of the Charter, on the ground that they do not explicitly rule out the imposition of a penalty for such a refusal.

57 Finally, it must be borne in mind, in that context, that Member States must use the discretion afforded to them by an instrument of secondary EU legislation in a manner that is consistent with fundamental rights (see, to that effect, judgment of 13 March 2019, *E.*, C-635/17, EU:C:2019:192, paragraphs 53 and 54). In the context of the implementation of obligations stemming from Directive 2003/6 or Regulation No 596/2014, it is therefore for them to ensure, as has been pointed out in paragraph 45 above, that, in accordance with the right to silence guaranteed by Articles 47 and 48 of the Charter, the competent authority cannot impose penalties on natural persons for refusing to provide that authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

58 In the light of all of the foregoing, the answer to the questions referred is that Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014, read in the light of Articles 47 and 48 of the Charter, must be interpreted as allowing Member States not to penalise natural persons who, in an investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 14(3) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and Article 30(1)(b) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6 and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as allowing Member States not to penalise natural persons who, in an investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

[Signatures]

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* Language of the case: Italian.

Provisional text

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 12 May 2021(1)

Case C-124/20

Bank Melli Iran, Aktiengesellschaft nach iranischem Recht

v

Telekom Deutschland GmbH

(Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg, Germany))

(Request for a preliminary ruling – Trade policy – Protection against the effects of the extraterritorial application of legislation adopted by a third country – Restrictive measures against Iran – Secondary sanctions adopted by the United States – Prohibition of compliance with such legislation – Exercise of an ordinary right of termination of a contract)

I. Introduction

1. The present reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ('the EU blocking statute'), (2) as last amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018. (3) It arises directly from the May 2018 decision of the (then) US President, Donald Trump, on behalf of the United States of America to withdraw from what is popularly known as the Iranian nuclear weapons deal, an agreement that had previously been reached in July 2015. The effect of that decision was to trigger the re-application of certain US sanctions against Iranian companies and other Iranian entities, the application of which had previously been suspended in 2015.

2. For reasons of foreign policy and national security, particularly in the fight against terrorism, the United States of America has imposed various types of economic sanctions against States and individuals or legal entities. Some of those sanctions are long-standing, such as the embargo on Cuba, which was authorised by the Foreign Assistance Act of 1961 and codified, in 1996, by the Cuban Liberty and Democratic Solidarity (Libertad) Act. Since 11 September 2001 and the intensification of the fight against terrorism, the US economic-sanctions programme has grown.

3. While these sanctions apply mainly to US persons and non-US persons within US jurisdiction who trade or invest with the countries concerned (primary sanctions), some of the provisions also target activities outside of the US jurisdictions, primarily by foreign companies (secondary sanctions). Indeed, much of the US legislation implementing these sanctions seeks either to impose penalties on third-State entities that trade with the target State or by prohibiting those third-State entities in turn from trading with the US. (4)

4. These attempts at US extraterritorial jurisdiction have historically been criticised at EU level, (5) as such endeavours typically amount to a form of exorbitant jurisdiction which some think is not easily reconciled with general principles of public international law. (6) Here it may be observed that Article 21(1) and Article 21(2)(h) TEU enjoin the Union to protect and promote this system of international law. In addition, the European business community has objected to this type of legislation on the grounds that, in practice, it affects almost exclusively foreign companies. (7)

5. For all of these reasons, the existence of such legislation with potentially considerable extraterritorial effect did not go unnoticed. In 1996, the EU blocking statute was adopted by the Union, the first paragraph of Article 5 of which prohibits European companies from complying with US measures. (8) Nevertheless, the tensions between the two legal regimes which are at the core of this reference for a preliminary ruling present potential geopolitical problems, not only in terms of conflict of sovereignty, but also in terms of the competing regulatory barriers in the EU and US markets. As the facts of this case graphically show, the operation of the EU blocking statute gives rise to a series of hitherto unresolved legal issues and a variety of intensely practical problems, not least of which is that European companies find themselves facing impossible – and quite unfair – dilemmas brought about by the application of two different and directly opposing legal regimes. (9) I cannot avoid observing that the nature of these dilemmas, together with the failure to provide clear guidance on important legal issues which directly arise from the operation of the EU blocking statute, is such that the EU legislature might with advantage review the manner in which that statute presently operates.

6. In particular, many of these difficulties have been brought sharply back into focus following the May 2018 decision of the then US President, Donald Trump, to withdraw from the Iranian nuclear deal (formally known as the Joint Comprehensive Plan of Action) reached by the Islamic Republic of Iran and the informally called ‘P5 plus 1’ in Vienna in July 2015. (10) This does not appear to have been a formal treaty as such but rather a political agreement between the five Permanent Members of the Security Council (the United States of America, the Russian Federation, the People’s Republic of China, the United Kingdom and the French Republic) along with the Federal Republic of Germany and the European Union, on the one hand, and the Islamic Republic of Iran, on the other. That agreement envisaged, inter alia, that the Islamic Republic of Iran would reduce its stockpiles of enriched uranium and centrifuges and agree to a programme of routine inspection in return for the gradual lifting of certain economic sanctions. The whole object of this agreement was to ensure that the Islamic Republic of Iran would not realise any ambition it might have had to achieve the capacity to manufacture and produce nuclear weapons.

7. President Trump’s decision to withdraw from that agreement led in turn to fresh US sanctions. This posed considerable difficulties for certain major European companies. (11) Therefore, in order to forestall the effects of this reactivation of US sanctions against Iranian entities following the withdrawal of the United States of America from the Joint Comprehensive Plan of Action, the European Union has added the US legislation related to the Iran sanctions programme to the items of foreign legislation covered by the EU blocking statute.

8. Before turning to address these issues, it is first necessary to lay out the relevant provisions.

II. Legal framework

A. EU law

1. The EU blocking statute

9. The first to seventh recitals of the EU blocking statute provide:

> ‘Whereas the objectives of the Community include contributing to the harmonious development of world trade and to the progressive abolition of restrictions on international trade;
>
> Whereas the Community endeavours to achieve to the greatest extent possible the objective of free movement of capital between Member States and third countries, including the removal of any restrictions on direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets;

Whereas a third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of the Member State;

Whereas by their extra-territorial application such laws, regulations and other legislative instruments violate international law and impede the attainment of the aforementioned objectives;

Whereas such laws, including regulations and other legislative instruments, and actions based thereon or resulting therefrom affect or are likely to affect the established legal order and have adverse effects on the interests of the Community and the interests of natural and legal persons exercising rights under the Treaty establishing the European Community;

Whereas, under these exceptional circumstances, it is necessary to take action at Community level to protect the established legal order, the interests of the Community and the interests of the said natural and legal persons, in particular by removing, neutralising, blocking or otherwise countering the effects of the foreign legislation concerned;

Whereas the request to supply information under this Regulation does not preclude a Member State from requiring information of the same kind to be provided to the authorities of that State'.

10. The first paragraph of Article 1 of the EU blocking statute states:

'This Regulation provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex of this Regulation, including regulations and other legislative instruments, and of actions based thereon or resulting therefrom, where such application affects the interests of persons, referred to in Article 11, engaging in international trade and/or the movement of capital and related commercial activities between the Community and third countries.'

11. Article 4 of the EU blocking statute provides:

'No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognised or be enforceable in any manner.'

12. Article 5 of the EU blocking statute states:

'No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.

Persons may be authorised, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community. The criteria for the application of this provision shall be established in accordance with the procedure set out in Article 8. When there is sufficient evidence that non-compliance would cause serious damage to a natural or legal person, the Commission shall expeditiously submit to the committee referred to in Article 8 a draft of the appropriate measures to be taken under the terms of the Regulation.'

13. Article 6 of the EU blocking statute provides:

'Any person referred to in Article 11, who is engaging in an activity referred to in Article 1 shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom.

Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.

…'

14. Article 7 of the EU blocking statute provides:

‘For the implementation of this Regulation the Commission shall:

…

(b) grant authorisation under the conditions set forth in Article 5 and, when laying down the time limits with regard to the delivery by the Committee of its opinion, take fully into account the time limits which have to be complied with by the persons which are to be subject of an authorisation;

…’

15. Article 8 of the EU blocking statute states:

‘1. For the purpose of implementing Article 7(b), the Commission shall be assisted by the Committee on Extra-territorial Legislation. Those implementing acts shall be adopted in accordance with the examination procedure referred to in paragraph 2 of this Article. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council [(12)].

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.’

16. Article 9 of the EU blocking statute reads:

‘Each Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation. Such sanctions must be effective, proportional and dissuasive.’

17. Article 11 of the EU blocking statute provides:

‘This Regulation shall apply to:

1. any natural person being a resident in the Community … and a national of a Member State,

2. any legal person incorporated within the Community,

3. any natural or legal person referred to in Article 1(2) of Regulation (EEC) No 4055/86, (13)

4. any other natural person being a resident in the Community, unless that person is in the country of which he is a national,

5. any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity.’

2. Commission Implementing Regulation (EU) 2018/1101

18. Article 4 of the Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of [the EU blocking statute], (14) provides:

‘When assessing whether a serious damage to the protected interests as referred to in the second paragraph of Article 5 of [the EU blocking statute] would arise, the Commission shall consider, inter alia, the following non-cumulative criteria, where appropriate:

(a) whether the protected interest is likely to be specifically at risk, based on the context, the nature and the origin of a damage to the protected interest;

(b) the existence of an ongoing administrative or judicial investigation against the applicant from, or a prior settlement agreement with, the third country which is at the origin of the listed extra-territorial legislation;

(c) the existence of a substantial connecting link with the third country which is at the origin of the listed extraterritorial legislation or the subsequent actions; for example the applicant has parent companies or subsidiaries, or participation of natural or legal persons subject to the primary jurisdiction of the third country which is at the origin of the listed extra-territorial legislation or the subsequent actions;

(d) whether measures could be reasonably taken by the applicant to avoid or mitigate the damage;

(e) the adverse effect on the conduct of economic activity, in particular whether the applicant would face significant economic losses, which could for example threaten its viability or pose a serious risk of bankruptcy;

(f) whether the applicant's activity would be rendered excessively difficult due to a loss of essential inputs or resources, which cannot be reasonably replaced;

(g) whether the enjoyment of the individual rights of the applicant would be significantly hindered;

(h) whether there is a threat to safety, security, the protection of human life and health and the protection of the environment;

(i) whether there is a threat to the Union's ability to carry out its humanitarian, development and trade policies or the external aspects of its internal policies;

(j) the security of supply of strategic goods or services within or to the Union or a Member State and the impact of any shortage or disruption therein;

(k) the consequences for the internal market in terms of free movement of goods, persons, services and capital, as well as financial and economic stability or key Union infrastructures;

(l) the systemic implications of the damage, in particular as regards its spill over effects into other sectors;

(m) the impact on the employment market of one or several Member States and its cross-border consequences within the Union;

(n) any other relevant factor.'

B. US law

1. Measures related to Iran

19. The US has enacted legislation providing for the sanctioning of violations in respect of its embargoes with other countries. Initially, however, the EU blocking statute mentioned only three items of legislation in its annex, namely, the 'National Defense Authorization Act for Fiscal Year 1993', the requirements of which are consolidated in Title I of the 'Cuban Liberty and Democratic Solidarity Act 1996', and the 'Iran and Libya Sanctions Act 1996'.

20. The Cuban Liberty and Democratic Solidarity (Libertad) Act 1996 (commonly called 'the Helms-Burton Act') was enacted in order to strengthen and continue the US embargo on Cuba. It prohibits the exportation to the United States of any goods or services of Cuban origin or containing materials or goods originating in Cuba either directly or through third countries, dealing in merchandise that is or has been located in or transported from or through Cuba, re-exporting to the United States sugar originating in Cuba without notification by the competent national authority of the exporter, or importing into the United States sugar products without assurance that those products are not products of Cuba. In addition, this act freezes Cuban assets, and financial dealings with the Republic of Cuba.

21. In particular, the provisions of Title III of that act provide both a means to discourage investment in Cuba, and a remedy for those who have had their property expropriated. In particular, it provides a remedy for US citizens who are victims of the Republic of Cuba's expropriation practices by granting them a right to sue in US courts any foreign nationals who 'traffic' in property 'confiscated' by the Cuban Government on or after 1 January 1959. The Helms-Burton Act defines 'trafficking' broadly, encompassing a wide range of activities connected to the expropriated property, including selling or managing it, as well as profiting through the trafficking of another person. (15)

22. The Iran and Libya Sanctions Act 1996 (also known as 'the d'Amato-Kennedy Act') provides that economic actors covered by the embargo on Iran or Libya may not invest in either of those countries any amount greater than USD 40 million during a period of 12 months 'that directly and significantly contributes to the enhancement of the Iranian or Libyan ability to develop their petroleum resources'. The term 'investment' covers the entering into a contract for that development, or the provision of guarantees, or the profiting therefrom or the purchase of a share of ownership therein.

23. In reaction to the adoption of this legislation, in addition to issuing political reprimands and enacting the EU blocking statute, the EU filed a claim with the World Trade Organisation Dispute Settlement Mechanism, seeking to have a piece of US legislation declared illegal pursuant to Article XXI of the General Agreement on Tariffs and Trade . (16) This was later withdrawn after the EU concluded an Understanding with the United States of America on US extraterritorial legislation on 11 April 1997.

24. As I have already observed, in May 2018 the United States of America withdrew from the Joint Comprehensive Plan of Action (also known as 'the Iran deal') signed in Vienna on 14 July 2015. The Joint Comprehensive Plan of Action was aimed at controlling Iran's nuclear programme and lifting economic sanctions against Iran. As a result, the US Iran Transactions and Sanctions Regulations ('the ITSR') were revived. In response to these new measures, the annex to the EU blocking statute was amended in 2018 (17) in order to include more US legislation, principally, legislation aimed at enforcing sanctions on Iran. The reference for a preliminary ruling specifies that the applicant has been included in the Specially Designated Nationals and Blocked Person List (SDN) maintained by the Office of Foreign Assets Control ('OFAC'), reference to which is made by various pieces of the legislation mentioned in the annex to the EU blocking statute.

25. One such piece of legislation is the Iran Threat Reduction and Syria Human Rights Act of 2012. Section 220(c) of that act provides that in the event a person continues knowingly and directly to provide specialised financial messaging services to, or knowingly enable or facilitate direct or indirect access to such messaging services for, the Central Bank of Iran or a financial institution, the US President may impose sanctions.

26. The other relevant piece of legislation added to the annex to the EU blocking statute is the ITSR.

27. Paragraph 560.211 of the ITSR, entitled 'Prohibited transactions involving blocked property', provides:

> '(a) All property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.
>
> (b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.
>
> (c)(1) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) Any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to paragraphs (a) through (c)(1)(i) of this section …

…

(d) The prohibitions in paragraphs (a) through (c) of this section include, but are not limited to, prohibitions on the following transactions:

(1) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to paragraphs (a) through (c) of this section; and

(2) The receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked pursuant to paragraphs (a) through (c) of this section.'

28. Paragraph 560.325 of those regulations, entitled 'Property; property interest', states:

'The terms *property* and *property interest* include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.'

29. Paragraph 560.410 of those regulations, entitled 'Provision of services', provides:

'…

(c) The prohibitions on transactions involving blocked property contained in §560.211 apply to services performed in the United States or by U.S. persons, wherever located, including by an overseas branch of an entity located in the United States:

…

(2) With respect to property interests of the Government of Iran, an Iranian financial institution, or any other person whose property and interests in property are blocked pursuant to §560.211.

…'

30. In the present case, neither the referring court in its reference, nor any of the parties in their observations, have specified exactly which piece of legislation and the provisions thereof would be likely to apply to Deutsche Telekom GmbH if that company did not terminate its contracts with Bank Melli Iran. In my view, the two pieces of the US legislation mentioned above seem to be the only ones likely to have this effect, albeit that this will depend on the circumstances of the case.

31. In regards to monetary penalties, both the d'Amato-Kennedy Act and the ITSR make reference to Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705). That latter act provides that a civil penalty for violations of its provisions (and thus for violations of the provisions of the two other acts cited above) shall be an amount not exceeding the greater of either USD 250 000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is

imposed. The International Emergency Economic Powers Act also provides, in regards to criminal penalties, that a person convicted of any violation of the relevant provisions of that act (and thus of the relevant provisions of the d'Amato-Kennedy Act and the ITSR) shall, upon conviction, be fined not more than USD 1 000 000, or if a natural person, may be imprisoned for not more than 20 years, or both. (18)

2. The Foreign Sovereign Compulsion Doctrine in US law

32. The foreign sovereign compulsion doctrine is a means of defence recognised by the US Supreme Court in 1958 in *Société Internationale v. Rogers* 357 U.S. 197 (1958). (19) This doctrine is rooted in the principle of due process, as well as in the doctrine of international comity, that is to say, respect for the legal system of another sovereign State. (20) According to that doctrine, which has been applied in particular in relation to antitrust laws, (21) a state or the federal administration is precluded from requiring a person (i) to do an act in another State that is prohibited by the law of the State of which he or she is a national, or (ii) to refrain from doing an act in another State that is required by the law of that State or by the law of the State of which he or she is a national.

33. However, with respect to its application in the context of the blocking statutes adopted by Canada, the United Kingdom and the European Union, the US District Court for the Eastern District of Pennsylvania found in *United States v. Brodie*, 174 F. Supp. 2d 294 (E.D. Pa. 2001), that the defendants in that case, who had engaged in transactions with the Republic of Cuba that were prohibited by US law, could not rely on the foreign sovereign compulsion doctrine as a defence for two reasons. (22) First, if the rationale for the doctrine is deference to the acts of a foreign sovereign, there is no place for the doctrine in a criminal case since the violation of the US public order outweighed any considerations of international comity. Secondly, without holding that the doctrine could never raise due-process concerns in the criminal context, the US District Court ruled that there were no due-process issues raised in that case on the ground that the various national blocking statutes which were in force at that time in Canada, in the United Kingdom and in the EU did not create an obligation for a company to trade with the Republic of Cuba. Indeed, in previous cases where that doctrine was held to apply, particular orders had been issued by the foreign jurisdictions directed at defendants, specifically ordering them to do something. Without such orders, the threat of prosecution did not exist. Such orders were absent in *United States v. Brodie*. Perhaps most importantly, in that case, there was no evidence supplied that the blocking statutes at issue *obliged* the defendants to *sell* their product to the Republic of Cuba. The element of compulsion required by the foreign sovereign compulsion doctrine was accordingly missing.

C. German law

34. According to the German Government, in the case of open-ended service contracts (to which contracts for the provision of telecommunications services belong), where the latter are concluded for an indefinite period, each party has, under Paragraph 620(2) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), an ordinary right of termination, meaning it has the possibility of terminating the contract without any particular reason. The applicable periods of notice and due dates are defined by Paragraph 621 of the BGB, which provides for different periods depending on the due date of the remuneration (daily, weekly, monthly, quarterly or other). Conversely, for service contracts concluded for a fixed term, no 'ordinary' right of termination is provided by law. These contracts are terminated at the end of the contract, pursuant to Paragraph 620(1). As those rules are default provisions, the parties may deviate from them. In addition, all contracts with continuing performance, which is the case with many service contracts, can be terminated for serious reasons at any time in accordance with Paragraph 314 of the BGB.

35. Paragraph 134 of the BGB provides:

> 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.' (23)

36. Infringement of the first paragraph of Article 5 of the EU blocking statute may be prosecuted in Germany as an administrative offence under Paragraph 19(4), first sentence, point 1 of the Außenwirtschaftsgesetz (Foreign Trade Act; 'the AWG'), read in conjunction with Paragraph 82(2) of the Außenwirtschtsverordnung (Foreign Trade Regulation) and is punishable by a fine of up to EUR 500 000 (Paragraph 19(6) of the AWG). (24)

III. The facts of the main proceedings and the reference for the preliminary ruling

37. The applicant, Bank Melli Iran, is an Iranian bank, in the form of a public limited company incorporated under Iranian law. It has a branch in Hamburg (Germany) and its core business is to settle foreign trade transactions with Iran. The defendant, Telekom Deutschland GmbH, is a subsidiary of Deutsche Telekom, one of the leading German telecommunication service providers. The group has over 270 000 employees worldwide, of whom over 50 000 are in the United States, where approximately 50% of its turnover is generated.

38. The applicant and the defendant entered into a framework contract that allows the applicant to group all its company connections at various sites in Germany under one contract. In the context of this contractual relationship, the applicant ordered different services which the defendant made available and invoiced monthly for an amount of approximately EUR 2 000, which sum was always paid without delay. The services governed by these contracts form the exclusive basis of the internal and external communication structures of the applicant in Germany and are therefore, as the referring court found, indispensable to its business activities.

39. Following the decision of President Trump in May 2018 by which the United States withdrew from the Joint Comprehensive Plan of Action, the ITSR were accordingly revived. In particular, following the adoption of Executive Order 13846 of 6 August 2018, Reimposing Certain Sanctions With Respect to Iran, Bank Melli Iran was again placed on a list of sanctions prepared by OFAC: the SDN. Bank Melli Iran had previously been on that list since 2007, after being designated as a blocked person by the OFAC pursuant to Executive Order 13382 of 28 June 2005, entitled Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, (25) before those sanctions were lifted by the Joint Comprehensive Plan of Action. These new sanctions came into effect on 5 November 2018.

40. By letter of 16 November 2018, the defendant gave notice of termination of all contracts with the applicant, with immediate effect. It sent identical notices of termination on the same date to at least four other clients with connections to Iran who were based in Germany. The applicant initiated proceedings against the defendant claiming the infringement of the EU blocking statute and, on 28 November 2018, the court of first instance, the Landgericht Hamburg (Regional Court, Hamburg, Germany) granted an interim junction ordering the defendant to perform the contracts until the end of the period of notice for ordinary termination.

41. By letter dated 11 December 2018, the defendant sent another notice of termination. That letter read, inter alia, as follows: '… by letter of 16 November 2018, we gave notice of termination of the services listed below with immediate effect. As a purely precautionary measure, we hereby also give notice of ordinary termination as of the earliest possible date'.

42. The period of notice for ordinary termination of the contracts ended respectively on 25 January 2019, 10 February 2019, 13 March 2019, 10 and 25 September 2019, 30 January 2020, 22 August 2020 and 7 January 2021. In response, the applicant requested the Landgericht Hamburg (Regional Court, Hamburg) to order the defendant to leave all contractually agreed lines active.

43. The court of first instance ordered the defendant to perform the contracts until the expiry of the ordinary notice periods. It held that the ordinary termination by the defendant of the disputed contracts was valid and, in particular, did not infringe Article 5 of the EU blocking statute. That court dismissed the action as to the remainder.

44. The applicant appealed against the decision of the Landgericht Hamburg (Regional Court, Hamburg) to the referring court, the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg, Germany), claiming that the notice of ordinary termination given by the defendant infringes the first paragraph of Article 5 of the EU blocking statute and should therefore be considered as inoperable and ineffective, since it was motivated solely by the defendant's desire to comply with one of the items of legislation listed in the annex to that statute. The defendant, relying on the Commission Guidance Note, contends that the first paragraph of Article 5 of the EU blocking statute does not change its right of ordinary termination, which did not depend upon a reason for termination, as that article leaves it free to end its business relationship with the applicant at any time, and its motives are immaterial.

45. In this context, the referring court noted, first, that the applicant has not shown that the termination of the contracts was preceded by a direct or indirect official or court order from the United States of America. As it happens, another German court of appeal, the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany), took the position, in a judgment of 7 February 2020, that, in such a situation, the first paragraph of Article 5 of the EU blocking statute would not be applicable. For its part, the referring court considers that the mere existence of secondary sanctions is sufficient to establish infringement of the first paragraph of Article 5 of the EU blocking statute, since that is the only way of effectively implementing the obligation laid down.

46. Secondly, the referring court observes that the (ordinary) termination of a contract infringes the first paragraph of Article 5 of the EU blocking statute where its decisive motive is compliance with US sanctions. However, the ordinary termination of contracts would not infringe the first paragraph of Article 5 of the EU blocking statute where it is motivated by purely economic reasons with no concrete link to the US sanctions. Consequently, the referring court would have to decide whether, in order to ensure the effectiveness of that article, it would not be appropriate to consider that the defendant should exceptionally have to explain the reasons for the termination, or even, as the case may be, demonstrate that the decision to terminate the contract was not taken for fear of possible negative repercussions on the US market.

47. Thirdly, the referring court considers that under Paragraph 134 of the BGB, a termination of a contract which infringes the first paragraph of Article 5 of the EU blocking statute is devoid of legal effect. That being so, that court wonders whether, in view of the risk of economic damage to the defendant, which earns 50% of its turnover on the US market, it could be considered contrary to the principle of proportionality of penalties laid down in Article 9 of the EU blocking statute to require the defendant to continue the contractual relationship with the applicant in addition to imposing a pecuniary fine.

48. Fourthly, the referring court points out that, according to its preamble, the EU blocking statute is intended to protect economic operators. However, that court considers that this objective would not be achievable since the risk of economic damage on the US market resulting from the application of the first paragraph of Article 5 of that statute is not sufficiently countervailed by the recovery claim regulated in Article 6 of the EU blocking statute and by the possibility of obtaining an authorised exemption under the second paragraph of Article 5 of that statute in so far as imminent economic losses alone might not provide sufficient grounds for an exemption. In those circumstances, the referring court wonders whether a measure prohibiting an undertaking from separating from a trading partner is compatible with the freedom to conduct business protected by Article 16 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and the principle of proportionality enshrined in Article 52 of the Charter.

49. In these circumstances, the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the first paragraph of Article 5 of [the EU blocking statute] only apply where the acting EU operator within the meaning of Article 11 of that [statute] is issued directly or indirectly with an official or court order on the part of the United States of America or does it suffice for its application that the action of the EU operator is predicated on compliance with secondary sanctions without any such order?

(2) If the answer to Question 1 is that the second alternative applies:

Does the first paragraph of Article 5 of [the EU blocking statute] preclude an understanding under national law that the party giving notice of termination is also able to terminate a continuing obligation with a contracting party named on the [SDN] held by the [OFAC], including where termination is motivated by compliance with US sanctions, without the need to give a reason for termination and therefore without having to show and prove in civil proceedings that the reason for termination was not to comply with US sanctions?

(3) If Question 2 is answered in the affirmative:

Must ordinary termination in breach of the first paragraph of Article 5 of [the EU blocking statute] necessarily be regarded as ineffective or can the purpose of the [statute] be satisfied

through other penalties, such as a fine?

(4) If the answer to Question 3 is that the first alternative applies:

Considering Articles 16 and 52 of the Charter of Fundamental Rights of the European Union, on the one hand, and the possibility of an exemption being authorised under the second paragraph of Article 5 of [the EU blocking statute], on the other, does that apply even where maintaining the business relationship with the listed contracting party would expose the EU operator to considerable economic losses on the US market (in this case: 50% of group turnover)?'

IV. Analysis

50. As a preliminary remark, I would like to point out that, although some parties have referred to the Commission Guidance Note – Questions and Answers: adoption of Update of the Blocking Statute of 7 August 2018, (26) that document has no binding normative value, as it was not adopted under a procedure provided for in the Treaties, nor can it have binding interpretative value, in so far as the competence to interpret an act taken by the institutions of the Union, such as the EU blocking statute, is conferred by the Treaties on the Court only. (27) In these circumstances, I consider that this document cannot be taken into account in consideration of the questions raised.

51. Similarly, in so far as Implementing Regulation 2018/1101 is a lower-ranking norm, its provisions cannot be taken into account in order to interpret the provisions of the EU blocking statute. (28)

52. Consequently, it is therefore exclusively in the light of the EU blocking statute and the primary law that the questions referred by the referring court should be examined.

A. On the first question

53. By its first question, the referring court asks whether the first paragraph of Article 5 of the EU blocking statute is to be interpreted as only applying where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to that statute has addressed, directly or indirectly, some instructions to a person referred to in Article 11 of that same statute, or whether it is sufficient that the first paragraph of Article 5 of the EU blocking statute applies where the economic operator who is within the territory of the European Union spontaneously complies with the foreign extraterritorial legislation in question in order to forestall the potential application of such legislation.

54. In this regard, it should be recalled that the first paragraph of Article 5 of the EU blocking statute provides that 'no person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom'.

55. As it appears from that wording, the first paragraph of Article 5 of the EU blocking statute refers to the 'requests of foreign courts' only as one of a multiplicity of 'requirements or prohibitions' under the laws listed in the annex thereto and which any person within the meaning of Article 11 of that statute is forbidden to comply with. (29) This implies that, at least, Article 5 of the EU blocking statute does *not* apply *only* where a request or an instruction has in fact been issued by a judicial authority. One might also observe that that article forbids compliance with any 'requirement' laid down in one of the laws specified in the annex to the EU blocking statute whereas the term 'requirement' refers, in law, to a duty imposed by any type of legal act, irrespective of whether it is a treaty, a convention, a statute, a regulation or a judicial decision. In the light of those two elements, it is clear that the wording of the first paragraph of Article 5 of the EU blocking statute supports the interpretation according to which this provision applies even in the absence of instructions or requests by an administrative or judicial authority. (30)

56. According to the Court's established case-law, the interpretation of a provision of EU law requires that consideration must also be given to its context and the objectives pursued by the rules of which it is part. (31)

57. So far as the *context* in which the first paragraph of Article 5 of the EU blocking statute is concerned, it may be noted that each time that statute lays down a provision requiring the existence of an administrative or judicial decision in order to apply, that statute expressly refers to this type of act and not to more general concepts such as those of 'requirement' or 'prohibition'. Accordingly, since, in comparison, Article 5 thereof is broadly worded, I believe that this provision does not apply only where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to the EU blocking statute has addressed, directly or indirectly, some instructions to a person referred to in Article 11 of that statute. Moreover, since Article 4 of the EU blocking statute excludes the possibility that instructions given by an administrative or a judicial authority located outside the Union might produce effects within it, the first paragraph of Article 5 of the EU blocking statute would be devoid of any autonomous scope if that provision required that the persons referred to in Article 11 of that statute have received such instructions before that provision needs to be applied. (32)

58. The objective pursued by the EU blocking statute also tends to confirm the broad scope that must be recognised in regard to Article 5 thereof.

59. First, it flows from the fourth to sixth recitals thereof that the EU blocking statute was enacted in reaction to the *effects* produced by the laws specified in the annex thereto. In particular, it can be inferred from the fifth recital of that statute that it is those laws in themselves, and not only the actions taken on their ground, that are likely to affect the established international legal order, which the Union has made it its mission to defend, and that have adverse effects on its interests or on those of natural and legal persons exercising rights under EU law.

60. Secondly, it follows from its seventh recital that the EU blocking statute aims at protecting those natural and legal persons whose interests are affected *by the aforementioned laws*, which is supposed to be done, according to the sixth recital, 'by removing, neutralising, blocking or otherwise countering *the effects of the foreign legislation concerned*'. (33) It is thus clear from that latter recital that the objective is to counteract the effect of the foreign legislation itself and not simply the effects of decisions giving effect to the obligations provided for in these laws.

61. Thirdly, Article 1 of the EU blocking statute, which summarises the objectives pursued by that statute, also indicates that those objectives are to counter and to protect European operators against the *effects* of the laws specified in its annex, and not only their *application* when an administrative or judicial authority issues an instruction, as claimed by the defendant. Such objectives could not be achieved if that statute and, in particular, the first paragraph of Article 5 thereof, were to be interpreted as only covering the situation where an economic operator has received a formal instruction from a court or an administrative authority. (34) Indeed, as economic operators are generally considered to be risk averse, those which are diligent will tend to comply spontaneously with any legal constraint resulting from their legal environment. (35) If it were otherwise, there would be a real risk that, even in the absence of a formal instruction to cease trading, entities could nonetheless cite the *potential* application of the US sanctions legislation in order to justify the non-performance or the repudiation of their contractual obligations. In those circumstances, any party affected in this way would be left without a remedy under the EU blocking statute simply because they could not point to a formal instruction for this purpose, even if the concerns about the potential application of the sanctions was simply contrived.

62. In any event, as Article 4 of the EU blocking statute clearly applies to prevent the enforcement of any award made by a judicial or administrative body based on the existence of the sanctions legislation even in the absence of an instruction to that effect from any such foreign or administrative body, the first paragraph of Article 5 of the EU blocking statute would be deprived of any autonomous scope if its application was made contingent on a requirement that the persons referred to in Article 11 thereof had received such an instruction.

63. Moreover, the laws listed in the annex do not in fact oblige the administrative or judicial authorities in charge of enforcing those laws to address instructions to give formal notice to any contracting partner of an undertaking subject to the first sanctions to comply with those same laws before being entitled to impose a sanction on them. Accordingly, those laws generate a judicial risk for the persons referred to in Article 11 of the EU blocking statute from the moment that they become fully applicable. It is therefore from that moment that these operators will have to decide whether they should try to avoid that risk by disengaging themselves

from (or by avoiding) the markets concerned (avoidance strategy) or whether they try to reduce that risk by complying with that legislation by adequate resources, which, in practice, will at least require those companies to monitor their transactions (reduction strategies). (36)

64. In practice, many large companies have already set up compliance departments to ensure that their actions are in line with such constraints. (37) As a result, these companies, when operating in the countries potentially affected by the legislation set out in the annex to the EU blocking statute will tend to comply with it even in the absence of any instruction to this effect. Consequently, in order to counter the effects of such legislation and in order to protect EU companies, it is necessary that the first paragraph of Article 5 of the EU blocking statute should be able to apply even in the absence of such a formal instruction from the administrative or judicial arms of the third party State to cease trading. Admittedly, as noted by the defendant, Article 1 of the EU blocking statute summarises the objectives pursued by this statute as being to 'provide protection against and counteract the effects of the extraterritorial *application* of the laws specified in the Annex'. However, I do not think that the term 'application' used in Article 1 should be understood in the context of the EU blocking statute as meaning that this statute requires, in order to be applied, a concretisation of the obligations provided for by the laws listed in the annex in the form of a judicial or administrative instruction from a foreign state. Indeed, that provision also specifies that the protection that this statute seeks to establish applies to actions based on or resulting from such legislation too, which implies, a fortiori, that this protection is expected to operate in respect of the provisions of those laws in the first place. Accordingly, I believe rather that this term is used by reference to what the EU legislature seems to see as an issue, namely, as flows from the third and fourth recitals of the statute, not the very principle of the prohibitions which they lay down, but their extraterritorial scope.

65. In view of the above, I propose to answer the first question to the effect that the first paragraph of Article 5 of the EU blocking statute is to be interpreted as not applying only where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to that statute has addressed, directly or indirectly, some instructions to a person referred to in Article 11 thereof. The prohibition contained in that provision accordingly applies even in the event that an operator complies with such legislation without first having been compelled by a foreign administrative or judicial agency to do so.

B. On the second question

66. By its second question, the referring court asks, in essence, whether the first paragraph of Article 5 of the EU blocking statute must be interpreted as precluding an interpretation of national law under which a person referred to in Article 11 of that statute may terminate a continuing obligation with a contracting party named on the (SDN held by the OFAC, without giving reasons for its decision to terminate those contracts.

67. While it is accepted that German contract law (in common with the legal systems of many Member States) generally allows traders to terminate contractual relations with any other economic operators without giving reasons for that decision, the argument here is that unless the decision to terminate Bank Melli Iran's contractual relationship can be justified in some way by Telekom Deutschland, the referring court cannot ascertain whether that company terminated those relations for a reason that does not infringe the EU blocking statute.

68. Before proceeding to discuss whether the first paragraph of Article 5 of the EU blocking statute should be interpreted as laying down an obligation in respect of a natural or legal person referred to in Article 11 thereof to give reasons when terminating a contract with a party named on the SDN or otherwise to justify such a termination, it is first necessary to raise the question of whether, in circumstances such as those at issue in the main proceedings, the first paragraph of Article 5 of the EU blocking statute can be invoked by a co-contracting party of such a person. (38)

1. Does the EU blocking statute apply to a situation such as that at issue in the main proceedings?

69. The question here is whether the first paragraph of Article 5 of the EU blocking statute should be understood as having conferred upon a person the right to rely on that provision to prevent a European operator from infringing that provision so that, in the main proceedings, Bank Melli Iran could invoke that article to challenge the termination of the contracts at issue.

70. The first thing to note is that the first paragraph of Article 5 of the EU blocking statute must be interpreted restrictively inasmuch as it severely affects freedom of enterprise. If, for example, that article could be enforced at the suit of a private entity such as Bank Melli Iran, it would have indeed the effect of *obliging* another European undertaking such as Telekom Deutschland to do business with it. This would be a far-reaching interference with ordinary commercial freedoms.

71. Secondly, there is no express reference in the EU blocking statute to any rights that this regulation would confer on persons other than those referred to in Article 11 thereof. In particular, it may be observed that, with regard to the first paragraph of Article 5 of the EU blocking statute, that provision seeks to prohibit generalised conduct required of the undertakings referred to in Article 11 of that regulation, namely to comply with one of the laws listed in the annex thereto. Given the general nature of this prohibition and the choice of the EU legislature to adopt a regulation rather than a directive, if that provision was intended to confer individual rights, one might have expected that the latter would have addressed the specific circumstances in which a party affected by one of the pieces of legislation mentioned in that annex could rely on the prohibition contained in the first paragraph of Article 5 of the EU blocking statute in order to defend its own private interests. This, however, is not the case.

72. Thirdly, Article 9 of the EU blocking statute (which is the only provision devoted to the consequences of the violation of the EU blocking statute) imposes an obligation on the Member States to provide for effective, proportionate and dissuasive sanctions in the event of a breach of that statute. This terminology − in particular, the use of the adjective 'dissuasive' − usually refers to public rather than private enforcement. (39)

73. Fourthly, the second paragraph of Article 5 of the EU blocking statute, which gives the Commission the power to authorise persons to comply wholly or partly with the requirements or prohibitions laid down or resulting from that legislation, does not provide that, in deciding whether to grant such an exemption, that institution should take into account the interests of third parties, as might have been expected if the EU blocking statute were to recognise the rights of persons likely to be addressed by the legislation listed in the annex to the EU blocking statute. (40)

74. Apart from these arguments drawn from wording and the context of the first paragraph of Article 5 of the EU blocking statute, perhaps the strongest argument in favour of interpreting it simply as laying down a rule of economic policy and not as conferring rights on contracting parties, lies in the objectives of the EU blocking statute. (41) Indeed, those objectives are, after all, *not* to protect third-country companies directly targeted by the US measures, but rather, as Article 1 of that statute states, to counter the effects of the targeted laws and to protect European companies, and indirectly, the national sovereignties of the Member States, against that legislation contrary to international law. (42) If Bank Melli Iran could enforce the first paragraph of Article 5 of the EU blocking statute by private enforcement action of the kind at issue here, this could be seen as contravening the objectives of that statute, which are to protect European companies (and *not* the companies targeted by the primary sanctions) because it puts them in an unenviable and almost impossible position. (43)

75. While recognising the force of these considerations, for my part, I nonetheless feel obliged to conclude that the first paragraph of Article 5 of the EU blocking statute must be interpreted as conferring such rights on third parties such as Bank Melli Iran.

76. The starting point here is the imperative language of the opening words of the first paragraph of Article 5 of the EU blocking statute itself ('No person referred to in Article 11 shall comply … with any requirement or prohibition … based on … the laws specified in the Annex.'). As if this stark and uncompromising language was not enough, the EU legislature reached deep into its armoury of legal language in order to ensure that full force and effect was given to this prohibition ('whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission … based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom').

77. Those policy objectives of those provisions are further set out in the recitals. These include the conviction (set out in the third to fifth recitals) that this type of extraterritorial legislation violates international law and compromises the effective operation of the internal market. The sixth recital states that

in these exceptional circumstances it is necessary in order to protect the 'established legal order, the interests of the [Union] and the interests of natural and legal persons exercising' Treaty rights by 'removing, neutralising, blocking or otherwise countering the effects of the foreign legislation'.

78. It accordingly behoves this Court to give effect to the policy choice which is reflected in the recitals and the substantive provisions of the EU blocking statute which the EU legislature has mandated in the most uncompromising and stark terms. (44) Yet, if a right of action in favour of Bank Melli Iran was not acknowledged, the net effect would be that the enforcement of policy expressed in the first paragraph of Article 5 of the EU blocking statute would rely only on the willingness of the Member States (45) and, indirectly, of the Commission.

79. It would mean, in turn, that, in certain Member States reluctant to enforce the blocking statute, for example, a large economic operator such as Telekom Deutschland could decide actively to comply with the US sanctions regime by terminating the contract with Bank Melli Iran.

80. Where they led, others would surely follow, and the entire public policy behind the EU blocking statute could be quickly undermined by a state of affairs in which many European entities quietly decide to comply (even indirectly) with those sanctions. In these circumstances, the threat of 'dissuasive' sanctions in the laws of the Member States envisaged by Article 9 of that statute would likely be a hollow one and the Union and its Member States would be reduced, like Shakespeare's King Lear, to protesting that they would 'do such things … I know not [what], but they shall be the terrors of the earth'.

81. It is true that one consequence of this interpretation is that a foreign entity – such as Bank Melli Iran – will collaterally obtain the benefit of this right of action at the expense of a European entity – such as Telekom Deutschland – which would then be obliged to remain contractually bound to a customer whose custom it no longer desires. Yet, unsatisfactory as it may seem to some, I see no other alternative if the Court is to uphold the public-policy objectives to which the first paragraph of Article 5 of the EU blocking statute is designed to give effect.

82. This can perhaps be tested another way. Suppose, for example, that a US company had obtained a judicial award in the United States against Bank Melli Iran and that this judicial decision was based 'directly or indirectly' on the US sanctions regime. Let us further suppose that the US company then sought to enforce that award before the German courts. Could it be suggested that Bank Melli Iran would not have the right to apply to those courts to halt those enforcement proceedings in view of Article 4 of the EU blocking statute, even if (as is the case) that provision also said nothing about the right of non-European entities to make an application of this kind?

83. I think that that question answers itself and that much the same can equally be said about third-party rights in respect of the first paragraph of Article 5 of the EU blocking statute.

2. Can the first paragraph of Article 5 of the EU blocking statute be interpreted as imposing an obligation for the persons referred to in Article 11 of that statute to give reasons ab initio when they terminate a contractual relationship with a person subject to primary sanctions?

84. From the outset, it should be noted that this question is to be seen in the context of German law, which allows persons in the position of the parties to the main proceedings, to exercise on the basis of freedom of contract the ordinary right to terminate any open-ended contract which requires neither the existence nor the identification of a ground for termination. The second question should therefore be understood as essentially concerning whether the first paragraph of Article 5 of the EU blocking statute *obliges* the Member States to acknowledge an exception to that freedom of contract where the contract has been entered into with a person subject to primary sanctions, by virtue of which, in that particular circumstance, a reason should be put forward in order to ascertain whether the termination is motivated by the existence of the laws listed in the annex thereto and, therefore, confer to that provision an *effet utile*.

85. It is true that there is nothing in the specific text of either the first paragraph of Article 5 of the EU blocking statute, in particular, or in that statute, in general, to support the view that this statute imposes an obligation to give reasons justifying the termination of a commercial relationship with a person subject to primary sanctions. I nevertheless consider that such an obligation must necessarily be inferred from the objectives pursued by this statute, essentially for all the reasons I have just given in respect of the existence

of a right of action to enforce the first paragraph of Article 5 of the EU blocking statute. If it were otherwise, an entity could quietly decide to give effect to the US sanctions legislation and, by maintaining an obscuring silence, impenetrable as to its reasons and (effectively) unreviewable as to its methods, the major policy objectives enunciated in the recitals and the first paragraph of Article 5 of the EU blocking statute would be compromised and set at naught.

86. This is essentially what appears to have happened here. The fact that Telekom Deutschland sought to terminate its contract with Bank Melli Iran (and, as the referring court observed, wrote a letter in more or less identical terms to four other customers, each of whom had significant Iranian connections) within two weeks of the coming into force of the renewed US sanctions may be thought to tell its own tale, although the appropriate inference which might perhaps be drawn in that regard is of course ultimately a matter for the referring court to determine. Certainly, in the absence of justification, it suggests that Telekom Deutschland decided that, rather than risk being exposed to the application of the US sanctions (with the appurtenant risks of large fines, business disruption and considerable reputational damage), it would in fact give effect to those sanctions, irrespective of whatever the first paragraph of Article 5 of the EU blocking statute provided to the contrary.

87. One must acknowledge, of course, that there are many companies and individuals who would have ethical qualms and reservations about doing business with countries such as the Islamic Republic of Iran (and, by extension, major Iranian entities such as Bank Melli Iran which are effectively controlled by the Iranian Government): its nuclear ambitions; its endeavours to destabilise other governments in the region; its willingness to conduct proxy wars, often by means of financing and supporting terrorist groups for this purpose; its religious fundamentalism and general intolerance of dissent; its discriminatory treatment of women and minorities and its promiscuous use of the death penalty often following summary and – by our standards, at least – deeply unfair trials are all features of that State which many understandably find disagreeable and highly objectionable. The right of a business to decide according to its own ethical sense of business values that it will not do business with regimes of that kind is, of course, a core element of the freedom of conscience protected by Article 10(1) of the Charter and the freedom to conduct business within the meaning of Article 16 of the Charter.

88. In order, however, to establish that the reasons given in respect of any decision to terminate a contract on this ground were in fact sincere, the person referred to in Article 11 of the EU blocking statute in question − in the present case Telekom Deutschland – would need, in my view, to demonstrate that it is actively engaged in a *coherent* and *systematic* corporate social-responsibility policy (CSR) which requires them, inter alia, to refuse to deal with any company having links with the Iranian regime. (46)

89. In any case, it nevertheless follows from the uncompromising terms of the first paragraph of Article 5 of the EU blocking statute that – in principle, at least – an undertaking seeking to terminate an otherwise valid contract with an Iranian entity subject to the US sanctions must demonstrate to the satisfaction of the referring court that it did not do so by reason of its desire to comply with those sanctions.

90. In this respect, as I have already indicated, the defendant's obligation is not simply to give reasons for the decision, but also to justify it. Indeed, for all the reasons I have mentioned, the *effet utile* of the first paragraph of Article 5 of the EU blocking statute would be compromised if the persons concerned were allowed to hide behind any vaguely credible reason for their decision. (47) In particular, in my view, a person referred to in Article 11 of that statute should not be able to invoke a termination clause for *force majeure* to justify the termination of the contractual relationship without at least demonstrating that the event constituting *force majeure* is unrelated to the US sanctions legislation listed in the annex to that statute. (48) Any other conclusion would undermine the capacity of an entity affected by the contract termination to avail itself of the rights conferred by the EU blocking statute.

91. In saying this, I do not overlook the fact that, first, for certain types of contracts, personal contact between the contracting parties (*intuitu personae*) can be important, but this cannot *in itself* exclude the requirement that a justification for the termination must be given. On the contrary, the specificity of these contracts and the relationship they apply between the parties may precisely constitute a legitimate reason to justify, in the event of changes in circumstances unrelated to the primary sanctions, the termination of the said contracts. In the present case, it would be quite unreal to suppose that the contracts at issue between the parties should be regarded in this manner: it was, on the contrary, an impersonal contract negotiated between

two business entities providing for the supply of essential public-utility services by a major telecommunications entity which, for all practical purposes, occupied a dominant position in the relevant market for the supply of such services.

92. However, that obligation to justify the termination of a contract is not, however, distinct from the obligation under the first paragraph of Article 5 of the EU blocking statute for persons covered by Article 11 of that statute not to comply with the sanctions legislation listed in the annex thereto. It rather relates to the burden of proof and, consequently, this justification does not necessarily have to be given at the time of termination but could, for example, also be advanced by way of defence following the commencement of judicial proceedings seeking the enforcement of the first paragraph of Article 5 of the EU blocking statute.

93. Admittedly, according to the Court's case-law, in the absence of harmonisation, Member States are free to set up their own procedural rules which govern the enforcement of EU law. However, I do not think that the principle of procedural autonomy may be applied where, as in the present case, the need to ensure an '*effet utile*' imposes a certain distribution of burden of proof. (49) Indeed, even to consider that the burden of proof is a matter of procedural law (50) and not, as seems to be the case in some Member States, of substantive law, the requirement to ensure the effectiveness of EU law would prevent this burden from being shifted in a way that would make it difficult to apply EU law to a dispute.

94. In EU law, if the prevailing principle is that the burden of proof weighs on the person who brings the claims, (51) it is also recognised that, in certain specific circumstances, a reversal of the burden of proof might be necessary. (52) This is the approach adopted, for example, by the EU anti-discrimination directives, an area where it is well known that proof of discriminatory behaviour can be difficult to provide. (53)

95. Regarding the first paragraph of Article 5 of the EU blocking statute, third parties will obviously have the greatest difficulty in gathering evidence that the decision not to enter into or not to continue a commercial relationship is the consequence of the will of a person referred to in Article 11 of that statute to comply with US law. Apart from the unlikely event that a person referred to in that latter article would ever, for example, publicly admit its willingness to comply with the legislation listed in the annex to that statute, I do not see what evidence could be provided by the applicants. A concomitance of decisions terminating business relations or refusing to enter into relations with persons subject to primary sanctions? However, in practice, business secrecy makes it extremely difficult for a company to know the real decisions taken by a supplier with regard to other companies. (54)

96. In these circumstances, I consider that where the claimant has simply provided prima facie evidence, on the one hand, that the person falling under the scope of Article 11 of the EU blocking statute with whom that claimant wishes to enter into or remain in a business relationship may feel concerned by one of the pieces of legislation mentioned in the annex thereto and, on the other hand, that it fulfilled the expected conditions for becoming or remaining a customer of that undertaking, (55) the effect of the first paragraph of Article 5 of the EU blocking statute is that the person referred to in Article 11 of that statute must justify its business decision to terminate the contract at issue or to refuse that claimant as a client. (56)

97. One may accept that such a reversal of the burden of proof may seem to some to be contrary to the freedom to contract. However, as the Court has pointed out, the exercise of the freedoms referred to in the Charter are only guaranteed within the limits of the liability that each national incurs for its own acts. (57) Moreover, one might note that the Court has already held, at least in the context of competition law, that under certain conditions, a company can be obliged to contract with third parties. (58) In these particular circumstances, the overwhelming public-policy reasons, the upholding of international law and the general distaste on the part of the Union for intrusive extraterritorial legislation of this kind which, as we have already seen, are all reflected here in the recitals and the provisions of Article 4 and of the first paragraph of Article 5 of the EU blocking statute require no less. (59)

98. Accordingly, so far as the procedure in the national courts is concerned, given that Bank Melli Iran and Telekom Deutschland were already in business and that it seems that neither of them have changed their business activity (a matter which, however, it is for the national court to verify), I consider that it is for Telekom Deutschland to establish that there was an objective reason, *other* than the fact that Bank Melli Iran was subject to primary sanctions, to terminate the contracts at issue and for the referring court to verify the veracity of such grounds. It is clear from the wording of the first paragraph of Article 5 of the EU blocking

statute that what matters is the intention of the economic operator to comply with the said sanctions, irrespective of whether it is actually concerned by their application.

99. In the light of the above, I propose to answer the second question to the effect that the first paragraph of Article 5 of the EU blocking statute must be interpreted as precluding an interpretation of national law under which a person referred to in Article 11 of that statute may terminate a continuing contractual obligation with a contracting party named on the SDN held by the OFAC, without ever having to justify its decision to terminate those contracts..

C. The third and fourth questions

100. By its third and fourth questions, the referring court asks, in essence, whether the first paragraph of Article 5 of the EU blocking statute is to be interpreted as meaning that, in the event of a failure to comply with the provisions of that article, the courts seised by a contracting party subject to primary sanctions are required to order a person referred to in Article 11 of that statute to maintain that contractual relationship, even though, first, the second paragraph of Article 5 thereof should be interpreted restrictively, secondly, such an injunction measure is liable to infringe Article 16 of the Charter and, thirdly, such a person is liable to be severely penalised by the authorities responsible for applying one of the laws referred to in the annex.

101. Here, it should be recalled that it is for the national courts responsible for applying, within the framework of their jurisdiction, the provisions of EU law having direct effect to ensure that they are fully effective. (60) Since, according to Article 288 TFEU, a regulation, such as the EU blocking statute, is directly applicable in any Member State, this obligation is imposed on those courts even in the absence of a provision in the national legislation transposing that regulation.

102. With regard to the first paragraph of Article 5 of the EU blocking statute, it may be observed that this provision does not specify what consequences are to be drawn from the fact that a person referred to in Article 11 of that statute decides, in breach of the first paragraph of Article 5 thereof, not to enter into or to terminate a commercial relationship with a person subject to primary sanctions in order to comply with the legislation listed in the annex thereto.

103. Admittedly, Article 9 of the EU blocking statute provides that it is for the Member States to lay down the rules on penalties applicable to infringements of the national provisions adopted, provided that they are effective, proportionate (61) and dissuasive. (62) Accordingly, if the Court were to consider, as I propose, that the first paragraph of Article 5 of the EU blocking statute is to be understood as conferring rights on persons subject to primary sanctions, then the term ‘sanction’ should necessarily be understood in a broad sense, as encompassing both criminal or administrative sanctions and civil sanctions whose purpose is not necessarily punitive, but may simply be to ensure the *effet utile* of the provision in question. (63)

104. This, however, does not mean that it would be entirely up to the Member States to decide on the nature of the sanctions. Indeed, it should be recalled that, where a norm refers the task of determining the sanctions to be adopted in the event of a breach of an obligation under EU law back to the Member States, this power of determination is limited by the obligation on the Member States, and in particular on the national courts, to ensure the full effect of EU law. This obligation requires the national courts to redress the situation resulting from the unlawfulness committed and, in particular, to put right-holders in the situation they would have been in in the absence of that unlawfulness.

105. It follows that, in the event of a breach of a provision of a regulation, a distinction must be drawn, among the measures to be adopted by States in order to punish that breach, between measures having a punitive purpose, which are necessary to ensure the requisite level of deterrence, and measures taken to redress the situation resulting from the unlawfulness committed, the adoption of which is necessary in order to ensure the full effect of EU law. (64) While, in the case of the former, the Member States have a relatively wide margin of discretion in deciding what measures to adopt, provided that those measures are, as indicated, effective, proportionate and dissuasive,(65) in so far as the latter give effect to the Member States’ obligation to ensure the full effect of EU law, that margin may be limited or even non-existent. (66)

106. In particular, in the case of an infringement of a provision laid down in a regulation (67) conferring rights on third parties, given that a regulation is directly enforceable, even in the absence of any specification as to the procedural arrangements for actions designed to safeguard the rights conferred on certain persons

by that provision, the national courts are nevertheless bound by the obligation to ensure the full effect of that provision. (68) All of this necessarily places an obligation on such national courts to (re-)establish the status quo ante that would have prevailed in the absence of the illegality committed.

107. In that regard, I would add that, unlike measures designed to punish, this obligation to ensure that the legal entitlements of the persons or entities concerned are preserved and the status quo ante is restored cannot, in so far as it touches on the very substance of the rights conferred by EU law, lead to a result which differs from one Member State to another. In other words, while the procedural arrangements for implementation by national courts may vary, the result must, in principle, be the same throughout the European Union. It is indeed not enough to proclaim the existence of rights for them to become a reality in the daily lives of EU citizens; they must also be effectively sanctioned, especially when they derive from a regulation that is supposed to be directly applicable.

108. Accordingly, I consider that, in the event of a breach of a provision prescribing a rule of conduct which must be complied with on a continuing basis (such as here), the national courts are required to order the infringer to put an end to the breach, on pain of a periodic penalty payment or other appropriate sanction, since only then can the continuing effects of the unlawfulness committed be brought to an end and compliance with EU law fully guaranteed.

109. Here, one may observe that the first paragraph of Article 5 of the EU blocking statute prohibits the persons referred to in Article 11 of that statute from *complying with* the legislation listed in the annex thereto. In the present case, the legislation in question prohibits any non-US company from trading with a person subject to primary sanctions. It is therefore a general prohibition. Failure to comply with it therefore implies that at no time may a person referred to in Article 11 of that statute refuse to maintain a commercial relationship for a reason derived from the existence of the US sanctions legislation.

110. In this context, to admit that any infringement of this provision may be sanctioned only by the payment of lump-sum damages would be tantamount to admitting the possibility that a person referred to in Article 11 of the EU blocking statute could comply with one of the pieces of US sanctions legislation listed in the annex thereto, outside of the mechanism provided for in the second paragraph of Article 5 of that statute merely by compensating the contractual right-holders. If that were indeed the case, then the prohibition set out very clearly in the first paragraph of Article 5 of the EU blocking statute would thus be distorted and the public-policy objectives which I have already identified, namely to counteract and to neutralise the effects of the US sanctions legislation, could not be achieved.

111. As I am of the view that the first paragraph of Article 5 of the EU blocking statute confers rights on persons subject to primary sanctions, the logical consequence of it is that any decision by a person referred to in Article 11 of that statute to terminate a contractual relationship with a person subject to primary sanctions which cannot be justified on any ground, other than the desire to comply with one of the pieces of legislation listed in that statute, should be regarded as invalid and ineffective, with the consequence that national courts are obliged to treat the contractual relationship as having continued on the same commercial terms as those previously existing. (69) Such an obligation therefore implies that, where appropriate, the national courts must order any person referred to in Article 11 of the EU blocking statute to continue the contractual relationship in question, on pain of a periodic penalty payment or other appropriate sanction.

112. In that regard, it is irrelevant whether the national legislation at issue in the main proceedings provides for administrative penalties in the form of a monetary fine. Since it must be accepted that the first paragraph of Article 5 of the EU blocking statute confers rights on the persons subject to the primary sanctions, the existence of administrative sanctions does not make it possible to remedy the obligation incumbent directly on the national courts, in the event of infringement of that provision, to take all necessary measures to ensure the full effect of those rights. (70)

113. This conclusion is not called into question, in my view, by Article 16 of the Charter.

114. Admittedly, the Charter applies to sanctions adopted by Member States to enforce EU law, (71) and there is no doubt that the adoption of such an injunction is likely to affect the right to freedom of enterprise of the undertaking concerned, as guaranteed by Article 16 of the Charter, in a far-reaching way. Indeed, it is common ground that freedom of enterprise includes the freedom to contract (72) and therefore, necessarily, also the freedom not to contract.

115. However, as I have already explained, if one accepts − as I think that we must − that the first paragraph of Article 5 of the EU blocking statute confers rights on undertakings subject to primary sanctions, the need to ensure the full effect of those rights will result in an obligation being imposed on the national courts, in the event of a breach of those rights, to order any person referred to in Article 11 of that statute to maintain the contractual relationship in question.

116. It follows, therefore, that the infringement of the freedom to conduct a business guaranteed by the Charter is not the consequence of the exercise by the referring court in question of any discretion, but rather of its *obligation* to ensure the full effect of EU law. It is therefore at the level of EU law only that the question of a possible unjustified infringement of Article 16 of the Charter should be examined.

117. Before examining whether the first paragraph of Article 5 of the EU blocking statute constitutes an unjustified infringement of Article 16 of the Charter, the question arises as to whether the Court may carry out such an examination procedurally. Indeed, the referring court did not formulate its question as relating to the validity of the first paragraph of Article 5 of the EU blocking statute (or of the decision to include the US legislation at issue in the annex to that statute), but rather to the interpretation of that article, as well as of Article 16 of the Charter.

1. On the possibility for the Court to examine ex officio the compatibility of the first paragraph of Article 5 of the EU blocking statute and the decision to include the US legislation at issue in the annex to that statute

118. According to the Court's case-law, where the compatibility of an act of the Union has not been expressly called into question by the referring court in its questions, the Court is under no obligation to examine the validity of that act, (73) since it is for the national court alone, which is seised of the case and which must assume responsibility for the judicial decision to be taken, to assess, in the light of the particular features of the case pending before it, both the need for a preliminary ruling in order to be able to give judgment and the relevance of the questions which it puts to the Court. (74) However, if the Court is not required to examine the validity of an act of its own motion when making a reference for a preliminary ruling on the interpretation of EU law, can it do so of its own motion?

119. In this respect, two arguments against this solution could be made. First, according to the case-law, in the context of an action for annulment, the infringement of a higher norm does not constitute a plea of public policy liable to be raised *ex officio* by the EU judicature. (75) Secondly, the justification of the preliminary-ruling procedure is not for the formulation of advisory opinions on general or hypothetical questions, but rather for the resolution of a dispute relating to EU law. (76) However, according to the Court's case-law, it is only when national law confers on a court the power to apply a binding rule of law of its own motion that this power becomes an obligation for that court to raise of its own motion the infringement of a rule of EU law. (77) Consequently, a finding that a rule of EU law is invalid in the absence of a challenge to it by the parties is not necessarily likely to have an impact on the effective resolution of a dispute, the existence of such an impact varying according to the nature of the pleas which may be raised of the national court's own motion.

120. Nonetheless, in several judgments, the Court has recognised its right to examine *ex officio* the validity of the provision at stake in a reference for a preliminary ruling in two particular situations, namely, first, where, despite the wording of the question, it is apparent from the reference for a preliminary ruling that the doubts expressed by the referring court are in fact linked to the validity of the act whose interpretation is formally sought and, secondly, where the validity of that act has been raised in the main proceedings. (78) Indeed, in these two scenarios, the fact of examining the validity of the provision in question *ex officio* does not appear to be totally at odds with the case-law recalled above, in so far as the question of validity is already, in some ways, a part of the dispute so that it may also reasonably be considered that such an examination could be useful to the referring court.

121. An *ex officio* examination of the validity of the provision whose interpretation is requested requires, however, respect for the right to be heard enjoyed by the institutions which have adopted that provision and for the procedural rights enjoyed by the Member States. Indeed, as the Court once more pointed out very recently that, 'to answer additional questions [not raised by the referring court] would be incompatible with the Court's duty to ensure that the governments of the Member States and the parties concerned are given the

opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind the fact that, under that provision, only the decision of the referring court is notified to the interested parties'. (79) In particular, it is quite obvious that, in view of the effects produced by a finding of invalidity, the decision of the Member States or of the institutions concerned whether or not to intervene in the preliminary ruling is likely to differ depending on whether the question referred must be understood as concerning the interpretation or the validity of an act.

122. It follows that, even though the questions asked only formally relate to the interpretation of a provision, the Court may nonetheless of its own motion examine the validity of an act in the context of a reference for a preliminary ruling if it is *sufficiently clear* from that reference, as notified to the Member States in their official language or in the summary thereof, that the referring court's doubts relate to the validity of the act whose interpretation has been formally requested only, or that the validity of that act constitutes the central subject matter of the dispute in the main proceedings. If not, compliance with the prerogatives of the authors of the act in question and of those Member States requires that the Court notify them in advance of its intention to examine of its own motion the validity of the act in question.

123. In the present case, it is clear, however, from the reference for a preliminary ruling that it is sufficient in law to understand that the doubts expressed by the referring court justifying the fourth question are linked to the existence of a 'general ban', which is the result of the adoption of the EU blocking statute and the decision to include the ITSR in the annex thereto. The referring court in particular observed as follows: 'It is the understanding of the chamber that, as a result of the ban on compliance with secondary sanctions, EU operators like the defendant (the very persons who, according to its preamble, the Regulation is designed to protect) face a dilemma … The chamber is of the opinion that that risk is inadequately countervailed by the recovery claim regulated in Article 6 of [the EU blocking statute]. The same applies to the possibility of obtaining an authorised exemption under the second paragraph of Article 5 of [the EU blocking statute] … That being so, the chamber has doubts, where there is a risk of considerable economic losses on the US market, as to whether a *general ban* on severing relations with a business partner, let alone an insignificant business partner, in order to avoid those risks is compatible with the freedom to conduct a business protected under Article 16 of the Charter … and the principle of proportionality anchored in Article 52 of that Charter' (emphasis added). Moreover, it flows from the observations of the various parties to the proceedings at issue that they have fully understood the doubts of the referring court as relating to the validity of the EU blocking statute.

124. Accordingly, I consider that the validity of the EU blocking statute and the decision to include the ITSR in the annex thereto under Article 16 of the Charter can be examined *ex officio* by the Court without the latter having to notify Member States of its intention to carry out this examination. (80)

2. On the compatibility of Article 5 of the EU blocking statute with Article 16 of the Charter

125. In this regard, it should be recalled that, in accordance with Article 52(1) of the Charter, an infringement of any of the freedoms guaranteed by the Charter may be permitted if it is provided for by law and if it respects the essential content of those rights and freedoms. Moreover, in accordance with the principle of proportionality, limitations may be made only if they are necessary and actually meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

126. As regards the first of these conditions, it is common ground that it is satisfied in so far as the infringement of the freedom of enterprise by reason of the prohibition on compliance with the Charter by persons referred to in Article 11 of the EU blocking statute must be regarded as provided for by law, in so far as it results from the first paragraph of Article 5 of that statute.

127. As regards the second condition relating to respect for the essential content of freedom of enterprise, of which the freedom to contract is only one aspect, it should be recalled that, like any freedom mentioned in the Charter, with the exception of human dignity guaranteed in Article 1 thereof, the wording of which expressly states that it is inviolable −, and perhaps also all the provisions contained in Title 1 −, (81) the freedom of contract does not constitute an absolute right, (82) but may rather be subject, in the general interest, to a wide range of interventions by the public authorities, provided, (83) from an institutional perspective of the said freedoms, that these interventions target specific situations.

128. In particular, so far as freedom of contract is concerned, the Court has already acknowledged that EU law may impose an obligation on an operator to contract, in particular for reasons relating to competition law. (84) By a parity of reasoning, one may therefore conclude that while the freedom not to contract is generally part of the essential content of the freedom to conduct a business, there are also circumstances where this right may be overborne. Just as equal status legislation provides, for example, that undertakings are not free to discriminate in their contractual dealings with the public on grounds of race or gender, there may also be other circumstances where public considerations may outweigh this freedom to conduct a business. This, accordingly, is a right which may therefore be restricted, provided that the other conditions mentioned in Article 52 of the Charter are respected.

129. Consequently, the question that remains to be examined is whether the first paragraph of Article 5 of the EU blocking statute is to be regarded as a measure proportionate to the attainment of an objective of general interest recognised by the Union, which, according to Article 52 of the Charter, presupposes that such a measure is necessary and that it actually meets such an objective. In so far as the case-law interprets these two conditions as referring to the usual conditions for a proportionality test, this presupposes that such measures must be suitable for achieving the objective which they pursue, in the sense that they must at least contribute to the attainment of that objective, and that they must not go beyond what is appropriate and necessary for that purpose. (85)

130. In that regard it should first be noted that, as already indicated, the first paragraph of Article 5 of the EU blocking statute aims at protecting the Union, its Member States and natural and legal persons exercising fundamental freedoms within the Union against the extraterritorial application of the laws cited in the annex, and at counteracting the effects of those laws. As it flows from the sixth recital, this objective forms part of the more general goal, which is to preserve the established legal order and safeguard the Union's interests and those of the Member States against the extraterritorial effects of foreign legislation whose reach is considered to be exorbitant and which operates in a manner contrary to international law. Since, in particular, Article 21(2)(a), (b), (e) and (h) TEU assigns to the Union the objective of safeguarding its fundamental interests, supporting the principles of international law, encouraging the removal of obstacles to international trade and promoting good global governance, such objectives should be considered as belonging to the objectives of general interest recognised by the Union. (86) These are also fundamental public-policy objectives which all serve to protect the core national sovereignties of the Member States of the Union.

131. Secondly, the first paragraph of Article 5 of the EU blocking statute appears to be *suitable for achieving* those objectives. In this regard, it should be recalled that, as already explained, that article merely defines the consequences that attach to the inclusion of legislation in the annex thereto. Admittedly, the EU blocking statute does not expressly specify on the basis of which criteria the Commission may decide to include legislation in the annex. (87) However, it may be inferred from the objectives of the said statute that the main criterion is that the foreign sanctions legislation has an extraterritorial effect, at least within the meaning of that statute. In the light of that criterion, a measure prohibiting European companies from complying with the pieces of legislation listed in the annex to that statute appears to be capable of achieving the objectives mentioned above. (88)

132. Such a provision also appears to be necessary since there does not seem to be any less restrictive means of achieving the abovementioned objectives while also being, at the same time, as effective. (89)

133. Finally, as far as the need for the measure in question not to produce disadvantages disproportionate to the aims pursued, to which the Court's case-law refers intermittently, it may be noted that the Court has already accepted that measures taken by the Union for Common Foreign and Security Policy purposes may 'have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanction'. (90)

134. Moreover, in accordance with the second paragraph of Article 5 of the EU blocking statute, economic operators may apply to the Commission for authorisation to derogate from the first paragraph of that article to the extent that, in particular, other conduct would seriously harm their interests or those of the Union. According to the Court's case-law, the existence of such an exemption mechanism is sufficient to ensure that the prohibition in question does not unduly infringe a substantive freedom. (91) Indeed, under that

circumstance, an infringement of the freedom of enterprise is most likely to result from an unjustified refusal by the Commission to grant such an exemption. (92)

135. Consequently, I consider that the first paragraph of Article 5 of the EU blocking statute is not, as such, contrary to Article 16 of the Charter. This, however, does not mean that the same necessarily applies to the decision to include legislation in the annex. It is clear, however, that the Commission must also ensure, when adding legislation enacted by third countries to the annex, that the inclusion serves the objectives of the EU blocking statute and that the consequences produced by this inclusion are justified and proportionate to the effects produced by the EU blocking statute. However, this question has not been raised by the referring court or by the parties and, as it happens, this issue has not even been mentioned by the referring court or by the parties and, in any case, there was no such suggestion in the present case that the inclusion of the US sanctions legislation in the annex was inappropriate.

V. Conclusion

136. In conclusion, I cannot avoid observing that it gives me no particular pleasure to arrive at this particular result. As the facts of this case have highlighted, the EU blocking statute is a very blunt instrument, designed as it is to sterilise the intrusive extraterritorial effects of US sanctions within the Union. This sterilisation method will inevitably bring casualties in its wake and many may think that Telekom Deutschland will be among the first to suffer, not least given its large US operations. As I have already hinted, these are matters which the EU legislature may well wish to ponder and consider.

137. This Court is nevertheless simply a court of law and our duty is to give effect to the language of the duly enacted legislation. For the reasons that I have given, I consider that the first paragraph of Article 5 of the EU blocking statute has these far-reaching effects even if in the circumstances such legislative provisions may also be thought to override ordinary business freedoms in an unusual and intrusive manner. I would accordingly propose that the questions posed by the referring court be answered as follows:

1) The first paragraph of Article 5 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, is to be interpreted as not applying only where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to that regulation has addressed, directly or indirectly, some instructions to a person referred to in Article 11 of that regulation. The prohibition contained in this provision accordingly applies even in the event that an operator complies with such legislation without first having been compelled by a foreign administrative or judicial agency to do so.

2) The first paragraph of Article 5 of Regulation No 2271/96 is to be interpreted as precluding an interpretation of national law under which a person referred to in Article 11 of that regulation may terminate a continuing contractual obligation with a contracting party named on the Specially Designated Nationals and Blocked Persons List held by the US Office of Foreign Assets Control, without ever having to justify its decision to terminate those contracts.

3) The first paragraph of Article 5 of Regulation No 2271/96 is to be interpreted as meaning that, in the event of a failure to comply with the provisions of that article, the national court seised by a contracting party subject to primary sanctions is required to order a person referred to in Article 11 of that regulation to maintain that contractual relationship, even though, first, the second paragraph of Article 5 should be interpreted restrictively, secondly, such an injunction measure is liable to infringe Article 16 of the Charter of Fundamental Rights of the European Union and, thirdly, such a person is therefore liable to be severely penalised by the authorities responsible for applying one of the laws referred to in the annex to that regulation.

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1 Original language: English.

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2 OJ 1996 L 309, p. 1.

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3 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to [the EU blocking statute] (OJ 2018 L 199I, p. 1).

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4 See Redding, B., 'The Long Arm of the Law or the Invasive Reach of the American Legal System', *Int'l Bus. L. J.*, 2007, p. 659. In his dissenting opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) 280-281, Brennan, J. stated that 'the enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three largest exports are now "rock music, blue jeans, and United States law"' (quoting Grundman, V.R., 'The New Imperialism: The Extraterritorial Application of United States Law', *The International Lawyer*, vol. 14, 1980, p. 257).

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5 The challenges posed to EU law by the extraterritoriality of certain legislation should also be raised with acuteness in the forthcoming years in an area dear to the Court, namely that of personal data protection. Indeed, the US Clarifying Lawful Overseas Use of Data Act 2018, which amended the 1986 Stored Communications Act, gives American law-enforcement authorities the power to request data stored by most major cloud providers, even if stored outside the United States. However, the data-storage market is largely dominated by US companies, at more than 85%.

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6 According to a French parliamentary report, the US administration rarely bothers to justify its jurisdiction. In practice, it seems that the European companies convicted of violating US sanctions, mainly banks, have been so found under primary sanctions. The settlement agreements that they conclude rely on an extensive conception of the traditional general principles of territorial jurisdiction on the grounds that the transactions in question were made to or through US financial institutions or that they transited through the United States, because they are carried out in United States dollars (USD) and therefore necessarily involve US clearing houses. See Lellouche, P. and Berger, K., *L'extraterritorialité de la législation américaine*, Rapport d'information, Assemblée Nationale, France, 2016, pp. 49-53. Concerning the potential justification, or lack thereof, of the US legislation under international law, see, among others, Ryngaert, C., 'Extraterritorial Export Controls (Secondary Boycotts)', *Chin. J. Int'l L.*, vol. 7, 2008, p. 625, esp. p. 642 et seq.; Meyer, J.A., 'Second Thoughts on Secondary Sanctions', *U. Pa. J. Int'l L.*, 30, 2009, p. 905, p. 932 et seq.; and Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, pp. 9-65.

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7 According to Hubert de Vauplane, , 'what is most shocking in the way the OFAC [(Office of Foreign Asset Control), which is in charge of enforcing those sanctions,] operates is a certain tropism to sanction mainly foreign banks, even when the only legal link with the United States is the use of the dollar as a payment currency'. De Vauplane, H., 'Iran: Sanctions américaines contre les banques européennes, hypocrisie ou arnaque?', *Les Échos*, 23 August 2012. See also Stratmann, K., Koch, M. and Brüggmann, M., 'Deutsche Firmen leiden unter US-Sanktionen – Amerikanische Konkurrenten werden geschont', *Handelsblatt*, 12 February 2019, and 'Wie hart Amerikas Forderung deutsche Unternehmen trifft', *Frankfurter Allgemeine Zeitung*, 10 May 2018 (source: https://www.faz.net/aktuell/wirtschaft/schutz-deutscher-unternehmen-vor-us-sanktionen-schwierig-15583846.html). In a related area, the fight against corruption, The New York Times also noted that in 2012 'a list of the top companies making these settlements is notable in one respect: its lack of American names' (Wayne, L., 'Foreign Firms Most Affected by a US Law Barring Bribes', *The New York Times*, 3 September 2012). See also Jakobeit, C., 'Große Schmiergeldzahler', *Welt-sichen*, No 9, 2010 (source: https://www.welt-sichten.org/artikel/3103/grosse-schmiergeldzahler), who comments on the fact that US companies have decades of experience in avoiding the stipulations of the Foreign Corrupt Practices Act (FCPA) and of the Organisation for Economic Co-operation and Development (OECD) by pointing out the political pressure exercised by the US Government on the basis of knowledge gained by its secret service which has led to the re-tendering of lucrative projects on several occasions as well as the possibility to apply to the US Department of Justice for an exemption from the FCPA in the interest of national security. In addition, the very broad scope of this legislation is compounded by problems of cost to defend such proceedings due to certain procedural mechanisms, requests for information within the framework of these same procedures that may relate to sensitive economic, financial or industrial data, and judicial uncertainty. Some authors have criticised the use of certain pieces of

legislation by the authorities in charge of their enforcement as a way of opening direct negotiations with companies to force them to cooperate. See Garapon, A., 'Une justice "très" économique', in Garapon, A. and Servan-Schreiber, P. (eds), *Deals de justice: le marché américain de l'obéissance mondialisée*, Puf, 2015, pp. 119-120. See also Lohmann, S., *Extraterritoriale US-Sanktionen*, SWP-Aktuell No 31, May 2019. Others considered that these measures were indicative of a new manifestation of the United States' claim to hegemony. See Szurek, S., 'Le recours aux sanctions', in Gherari, H., and Szurek, S. (eds), *Sanctions unilatérales, mondialisation du commerce et ordre juridique international*, Cedin-Parix X Nanterre, Montchrestien 1998, p. 36, as well as *Nord Stream 2 Schwesig empört über amerikanische Drohung gegen Ostseehafen*, Frankfurter Allgemeine Zeitung, 7 August 2020 (source: https://www.faz.net/aktuell/wirtschaft/klima-energie-und-umwelt/nord-stream-2-schwesig-empoert-ueber-drohung-gegen-hafen-16894385.html). Finally, even though this situation is more in relation to anti-corruption legislation, some were alarmed by the fact that certain US sanctions based on legislation with extraterritorial effect had the effect of destabilising several European companies and were then followed by takeovers by US companies. See Laïdi, A., *Le droit, nouvelle arme de guerre économique: Comment les États-Unis déstabilisent les entreprises européennes*, Acte Sud, 2019, p. 156 et seq.

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8 While the EU blocking statute is not the first act taken to counter the extraterritoriality of US law, it has nonetheless served as a model for the People's Republic of China, which has adopted similar rules very recently with the major difference that those rules do not target specific sanction measures from a third country, but provide that those rules generally apply,, 'where the extra-territorial application of foreign legislation and other measures, in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organisations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organisations'. See Wang, J., 'Can China's New "Blocking Statute" Combat Foreign Sanctions?', *Conflict of Laws .net*, 30 January 2021.

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9 See to this effect, Truyens, L., and Loosveld, S., 'The EU Blocking Regulation: navigating a diverging sanctions landscape', *I.C.C.L.R.*, 30(9), 2019, pp. 490-501, at p. 501, and, referring to a 'Catch-22 situation', de Vries, A., 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', *Int'l Bus. Lawyer*, 26(8), 1998, p. 345, at p. 348.

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10 The EU blocking statute laid dormant for a long time as successive US presidents suspended the controversial Title III of the Helms-Burton Act and as the EU and US sanctions regarding the Islamic Republic of Iran tended to converge after 2006. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 81.

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11 The most best-known of these cases is that concerning BNP Paribas, which was fined USD 8.9 thousand million for having transited money through the United States from 2004 to 2012 on behalf of Sudanese (USD 6.4 thousand million), Cuban (USD 1.7 thousand million) and Iranian (USD 650 million) clients. In addition, that bank was barred from US dollar-clearing operations for one year for its oil and gas commodity-finance business, and several executives, including its group chief operating officer, were required to leave BNP Paribas.

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12 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

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13 Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, (OJ 1986 L 378, p. 1).

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14 OJ 2018 L 199 I, p. 7.

15 See Arendt, M., 'The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: Isolationist Obstacle to Policy of Engagement', *Case Western Reserve Journal of International Law*, 30(1), 1998, p. 262.

16 OJ 1994 L 336, p. 11. See Lesguillons, H., 'Helms-Burton and D'Amato Acts: Reactions of the European Union', *I.B.L.J.*, vol. 1, 1997, pp. 95-111, esp. pp. 97-103, and Smis S., Van Der Borght, K., 'The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts', *American Journal of Int'l Law*, 93, 1999, p. 227, esp. pp. 231-235.

17 See Regulation 2018/1100.

18 It might be noted, regarding Article 6 of the EU blocking statute (known as 'the claw-back provision'), that in so far as the United States of America benefits in principle from immunity from jurisdiction under the current state of customary international law, this provision is likely to apply principally to private enforcers. However, the US legislation relating to Iran mentioned in the annex to that statute does not seem to provide for a private enforcement mechanism as in Title III of the Helms-Burton Act.

19 In *Société Internationale v. Rogers*, the US Supreme Court had reversed an original US District Court finding that there had been a breach of a US discovery order on the basis that the threat of prosecution in Switzerland for a breach of that jurisdiction's non-disclosure rules prevented the applicant in that case from complying with the order.

20 See, Wallace Jr., D., 'The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process', *International Lawyer*, vol. 23, ABA, 1989, p. 593, esp. pp. 595-596.

21 In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc*, 307 F. Supp. 1291 (D. Del. 1970), the United States District Court for Delaware recognised that the defendant's refusal to sell oil had been compelled by the Venezuelan Government.

22 It should be noted, however, that in *Societe Nationale Aéronautique v. District Court*, 482 U.S. 522 (1987), Stevens J, delivering the judgment of the US Supreme Court mentioned, but in a footnote, that 'it is well settled that [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute'. See footnote 29. Stevens J pointed out nonetheless that 'American courts should … take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state'.

23 According to the information provided by the German Government, the concept of 'legal transaction' used in Paragraph 134 of the BGB does not only refer to contracts but also unilateral legal acts, such as an act of termination of a contract.

24 The initiation of administrative proceedings for the purpose of a fine is, unlike criminal proceedings, subject to the principle of discretionary prosecution, which means that the prosecution of an offence by an administrative authority is discretionary in view of the circumstances of the individual case.

25 See Federal Register / vol. 72, No 213 / Monday, 5 November 2007 / Notices.

26 C/2018/5344 (OJ 2018 C 2771, p. 4).

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27 According to the Court's case-law, first, outside the procedures laid down in the Treaties, the Commission may only adopt rules of practice about the manner in which this institution intends to exercise a discretionary power conferred on it by the Treaties, from which, moreover, it cannot depart without giving the reasons which led it to do so. See, to this effect, judgments of 9 October 1984, *Adam and Others* v *Commission* (80/81 to 83/81 and 182/82 to 185/82, EU:C:1984:306, paragraph 22), and of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328, paragraph 91). In addition, even when it fulfils that obligation, an institution may never entirely renounce the exercise of such a discretionary power. See, for example, judgment of 10 October 2019, *Société des produits Nestlé* v *EUIPO – European Food (FITNESS)* (T-536/18, not published, EU:T:2019:737, paragraph 38). Secondly, the scope of the provisions laid down in legal acts can never depend on the conduct or statements of the institutions. See judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 53).

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28 Any contrary solution would be tantamount to admitting that a lower norm may modify the scope of a rule of higher rank.

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29 Since, regarding companies, Article 11(2) of the EU blocking statute refers to legal persons 'incorporated within the [Union]', Article 5 of that statute applies to European subsidiaries of US companies, but not to US companies trading in Europe or to US subsidiaries of European companies. Regarding the European Central Bank and the European Investment Bank, since their legal personality derives from the Treaties, respectively in Articles 282 and 308 TFEU, and, therefore, they are not 'incorporated', Article 5 of the EU blocking statute does not apply to them as such. However, both are, in principle, required to apply Article 4 of that statute.

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30 Admittedly, that provision refers to 'any requirement or prohibition … [which is] *based on* or resulting … from the laws specified in the Annex or from actions based thereon or resulting therefrom' (emphasis added), which may give the impression that those requirements or prohibitions are distinct from the obligations contained in those laws. However, I consider that the term 'resulting from' used in the alternative is broad enough to include the obligations set out directly in those laws.

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31 See, to that effect, for example, judgment of 10 September 2014, *Holger Forstmann Transporte* (C-152/13, EU:C:2014:2184, paragraph 26), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47).

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32 This provision implies in particular a duty for Member States not to honour any extradition request from the United States based on one of the pieces of legislation listed in the annex to the EU blocking statute.

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33 Emphasis added.

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34 In this respect, I disagree with the argument put forward by Telekom Deutschland according to which an instruction from a US judicial or administrative authority would be necessary in order for the first paragraph of Article 5 of the EU blocking statute to apply in so far as any law adopted abroad would, as a matter of principle, produce its effect only on the adopting State's territory. Indeed, it is obvious that the problem raised by this legislation concerns first and foremost companies which, like Telekom Deutschland, have interests in the United States. In reality, the difficulty that exists in combatting the extraterritoriality of certain laws is simply related to the interconnectedness of economies.

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35 The fact that a company complies is closely linked to the perception of risk. Some authors define legal risk as arising 'from the conjunction of a legal norm and an event, with either one or the other (or both) being characterised by a degree of uncertainty. This conjunction of a legal norm and an event in a context of uncertainty will have consequences likely to affect the value of the company'. Collard, C. and Roquilly, C., *Proposals for a Definition and Map of Legal Risk*, EDHEC Business School, research paper, 2011, p 7. Consequently, the greater the links between an operator and its market, the greater its propensity to comply with the legislation in question. Conversely, an operator with no ties to the US market and whose managers are prepared to agree never to travel to that country or to a State that has extradition agreements with it can afford to ignore the laws in question. On the question of legal risk management, see Masson, A., Shariff, M., 'Through the Legal Looking Glass : Exploring the Concept of Corporate Legal Strategy', *EBLR*, vol. 22(1), Wolters Kluwer, 2011, p.64 et seq; as well as Masson, A., Bouthinon-Dumas, H., 'L'approche Law & Management', *RTD Com*, N°2, Dalloz, 2011, p.238.

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36 A number of firms commercialise IT solutions for screening and monitoring transactions in order to detect any risk of violation of the legislation in question. Most often, those solutions are modules of anti-money-laundering software.

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37 See in Paine, L.S., 'Law, Ethics, and Managerial judgment', Journal of Legal Studies, 1994, pp. 153-169; Weinstein, S. and Wild, C. (eds), Legal risk management, governance and compliance: a guide to best practice from leading experts, Globe Law and Business, 2013; Verdun F., Le management stratégique des risques juridiques, LexisNexis, 2nd, 2013, p. 133 et seq. According to Hugues Bouthinon-Dumas, the term 'compliance' refers to the way in which companies organise themselves in order to manage their legal constraints and on which their economic performance partly depends. It is based on a proactive approach aimed at ensuring the effective application of standards within an organisation by internalising the standards to which it is subject. In concrete terms, compliance takes the form of a series of coordinated actions ranging from regulatory monitoring to the internal sanctioning of any deviation that is observed, through the mapping of legal risks, monitoring of administrative and legal practices in the sector, raising the awareness of company teams of legal risks and their damaging consequences, employee training, participation in the definition of a risk policy, monitoring of compliance with standards, and the organisation of the detection of transgressions. These practices are nowadays implemented by specialised professionals, belonging to the organisations themselves or acting as external service providers (for example, lawyers or consulting firms). More and more companies are equipping themselves with a compliance officer and their teams are growing. Bouthinon-Dumas, H., 'La compliance: une inflation normative au carré', Management & Avenir, 2019/4, No 110, p. 110 (informal translation). According to Marie-Anne Frison-Roche, 'compliance law' refers to legislation requiring certain 'crucial' private operators to internalise general interest objectives, because of their position and the means at their disposal, in order to satisfy these objectives. Frison Roche, M. A., L'apport du droit de la compliance à la gouvernance d'internet, Rapport commandé par Monsieur le Ministre en charge du Numérique, April 2019, pp. 13-16.

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38 In this respect, it is worth recalling that not all the rules laid down by EU law, including those in the Treaties, are intended to be invoked by individuals against other individuals. For example, the free movement of goods, although guaranteed by the Treaties, hasonly a direct vertical reverse effect, in that it creates obligations for the States alone. See judgments of 29 February 1984, *REWE-Zentrale* (37/83, EU:C:1984:89, paragraph 18); of 17 May 1984, *Denkavit Nederland* (15/83, EU:C:1984:183, paragraph 15); and of 24 November 1982, *Commission* v *Ireland* (249/81, EU:C:1982:402, paragraph 21).

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39 In the context of the EU blocking statute, the adjective 'dissuasive' implies that the penalties provided for be potentially equivalent to the penalties provided for by the legislation listed in the annex. It is indeed only on this condition that the trade-off is likely to lean in favour of that statute and thus, for the prohibition laid down in the first paragraph of Article 5 of that statute to be respected.

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40 In addition, the Commission does not publish its exemption decisions whereas publication is, in principle, a condition which must be fulfilled in order for laws to be relied on as against third parties. One

can, however, understand why, namely that it would allow the foreign authorities concerned to know which company has not applied for an exemption and is therefore supposed not to comply with the legislation in question.

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41 Regarding the second objective − which is to protect European companies against the effects of that legislation − at the time when the EU blocking statute was adopted in 1996, the state of the US case-law seemed to suggest that by prohibiting EU companies from complying with US law, the EU blocking statute would then provide them with a means of defence before the US courts. However, it can also be argued that, in order to achieve such protection, it was sufficient to provide that such a prohibition be publicly enforced only.

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42 See Article 1 of the EU blocking statute.

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43 Indeed, the EU blocking statute offers little help to EU entities with assets in the US against which US authorities can simply take territorial enforcement action. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 85. According to the report commissioned by the European Parliament, 'the cumulative effect of firms to avoid fines from the US side while simultaneously not being seen as complying with the sanction may create massive costs (and headaches) for European firms worried about both their overseas and domestic markets. In this sense, the US sanctions will have achieved a desired effect, as they will make it very difficult for any firm to willingly take on political risk from the two directions'. Stoll, T., Blockmans, S., Hagemejer, J., Hartwell, A., Gött, H., Karunska, K. and Maurer, A., *Extraterritorial Sanctions on Trade and Investments and European responses*, Study requested by the Committee on International Trade (INTA) of the European Parliament, 2020, p. 33. See also to this effect, Truyens, L. and Loosveld, S., 'The EU Blocking Regulation: navigating a diverging sanctions landscape', *I.C.C.L.R.*, 30(9), 2019, pp. 490-501, p. 501, and, referring to a 'Catch-22 situation', de Vries, A., 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', *Int'l Bus. Lawyer*, 26(8), 1998, p. 345, p. 348.

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44 According to Anthonius de Vries, 'the Commission had, in its proposal for a Blocking Statute, already foreseen, that in certain circumstances the prohibition could lead to serious injury to the interests of persons and companies involved or to the interests of the European [Union] itself. It therefore proposed a waiver possibility which the Council, with certain modifications, maintained in the Regulation'. See de Vries, A., 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', *Int'l Bus. Lawyer*, 26(8), 1998, p. 345, p. 349. See, also supporting this position, Lesguillons, H., 'Helms-Burton and D'Amato Acts: reactions of the European Union', *I.B.L.J.*, vol. 1, 1997, pp. 95-111, p. 108, and Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 86.

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45 According to a report by the French Parliament, until 2019, there was only one case in which this regulation would have been successfully invoked, namely in Austria, in April 2007, on the occasion of the closure of Cuban bank accounts by the Austrian bank BAWAG PSK. See, Gauvain, R., d'Urso, C., Damais, A. and Jemai, S., 'Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale, rapport de l'Assemblée nationale (France)', 2019, p. 26. Subsequently, the Rechtbank Den Haag (District Court, The Hague, Netherlands) granted an application for summary proceedings in a case relating to the breach of a contract by a European company with a Cuban company for fear of US sanctions and ordered the continuation of the contract. Although this decision was not expressly based on the EU blocking statute, that court nevertheless noted that it could not rule out the possibility that the said termination also violates the latter. Rb Den Haag, 25 June 2019, ECLI:NL:RBDHA:2019:6301. It also seems that, in 2020, Cuban customers obtained the unblocking of their accounts from the ING bank, having filed a lawsuit against the bank based on the EU blocking statute. See Rechtbank Amsterdam, Claimant v. ING Bank NL: RBAMS:2020:893 (District Court Amsterdam, the Netherlands) 6 February 2020. Nevertheless, the examples of the application of the EU blocking statute remain limited. This has led some authors to say that 'the Blocking Statute has proved to be mostly a paper

tiger – a mere symbol of the EU's disagreement with the wide reach of US sanctions'. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law*, 2020, pp. 98 and 115, and, to this effect, Bonnecarrère, Ph., *Sur l'extraterritorialité des sanctions américaines,* Rapport d'Information, No 17 (2018-2019), Sénat, France, pp. 20-22.

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46 See, by analogy, judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203, paragraph 40).

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47 Some lawyers recommend to their clients 'to seek alternative commercial reasons to discontinue business with Iran or Cuba' in order to circumvent the application of the EU blocking statute. See Doussin, A., Catrain, L. and Dukic, A., *How to Mitigate sanctions risks*, Hogan Lovells, 2020, slides available on the firm's website.

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48 In this regard, I respectfully consider that, contrary to what the Tribunal de Commerce de Paris (Commercial Court, Paris, France) held in a case also concerning the termination of a contract entered into with Bank Melli Iran, the fact that the EU blocking statute already existed at the date on which the contract in question was concluded cannot exclude the application of the first paragraph of Article 5 of that statute on the ground that the *force majeure* clause used to terminate the contract was agreed in consideration of the provisions of that regulation. Indeed, the first paragraph of Article 5 represents a fundamental public policy of the Union and its Member States so that the parties may not derogate from it. See Tribunal de Commerce de Paris (Commercial Court, Paris), 23 January 2020, *SC Bank Melli Iran Banque Nationale c SAS Viveo France*, No 2019023091.

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49 Indeed, the Court distinguishes the *taking of evidence* from the *burden of proof*. See, in relation to appeals, judgments of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 38), and of 28 June 2018, *EUIPO* v *Puma* (C-564/16 P, EU:C:2018:509, paragraph 57). Apart from appeals, see, for example, to this effect, judgment of 21 June 2017, *W and Others* (C-621/15, EU:C:2017:484, paragraph 24).

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50 The procedural autonomy of the Member States is, however, limited by the obligation, for the Member States, not to render impossible in practice or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness), to apply, with regard to the enforcement of EU law, the same rules as those governing similar situations subject to national law (principle of equivalence) and to comply with the general principles of EU law. See, for example, judgment of 27 June 2018, *Turbogás* (C-90/17, EU:C:2018:498, paragraph 43). In addition, if the taking of evidence is clearly a matter of procedural law, some legal traditions connect the distribution of the burden of evidence to substantive law. For example, in French Law, the rules of presumptions and of burden of proof are provided for in the Civil Code and not in the Code of Civil Procedure. In German law, according to the norm theory (*Normenbegünstigungstheorie*), the legislature takes account of the distribution of the burden of proof when formulating a norm. Accordingly, judges infer the distribution of the burden of proof by interpreting the substantive law. See *Prütting Münchener Kommentar zur ZPO*, 3. Aufl. 2008, § 286, No 113-115. To my knowledge, the Court has never clearly ruled on this question since EU law very often specifies what this distribution of the burden of proof actually is.

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51 See, for example, judgments of 28 April 1966, *ILFO* v *High Authority* (51/65, EU:C:1966:21); of 26 January 1989, *Koutchoumoff* v *Commission* (224/87, EU:C:1989:38); or of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 78).

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52 See judgment of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 56).

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53 See Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L 180, p. 22), Article 10 of 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) and Article 19 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006, L 204, p. 23).

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54 Other elements, such as the fact that the company organises in-house training of its staff on the legislation in question, that it has a policy related to these regulations or that it uses or has recourse to monitoring tools appear to constitute evidence that it is difficult for third parties to provide for.

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55 In this respect, some argue that it could be inferred from the objectives pursued by the EU blocking statute that the application of this provision would further require demonstration that the situation at issue involves an extraterritorial application of the laws in question. See, for example, Financial Markets law committee, *U.S. Sanctions and the EU blocking statute Regulation: Issues of legal uncertainty*, 2019, paragraphs 3.5 and 3.12. However, while the wording of Article 5 is peremptory, there is nothing in it to support the existence of such a condition. In addition, if, as I suspect, the EU blocking statute has been conceived as a countermeasure in the sense of international law, it must be considered that it aims at blocking in general the effects of that legislation.

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56 These justifications may be economic or commercial, or may relate to EU sanctions, EU rules on money laundering and terrorist financing, or even US sanctions, but as long as those sanctions are not part of one of the pieces of legislation listed in the annex.

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57 Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 49).

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58 See, for example, judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraph 41); and, to that effect, judgment of 25 March 2021, *Deutsche Telekom v Commission* (C-152/19 P, EU:C:2021:238, paragraph 49).

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59 Admittedly, in matters having a penal flavour, as is, in my opinion, the case of the application of the EU blocking statute, the Court has ruled that EU law precludes the Member States from penalising as such the refusal of a natural person, in an investigation carried out to provide the competent authority with answers that are capable of establishing their liability for an offence. See, to that effect, judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraph 58). However, the Court has nonetheless accepted that a national jurisdiction or administrative authority may rely on a body of corroborating evidence to establish the infringement of certain rules of EU law (see, to that effect, judgment of 26 January 2017, *Maxcom* v *Chin Haur Indonesia* (C-247/15 P, C-253/15 P and C-259/15 P, EU:C:2017:61, paragraph 64)) or, simply, to effect a reversal of the burden of proof, as in the case of the principle of non-discrimination. See, for example, judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397, paragraph 32).

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60 Judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 16).

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61 As regards the proportionality condition, it should be emphasised that this condition is not contrary to the one of dissuasion in so far as it simply presupposes that the penalty *actually* imposed is proportionate to the seriousness of the facts in question, where dissuasion is ensured by the threat of punishment, that is to say, the extent of possible sanctions. In the case of the EU blocking statute, the seriousness of the facts will, for example, depend on the more or less continuous nature of the conduct of the undertaking referred to in Article 11 of that statute, as well as on the nature of the legislation and the cost of the penalties provided for therein, to which that person has complied.

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62 These requirements are simply those required by the case-law of the Court in the event of a breach of EU law. See judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 28); of 21 September 1989, *Commission* v *Greece* (68/88, EU:C:1989:339, paragraph 24); and, to that effect, regarding the common system of VAT, of 5 December 2017, *M.A.S. and M.B*. (C-42/17, EU:C:2017:936, paragraphs 34 to 35).

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63 As regards the dissuasive nature of the penalties, this condition logically implies that the penalties that may be imposed must be at least equivalent to those that may be imposed on the basis of the legislation listed in the annex. Otherwise, the trade-off between compliance with the legislation listed in the annex and the EU blocking statute would systematically be in favour of the former, with the sanctions provided for in the latter then being considered as a simple additional compliance cost. See, for example, Wils, W.P.J., 'Optimal Antitrust Fines: Theory and Practice', *World Competition,* vol. 29(2), 2006, p. 15: 'For deterrence to work, it is required that, from the perspective of the company (or the individual decision-maker deciding for the company) contemplating a possible antitrust violation, the expected fine exceeds the expected gain. What thus counts is the potential offender's subjective estimate of the gain, of the probability of detection and punishment, and of the amount of the fine in case of detection and punishment'. In the case of the EU blocking statute, as the report ordered by the European Parliament notes, 'only if enterprise must expect that the blocking state will be enforced as vigorously as US sanctions legislations, they will be inclined to align their conduct with the Blocking statute and disobey US law'. Stoll, T., Blockmans, S., Hagemejer, J., Hartwell, A., Gött, H., Karunska, K. and Maurer, A., *Extraterritorial Sanctions on trade and investments and European responses, Study requested by the INA committee of the European Parliament*, 2020, p. 65. This does not mean, however, that the maximum sanctions must always be imposed, as the threat of such sanctions, as long as it remains credible, is sufficient to create a deterrent effect. Moreover, in so far as Article 9 of the EU blocking statute refers to the 'regime' of applicable sanctions, it must be inferred that it is the various sanctions provided for, whether criminal, administrative or civil, which, taken as a whole, must be effective, proportionate and dissuasive.

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64 See, for example, in VAT matters, as regards the obligation to provide for punitive sanctions in case of fraud, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 19), and, as regards the obligation to redress the situation, judgment of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932, paragraphs 33 to 34). While the same measure may pursue both objectives, conversely, it is not required that both objectives be achieved by the same measure. Accordingly, to consider that the first paragraph of Article 5 of the EU blocking statute confers rights on persons subject to primary sanctions, the measures which national courts are obliged to adopt from a civil-law point of view should certainly be effective and proportionate, but not necessarily dissuasive, since such a dissuasive effect can be achieved separately by means of administrative sanctions.

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65 Thus, in the case of the EU blocking statute, several European countries have adopted legislation providing for criminal sanctions (Ireland, the Kingdom of the Netherlands and the Kingdom of Sweden), while others have preferred administrative sanctions (the Federal Republic of Germany, the Kingdom of Spain and the Italian Republic). See Bonnecarrère, Ph., *Sur l'extraterritorialité des sanctions américaines*, Rapport d'information du Sénat (France), No 17, 2018, p. 20.

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66 See, inter alia, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 16); of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 19); of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 25); and of 17 September 2002, *Muñoz and Superior Fruiticola* (C-253/00, EU:C:2002:497, paragraph 28).

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67 The situation is different in the case of a directive. Since a directive has to be transposed in order to be invoked either by a State against a person or, horizontally, between two private persons, the Member States have more room for manoeuvre. The latter only ensure that, in accordance with the principle of loyal cooperation enshrined in Article 4(3) TEU, any infringement of a directive is sanctioned under substantive and procedural conditions, which are analogous to those applicable to infringements of national law of a

similar nature and importance. See judgment of 27 March 2014, *LCL Le Crédit Lyonnais* (C-565/12, EU:C:2014:190, paragraph 44).

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68 In my opinion, the principle of procedural autonomy is not directly applicable here, in so far as this principle concerns 'the procedural details of legal proceedings designed to safeguard the rights which individuals derive from [EU] law'. See judgments of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 34); of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 24); and of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 17). However, the measures that national courts must adopt in order to remedy the consequences of the infringement of EU law are not procedural law, but substantive law. Thus, for example, with regard to measures to remedy the consequences of the infringement of the prohibition on the implementation of aid projects, laid down in the last sentence of Article 108(3) TFEU, the national administrative and judicial authorities are obliged to ensure the full effect of those provisions, thus obliging them to recover unlawfully granted aid on their own initiative. Only the practical arrangements for such recovery are subject to procedural autonomy. See, for example, judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 92).

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69 It should be recalled that, according to the Court's case-law, considerations relating to the domestic law of the Member States, including those of a constitutional nature, cannot be invoked to limit the *effet utile* of EU law. See judgments of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 3), or of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 59).

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70 In the present case, the question is rather whether fines of up to EUR 500 000 really serve as a deterrent, given that the US sanctions can be up to twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed and, accordingly, might run into thousands of millions.

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71 Judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 32 to 42).

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72 Judgments of 12 July 2018, *Spika and Others* (C-540/16, EU:C:2018:565, paragraph 34), and of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 25).

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73 See, for example, in this sense, judgment of 13 December 2001, *DaimlerChrysler* (C-324/99, EU:C:2001:682, paragraph 30).

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74 Judgments of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 33), and of 5 November 2014, *Herbaria Kräuterparadies* (C-137/13, EU:C:2014:2335, paragraph 50). Thus, in particular, the Court is not required to examine the validity of an EU act on a ground raised before it by one of those parties. See judgments of 4 September 2014, *Simon, Evers & Co.* (C-21/13, EU:C:2014:2154, paragraphs 27 and 28), and of 28 January 2016, *CM Eurologistik and GLS* (C-283/14 and C-284/14, EU:C:2016:57, paragraph 45 and 46).

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75 Judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraphs 27 to 29 and 36).

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76 See, for example, judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28).

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77 Judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraph 14); of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 45); and

of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 54).

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78 See, in particular, judgment of 17 September 2020, *Compagnie des pêches de Saint-Malo* (C-212/19, EU:C:2020:726, paragraphs 28 and 38).

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79 Judgment *Welmory* of 17 December 2020, *BAKATI PLUS* (C-656/19, EU:C:2020:1045, paragraph 33). Before that, see of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 34); of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* (C-508/14, EU:C:2015:657, paragraphs 28 to 29); and order of 21 April 2016, *Beca Engineering* (C-285/15, not published, EU:C:2016:295, paragraph 24).

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80 In my view, there is no need, however, to examine the validity of the decision, contained in Regulation 2018/1100, to include the US legislation at issue in the annex to the EU blocking statute, since that decision has not even been mentioned by the referring court.

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81 Lenaerts, K., 'Exploring the limits of the EU Charter of fundamental rights', *European Constitutional Law Review*, vol. 8(3), 2012, p. 388.

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82 Judgment of 6 September 2012, *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54).

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83 Judgments of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28 paragraph 46); of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 34); and of 16 July 2020, *Adusbef and Federconsumatori* (C-686/18, EU:C:2020:567, paragraphs 82 and 83).

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84 See judgments of 6 April 1995, *RTE and ITP* v *Commissio*n (C-241/91 P and C-242/91 P, EU:C:1995:98, paragraphs 49 to 57); of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraphs 38 to 47); and of 29 April 2004, *IMS Health* (C-418/01, EU:C:2004:257, paragraph 38); and Opinion of Advocate General Kokott in *Pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:167, point 133).

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85 See, for example, in this sense, judgments of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 52), or of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 50). The case-law also refers at times to another criterion, that when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued. , However, these criteria can be considered as already contained in the two mentioned previously mentioned. See, for example, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 64).

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86 In this regard, it should be emphasised that the adoption of countermeasures is permitted under international law. As to the conditions under which such measures are permitted, see Article 49 et seq. of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd session and approved, on 28 January 2002, by a resolution of the General Assembly of the United Nations, and, also, Leben, Ch., 'Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale', *Annuaire Français de Droit International*, vol. 28, 1982, pp. 9-77, and Sicilianos, L.A., 'La codification des contre-mesures par la Commission du droit international', *Revue belge de droit international*, vol. 38, 2005, pp. 447-500. In any case, some authors consider that, technically, the EU blocking statute comes under the concept of retorsion measures, that is to say, unfriendly measures which are not internationally wrongful as such, since they do not violate the rules of jurisdiction recognised by international law. See Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 82.

87 This absence of explicit criteria for the inclusion of legislation in the annex could raise some concerns. However, as the questions posed in this case do not address these aspects, I am not going to examine this issue further.

88 Admittedly, the first paragraph of Article 5 of the EU blocking statute may seem somehow obsolete since the US Federal District Court for the Eastern District of Pennsylvania in *United States v. Brodie* dismissed the application of the Foreign Sovereign Compulsion Doctrine in relation to the blocking statute. However, the US Supreme Court has never expressly ruled on the opposability of the Foreign Sovereign Compulsion Doctrine in the context of the EU blocking statute. In addition, it is not excluded that that article may, on the basis of this doctrine or similar doctrines, serve as a defence in the context of a legislation other than those at issue in the present case. In any event, this provision remains relevant from the point of view of the objective of countering the effects of this legislation.

89 In this respect, I would stress that the first paragraph of Article 5 of the EU blocking statute merely envisages the possibility of prohibiting the persons referred to in Article 11 of that statute from complying with legislation where that legislation fulfils the conditions laid down in that statute or deriving from the objectives of that statute for being added to the annex. The question whether, in a given case, the decision to include a given piece of legislation in the annex constitutes a proportionate measure is a matter for review of the validity of such a decision and not for review under the first paragraph of Article 5 of the EU blocking statute.

90 Judgments of 25 June 2020, *VTB Bank* v *Council* (C-729/18 P, not published, EU:C:2020:499, paragraphs 80 to 81), and of 24 September 2020, *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 89).

91 See, by analogy, judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 92).

92 According to Tom Ruys and Cedric Ryngaert, by mid-2019, there had been only 15 requests for authorisation. The Commission has not, however, communicated the success ratio of those requests. Ruys, T. and Ryngaert, C., ‘Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions’, *British Yearbook of International Law*, 2020, p. 87.

JUDGMENT OF THE COURT (Grand Chamber)

24 September 2019 (*)

(Reference for a preliminary ruling — Personal data — Protection of individuals with regard to the processing of such data — Directive 95/46/EC — Regulation (EU) 2016/679 — Internet search engines — Processing of data on web pages — Territorial scope of the right to de-referencing)

In Case C-507/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 19 July 2017, received at the Court on 21 August 2017, in the proceedings

Google LLC, successor in law to Google Inc.,

v

Commission nationale de l'informatique et des libertés (CNIL),

in the presence of:

Wikimedia Foundation Inc.,

Fondation pour la liberté de la presse,

Microsoft Corp.,

Reporters Committee for Freedom of the Press and Others,

Article 19 and Others,

Internet Freedom Foundation and Others,

Défenseur des droits,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, E. Regan, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, M. Ilešič (Rapporteur), L. Bay Larsen, M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, judges,

Advocate General: M. Szpunar,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 11 September 2018,

after considering the observations submitted on behalf of:

– Google LLC, by P. Spinosi, Y. Pelosi and W. Maxwell, avocats,

– the Commission nationale de l'informatique et des libertés (CNIL), by I. Falque-Pierrotin, J. Lessi and G. Le Grand, acting as Agents,

– Wikimedia Foundation Inc., by C. Rameix-Seguin, avocate,

– the Fondation pour la liberté de la presse, by T. Haas, avocat,

– Microsoft Corp., by E. Piwnica, avocat,

– the Reporters Committee for Freedom of the Press and Others, by F. Louis, avocat, and by H.-G. Kamann, C. Schwedler and M. Braun, Rechtsanwälte,

– Article 19 and Others, by G. Tapie, avocat, G. Facenna QC, and E. Metcalfe, Barrister,

– Internet Freedom Foundation and Others, by T. Haas, avocat,

– the Défenseur des droits, by J. Toubon, acting as Agent,

– the French Government, by D. Colas, R. Coesme, E. de Moustier and S. Ghiandoni, acting as Agents,

– Ireland, by M. Browne, G. Hodge, J. Quaney and A. Joyce, acting as Agents, and by M. Gray, Barrister-at-Law,

– the Greek Government, by E.-M. Mamouna, G. Papadaki, E. Zisi and S. Papaioannou, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,

– the Austrian Government, by G. Eberhard and G. Kunnert, acting as Agents,

– the Polish Government, by B. Majczyna, M. Pawlicka and J. Sawicka, acting as Agents,

– the European Commission, by A. Buchet, H. Kranenborg and D. Nardi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2 The request has been made in proceedings between Google LLC, successor in law to Google Inc., and the Commission nationale de l'informatique et des libertés (French Data Protection Authority, France) ('the CNIL') concerning a penalty of EUR 100 000 imposed by the CNIL on Google because of that company's refusal, when granting a de-referencing request, to apply it to all its search engine's domain name extensions.

Legal context

European Union law

Directive 95/46

3 According to Article 1(1) thereof, the purpose of Directive 95/46 is to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, and to remove obstacles to the free movement of such data.

4 Recitals 2, 7, 10, 18, 20 and 37 of Directive 95/46 state:

‘(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to … the well-being of individuals;

…

(7) Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level …

…

(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

…

(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; …

…

(20) Whereas the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; whereas in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

…

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary [or] artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing …’

5 Article 2 of that directive provides:

‘For the purposes of this Directive:

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); …

(b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection,

recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; …

…'

6 Article 4 of that directive, entitled 'National law applicable', provides:

'1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

2. In the circumstances referred to in paragraph 1(c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.'

7 Article 9 of Directive 95/46, entitled 'Processing of personal data and freedom of expression', states:

'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.'

8 Article 12 of that directive, entitled 'Right of access', provides:

'Member States shall guarantee every data subject the right to obtain from the controller:

…

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

…'

9 Article 14 of that directive, entitled 'The data subject's right to object', provides:

'Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him,

save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

…'

10 Article 24 of Directive 95/46, entitled 'Sanctions', provides:

'The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.'

11 Article 28 of that directive, entitled 'Supervisory authority', is worded as follows:

'1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

…

3. Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that of … ordering the blocking, erasure or destruction of data, [or] of imposing a temporary or definitive ban on processing …

…

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

…

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

…'

Regulation (EU) 2016/679

12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119, p. 1, and Corrigendum OJ 2018 L 127, p. 2), which is based on Article 16 TFEU, is applicable, pursuant to Article 99(2) thereof, from 25 May 2018. Article 94(1) of that regulation provides that Directive 95/46 is repealed with effect from that date.

13 Recitals 1, 4, 9 to 11, 13, 22 to 25 and 65 of that regulation state:

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2018 (*) (i)

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Article 7 — Right to paid annual leave — Employment relationship terminated by the death of the worker — National legislation preventing the payment of an allowance to the legal heirs of a worker in lieu of paid annual leave not taken by him — Obligation to interpret national law in conformity with EU law — Charter of Fundamental Rights of the European Union — Article 31(2) — Whether it may be relied upon in a dispute between individuals)

In Joined Cases C-569/16 and C-570/16,

REQUESTS for a preliminary ruling under Article 267 TFEU made by the Bundesarbeitsgericht (Federal Labour Court, Germany), by decisions of 18 October 2016, received at the Court on 10 November 2016, in the proceedings

Stadt Wuppertal

v

Maria Elisabeth Bauer (C-569/16) and

and

Volker Willmeroth, in his capacity as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K.

v

Martina Broßonn (C-570/16),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Prechal (Rapporteur), M. Vilaras, T. von Danwitz, F. Biltgen, K. Jürimäe, and C. Lycourgos, Presidents of Chambers, M. Ilešič, J. Malenovský, E. Levits, L. Bay Larsen and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Stadt Wuppertal, by T. Herbert, Rechtsanwalt,

– Mrs Broßonn, by O. Teubler, Rechtsanwalt,

– the European Commission, by M. van Beek and T.S. Bohr, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2018,

gives the following

Judgment

1 The present requests for a preliminary ruling concern the interpretation of Article 7 of 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) and of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in two sets of proceedings between, in Case C-569/16, Stadt Wuppertal (town of Wuppertal, Germany) and Mrs Maria Elisabeth Bauer and, in Case C-570/16, Mr Volker Willmeroth, in his capacity as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K., and Mrs Martina Broßonn, concerning the refusal by Stadt Wuppertal and Mr Willmeroth, respectively, in their capacity as former employers of the late husbands of Mrs Bauer and Mrs Broßonn, to pay Mrs Bauer and Mrs Broßonn an allowance in lieu of the paid annual leave not taken by their spouses before their death.

Legal context

European Union law

3 The fourth recital of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), stated:

'Whereas the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 by the Heads of State or of Government of 11 Member States, and in particular … [point] 8 … thereof, declared that:

"…

8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices.

..."'

4 As is apparent from recital 1, Directive 2003/88, which repealed Directive 93/104, codified the provisions of the latter.

5 According to recitals 4 to 6 of Directive 2003/88:

'(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. …

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.'

6 Article 7 of Directive 2003/88, which is identical to Article 7 of Directive 93/104, is worded as follows:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

7 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. However, no derogation is permitted in respect of Article 7 of the directive.

German law

8 Paragraph 7(4) of the Bundesurlaubsgesetz (Federal Law on leave), of 8 January 1963 (BGBl. 1963, p. 2), in its version of 7 May 2002 (BGBl. 2002 I, p. 1529) ('the BUrlG'), provides:

'If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.'

9 Paragraph 1922(1) of the Bürgerliches Gesetzbuch (Civil Code) ('the BGB') provides, under the heading 'Universal Succession':

'Upon the death of a person (devolution of an inheritance), that person's property (estate) passes as a whole to one or several other persons (heirs).'

The disputes in the main proceedings and the questions referred for a preliminary ruling

10 Mrs Bauer is the sole legal heir of her husband, who died on 20 December 2010, and who was employed by Stadt Wuppertal. The latter rejected Mrs Bauer's request for an allowance in the amount of EUR 5 857.75, corresponding to the 25 days of outstanding paid annual leave which her husband had not taken at the time of his death.

11 Mrs Broßonn is the sole legal heir of her husband, who had been employed by Mr Willmeroth since 2003 and had died on 4 January 2013, having been unable to work since July 2012 due to illness. Mr Willmeroth rejected Mrs Broßonn's request for an allowance in the amount of EUR 3 702.72, corresponding to the 32 days of outstanding paid annual leave which her husband had not taken at the time of his death.

12 Mrs Bauer and Mrs Broßonn both brought an action before the Arbeitsgericht (Labour Court, Germany) having jurisdiction, seeking payment of those allowances. Those actions were upheld, and the appeals brought, respectively, by Stadt Wuppertal and by Mr Willmeroth against the judgments delivered at first instance were dismissed by the Landesarbeitsgericht (Higher Labour Court, Germany) having jurisdiction. Stadt Wuppertal and Mr Willmeroth thereupon appealed to the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany), on a point of law against those decisions.

13 In the orders for reference in each of those two cases, the referring court points out that the Court has already held, in its judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation or practice which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, where the employment relationship is terminated by the death of the worker.

14 The referring court asks, however, whether the same applies where national law precludes an allowance in lieu from forming part of the estate of the deceased.

15 In that regard, that court states that, read together, Paragraph 7(4) of the BUrlG and Paragraph 1922(1) of the BGB lead to the right to paid annual leave lapsing upon the worker's death, as a result of which it cannot be converted into an entitlement to an allowance in lieu or be part of the estate. It states, furthermore, that any other interpretation of those provisions would be *contra legem* and cannot therefore be accepted.

16 First, the referring court recalls that the Court held, in the judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), that the right to paid annual leave could lapse after 15 months from the end of the reference year, since it had not yet satisfied the purpose of the leave, which was to enable the worker to rest and to enjoy a period of relaxation and leisure. Moreover, noting that that objective does not appear capable of being attained where the worker dies, the referring court asks whether the loss of

the right to paid annual leave and to an allowance in lieu of paid annual leave not taken may also be accepted in the latter case. According to that court, to hold otherwise would suggest that the minimum paid annual leave guaranteed by Directive 2003/88 and the Charter is also intended to provide cover for the heirs of the deceased worker.

17 In that context, the referring court is also uncertain whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter may have the effect of requiring the employer to pay an allowance in lieu of paid annual leave not taken to the worker's heirs, notwithstanding the fact that, in the present case, the provisions of national law mentioned in paragraph 15 of the present judgment preclude such a possibility.

18 Finally, in Case C-570/16, the referring court, which observes that the dispute in the main proceedings is between two individuals, asks whether those provisions of EU law are capable of producing direct effect in such a context.

19 It is in those circumstances that the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling, the first of those questions being asked in identical terms in respect of Cases C-569/16 and C-570/16, and the second only in respect of Case C-570/16:

'(1) Does Article 7 of Directive [2003/88] or Article 31(2) of the [Charter] grant the heir of a worker who died while in an employment relationship a right to financial compensation for the worker's minimum annual leave prior to his death, which is precluded by Paragraph 7(4) of the [BUrlG], read in conjunction with Paragraph 1922(1) of the [BGB]?

(2) If the first question is answered in the affirmative: Does this also apply where the employment relationship is between two private persons?'

Consideration of the questions referred

Admissibility

20 Mrs Broßonn casts doubt on the admissibility of the requests for a preliminary ruling on the ground, first, that the Court has already held, in its judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), that Article 7 of Directive 2003/88 precludes national legislation or practices, such as that at issue in the main proceedings, under which, in the event of the death of the worker, the right to paid annual leave lapses without giving rise to an entitlement to an allowance in lieu of paid annual leave not taken. To hold that that provision does not preclude the national legislation at issue, in so far as it prevents the allowance from being passed on to the heirs, would render ineffective the guidance resulting from the judgment of the Court. Moreover, many national courts and academic legal writings take the view that it is possible to interpret the national legislation at issue in a manner consistent with that guidance.

21 In that regard, however, it should first be recalled that, even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so; the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32 and the case-law cited).

22 It follows that the fact that the Court, in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), has already interpreted Article 7 of Directive 2003/88 in the light of the same national legislation as that at issue in the main proceedings, cannot lead to the inadmissibility of the questions referred in the present cases.

23 Secondly, it is settled case-law that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to

determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 42 and the case-law cited).

24 The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 43 and the case-law cited).

25 In that regard, and in respect of Mrs Broßonn's submission that the national legislation at issue in the main proceedings could be interpreted in such a way as to ensure its compliance with Article 7 of Directive 2003/88, as interpreted by the Court in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), it is admittedly true that the question whether a national provision must be disapplied inasmuch as it conflicts with EU law arises only if no compatible interpretation of that provision proves possible (see, to that effect, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 23).

26 However, it should also be recalled that the principle that national law must be interpreted in conformity with EU law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25 and the case-law cited).

27 In the case in the main proceedings, and as is apparent from paragraph 15 of the present judgment, the referring court states that it is faced with precisely such a limitation. In its view, Paragraph 7(4) of the BUrlG, read in conjunction with Paragraph 1922(1) of the BGB is not open to an interpretation which is compatible with Article 7 of Directive 2003/88, as interpreted by the Court in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755).

28 In those circumstances, the requests for a preliminary ruling cannot be held inadmissible in that the questions referred concern the issue of whether the provisions of EU law to which they relate can, where it is not possible to interpret national law in a manner consistent with EU law, result in the national court being obliged, where necessary, to disapply that national legislation, in particular in the context of a dispute between two individuals.

29 In the light of the foregoing, the requests for a preliminary ruling must be regarded as admissible.

Substance

Preliminary observations

30 It should be noted that, as is apparent from the grounds of the orders for reference set out in paragraphs 13 to 17 of the present judgment and in the light of which the question in Case C-569/16 and the first question in Case C-570/16 must be read, those questions include two separate parts.

31 First, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding legislation such as that at issue in the main proceedings, and whether the Court's interpretation in its judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755) should be reconsidered or qualified in that regard.

32 Secondly, and assuming that the Court upholds that interpretation, the referring court asks whether those provisions of EU law must be interpreted as meaning that they have direct effect, as a result of which the national court is required to set aside that national legislation in so far as it cannot be interpreted in a manner consistent with the requirements deriving from those provisions.

33 Finally, by its second question in Case C-570/16, the referring court wishes to know whether any such exclusionary effect in respect of the national legislation at issue is also applicable in a dispute between two private parties.

34 In those circumstances, it is appropriate to examine, first, the first part of the question referred in Case C-569/16 and the first part of the first question in Case C-570/16 and, secondly, and in the light of the connection between them, the second part of those questions and the second question referred in Case C-570/16.

The first part of the question in Case C-569/16 and the first part of the first question in Case C-570/16

35 By the first part of its question in Case C-569/16 which is identical to the first part of its first question in Case C-570/16, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions, and not taken by the worker before his death, lapses without being able to give rise to an entitlement to an allowance in lieu of that leave which may be passed on to the worker's legal heirs by inheritance.

36 As regards, first, Article 7 of Directive 2003/88, it should be recalled that, as the referring court observes, in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), in a case involving a similar factual context to that of the present joined cases and relating to the same national legislation as that at issue in the main proceedings, the Court held, in paragraph 30 of that judgment, that that provision of EU law must be interpreted as meaning that it precludes national legislation or practices which provide that the right to paid annual leave lapses without conferring any right to an allowance in lieu of leave not taken where the employment relationship is terminated by the death of the worker.

37 As is apparent from the orders for reference and from paragraphs 14 to 16 of the present judgment, the referring court, however, has doubts concerning the interpretation adopted by the Court, on the ground, essentially, that the purpose of the right to paid annual leave, which is to enable the worker to rest and to enjoy a period of relaxation and leisure, no longer appears to that court to be capable of being met once the person concerned has died.

38 In that regard, it should be recalled at the outset that, according to the settled case-law of the Court, every worker's right to paid annual leave must be regarded as a particularly important principle of EU social law from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 15 and the case-law cited). Similarly, and in order to ensure respect for that fundamental right affirmed in EU law, Article 7 of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 22 and the case-law cited).

39 It is settled case-law that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law, that right also including the entitlement to payment. The expression 'paid annual leave', used, inter alia, by the EU legislature in Article 7 of Directive 2003/88, means that, for the duration of the annual leave within the meaning of that directive, the worker's remuneration must be maintained. In other words, workers must continue to receive their normal remuneration throughout that period of rest and relaxation (judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 20 and 21 and the case-law cited).

40 The holiday pay required by Article 7(1) of Directive 2003/88 is intended to enable the worker actually to take the leave to which he is entitled (judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 49).

41 According to the settled case-law of the Court, the right to annual leave laid down in Article 7 of Directive 2003/88 is intended to enable the worker to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 34 and the case-law cited).

42 Thus, by providing that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except in the event of termination of the employment relationship, Article 7(2) of Directive 2003/88 aims in particular to ensure that workers are entitled to actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 60 and the case-law cited).

43 Upon termination of the employment relationship, the actual taking of paid annual leave to which a worker was entitled is no longer possible. It is in order to prevent this impossibility from leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, that Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu for the days of annual leave not taken (see, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 56; of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 17; and of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 27).

44 That provision lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he was entitled on the date that that relationship ended (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 23).

45 Thus, the reason for which the employment relationship is terminated is not relevant as regards the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88 (see, to that effect, judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 28).

46 As noted by the referring court, while the worker's death admittedly has the inevitable consequence of depriving him of any effective possibility of enjoying the period of rest and relaxation attaching to the right to paid annual leave to which he was entitled at the time of his death, it cannot be accepted that his death retroactively entails the total loss of the right thus acquired which, as recalled in paragraph 39 of the present judgment, includes a second aspect of equal importance, namely the entitlement to a payment (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 25).

47 In that regard, it should also be noted that the Court has already held that Article 7(2) of Directive 2003/88 must be interpreted as meaning that a worker is entitled, upon retirement, to an allowance in lieu of paid annual leave not taken due, for example, to the fact that he has not performed his duties because of illness (see judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraphs 31 and 32 and the case-law cited). Nor is such a worker able to enjoy leave as a period intended to allow him to rest and relax with a view to the future pursuit of his occupational activity, since he has, in principle, entered a period of occupational inactivity and is thus, in essence, able to benefit only from the financial aspect of paid annual leave.

48 Moreover, from a financial perspective, the right to paid annual leave acquired by a worker is purely pecuniary in nature and, as such, is therefore intended to become part of the relevant person's assets, as a result of which the latter's death cannot retrospectively deprive his estate and, accordingly, those to whom it is to be transferred by way of inheritance, from the effective enjoyment of the financial aspect of the right to paid annual leave.

49 The loss of a worker's acquired right to paid annual leave or his corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right (see, to that effect, judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 32).

50 Thus, receipt of financial compensation if the employment relationship is terminated by reason of the worker's death is essential to ensure the effectiveness of the entitlement to paid annual leave granted to the worker (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 24).

51 Secondly, it must be recalled that the right to paid annual leave, as a principle of EU social law, is not only particularly important, but is also expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 20 and the case-law cited).

52 The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 42 and the case-law cited).

53 Since the national legislation at issue in the main proceedings is an implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply to the cases in the main proceedings (see, by analogy, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 43).

54 In that regard, it follows, first, from the wording of Article 31(2) of the Charter that that provision enshrines the 'right' of all workers to an 'annual period of paid leave'.

55 Next, according to the explanations relating to Article 31 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for the interpretation of the Charter, Article 31(2) of the Charter is based on Directive 93/104 and on Article 2 of the European Social Charter, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996, and on point 8 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council in Strasbourg on 9 December 1989 (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 27).

56 As is apparent from the first recital of Directive 2003/88, that directive codified Directive 93/104. Article 7 of Directive 2003/88 concerning the right to paid annual leave reproduces the terms of Article 7 of Directive 93/104 exactly (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 28).

57 In that context, it is important, finally, to recall that the Court has already held that the expression 'paid annual leave' in Article 7(1) of Directive 2003/88, which should be given the same meaning as that of 'annual period of paid leave' in Article 31(2) of the Charter, means that, for the duration of annual leave within the meaning of those provisions, remuneration must be maintained and, in other words, workers must receive their normal remuneration for that period of rest (see, to that effect, judgment of 15 September 2011, *Williams and Others*, C-155/10, EU:C:2011:588, paragraphs 18 and 19).

58 As was recalled in paragraph 39 of the present judgment, the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law reflected in Article 7 of Directive 93/104 and Article 7 of Directive 2003/88, now expressly enshrined as a fundamental right in Article 31(2) of the Charter. As well as an entitlement to a payment, that fundamental right also includes, as a right which is consubstantial with the right to 'paid' annual leave, the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship.

59 In that regard, limitations may be imposed on that right only under the strict conditions laid down in Article 52(1) of the Charter and, in particular, of the essential content of that right. Thus, Member States may not derogate from the rule laid down in Article 7 of Directive 2003/88, read in the light of Article 31(2) of the Charter, that the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 56).

60 As was recalled in paragraph 46 of the present judgment, Member States are similarly precluded from deciding that termination of the employment relationship caused by death leads retroactively to the complete loss of the right to paid annual leave acquired by the worker, since such a right, aside from the right to leave as such, includes a second aspect of equal importance, namely the entitlement to a

payment, justifying the payment to the person concerned or his legal heirs of an allowance in lieu of annual leave not taken upon termination of the employment relationship.

61 Therefore, in relation to situations falling within the scope of Article 31(2) of the Charter, that provision has the effect, in particular, that it is not open to Member States to adopt legislation pursuant to which the death of a worker retroactively deprives him of the right to paid annual leave acquired before his death, and, accordingly, his legal heirs of the allowance in lieu thereof by way of the financial settlement of those rights.

62 In the light of the foregoing, and in view of what has been stated in paragraphs 38 to 50 of the present judgment, it must be held that, where an employment relationship is terminated by the death of the worker, it follows not only from Article 7(2) of Directive 2003/88 but also from Article 31(2) of the Charter that, in order to prevent the fundamental right to paid annual leave acquired by that worker from being retroactively lost, including the financial aspect of those rights, the right of the person concerned to an allowance in lieu of leave which has not been taken may be passed on by inheritance to his legal heirs.

63 It follows that the answer to the first part of the question in Case C-569/16 and to the first part of the first question in Case C-570/16 is that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, upon termination of the employment relationship because of the worker's death, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance.

The second part of the question in Case C-569/16 and the second part of the first question and the second question in Case C-570/16

64 By the second part of its question in Case C-569/16 and by the second part of its first question in Case C-570/16, the referring court asks, in essence, whether, in the event that it is impossible to interpret a national rule such as that at issue in the main proceedings in such a way as to ensure compliance with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the provisions of EU law must be interpreted as meaning that they entail that such national legislation must be disapplied by the national court and that the legal heir of the deceased worker must be granted, by the former employer, an allowance in lieu of paid annual leave acquired under those provisions and not taken by that worker. By its second question in Case C-570/16, the referring court asks whether such an interpretation of those provisions of EU law must, in the present case, also prevail in the context of a dispute between the legal heir of a deceased worker and his former employer where the employer is a private individual.

65 As a preliminary point, it should be recalled that the question whether a national provision must be disapplied in as much as it conflicts with EU law arises only if no interpretation of that provision which is compatible with EU law proves possible.

66 In that regard, it should be noted that, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive, and consequently comply with the third paragraph of Article 288 TFEU (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

67 It should further be noted that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited).

68 As has been held by the Court, the requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive.

Consequently, a national court cannot, in particular, validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 72 and 73 and the case-law cited).

69 It is, in the present case, for the referring court to fulfil its obligation under EU law to check, in the light of the principles set out in the three preceding paragraphs of the present judgment, if an interpretation which is consistent with EU law is possible.

70 That being so, and as regards, first, the possible direct effect that it may be appropriate to acknowledge Article 7 of Directive 2003/88 as producing, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited). In addition, where a person involved in legal proceedings is able to rely on a directive against a State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case, it is necessary to prevent the State from taking advantage of its own failure to comply with EU law (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited).

71 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, in particular against a Member State and all the organs of its administration, including decentralised authorities (see, to that effect, judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 45 and the case-law cited).

72 The Court has already held that Article 7(1) of Directive 2003/88 satisfies those criteria of unconditionality and sufficient precision, as it imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four weeks' paid annual leave. That article thus fulfils the conditions required to produce direct effect (see, to that effect, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraphs 34 to 36).

73 As regards Article 7(2) of that directive, as recalled in paragraph 44 of the present judgment, that provision does not lay down any condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he was entitled on the date that that relationship ended. That right is conferred directly by the directive and does not depend on conditions other than those which are explicitly provided for (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 28). Article 7(2) thus fulfils all the conditions necessary for it to have direct effect.

74 In the present case, as regards Case C-569/16, it is not disputed, first, that Mr Bauer had not, at the time of his death which caused the employment relationship with Stadt Wuppertal to be terminated, taken all paid annual leave to which he was entitled on that date, and, second, that the status of the employer is that of a decentralised public authority.

75 Since Article 7 of Directive 2003/88 fulfils, as is apparent from paragraphs 72 and 73 of the present judgment, the conditions required to produce direct effect, it follows that Mr Bauer, or in the light of his death, his legal heir, has, as is clear from the case-law of the Court referred to in paragraphs 70 and 71 of this judgment, the right to obtain, from Stadt Wuppertal, an allowance in lieu of paid annual leave acquired under that provision and not taken by the individual, national courts being, in that regard, required to disapply national legislation which, like that at issue in the main proceedings, precludes the award of such an allowance.

76 However, as regards the dispute in the main proceedings in Case C-570/16 between Ms Broßonn, as the legal heir of her late husband, and his former employer, Mr Willmeroth, it should be recalled that,

according to the Court's settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 42 and the case-law cited).

77 Thus, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 43 and the case-law cited).

78 As the Court has already held, Article 7 of Directive 2003/88 cannot therefore be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law (judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 48).

79 In the light of the foregoing, it is necessary, secondly, to examine the scope of Article 31(2) of the Charter, in order to determine whether that provision, for which it has been established, in paragraphs 52 to 63 of the present judgment, that it is intended to apply to situations such as those in the main proceedings and must be interpreted as meaning that it precludes legislation such as that at issue in the main proceedings, may be invoked in a dispute between individuals, such as that arising in Case C-570/16, in order to require that the national court sets aside that national legislation and grants the deceased worker's legal heirs an allowance, payable by the former employer, in lieu of paid annual leave not taken to which that worker was entitled under EU law at the time of his death.

80 In that regard, it should be recalled that the right to paid annual leave constitutes an essential principle of EU social law.

81 That principle is itself mainly derived both from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter, to which all Member States are parties in so far as they ratified it in its original version, its revised version or both versions, also referred to in Article 151 TFEU. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which, as the Court noted in paragraphs 37 and 38 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), sets out certain principles of that organisation which recital 6 of Directive 2003/88 states must be taken into account.

82 In that regard, the fourth recital of Directive 93/104 states, in particular, that paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers provides that every worker in the Union has a right, inter alia, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices (see, to that effect, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 39).

83 Article 7 of Directive 93/104 and Article 7 of Directive 2003/88 did not, therefore, themselves establish the right to paid annual leave, which is based in particular on various international instruments (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75) and is, as an essential principle of EU social law, mandatory in nature (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraphs 48 and 68), that essential principle including, as noted in paragraph 58 of the present judgment, the right to 'paid' annual leave as such and the right, inherent in the former, to an allowance in lieu of annual leave not taken upon termination of the employment relationship.

84 By providing in mandatory terms that 'every worker' has 'the right' 'to an annual period of paid leave' without referring in particular in that regard — like, for example, Article 27 of the Charter which led to the judgment of 15 January 2014, *Association de médiation sociale* (C-176/12,

EU:C:2014:2) — to 'the cases and … conditions provided for by Union law and national laws and practices', Article 31(2) of the Charter reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.

85 The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

86 Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, first, that the national court must disapply national legislation such as that at issue in the main proceedings pursuant to which the death of a worker retroactively deprives him of his entitlement to paid annual leave acquired before his death, and, accordingly, his legal heirs of the entitlement to the allowance in lieu thereof by way of the financial settlement of those rights, and, second, that employers cannot rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.

87 With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.

88 First of all, as noted by the Advocate General in point 78 of his Opinion, the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).

89 Next, the Court has, in particular, already held that the prohibition laid down in Article 21(1) of the Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76), without, therefore, Article 51(1) of the Charter preventing it.

90 Finally, as regards, more specifically, Article 31(2) of the Charter, it must be noted that the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.

91 In the event that the referring court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31(2) of the Charter, it will therefore be required, in a situation such as that in the particular legal context of Case C-570/16, to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79).

92 In the light of all the foregoing considerations, the answer to the second part of the question in Case C-569/16 and the second part of the first question and the second question in Case C-570/16 is that, where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. That obligation on the national court is

dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 7 of 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 and of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance.**

2. **Where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. That obligation on the national court is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual.**

[Signatures]

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* Language of the case: German.

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i The wording of paragraph 84 of this document has been modified after it was first put online.

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2018 (*) (i)

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Article 7 — Right to paid annual leave — National legislation providing for the loss of annual leave not taken and of the allowance in lieu thereof where an application for leave has not been made by the worker prior to the termination of the employment relationship — Directive 2003/88/EC — Article 7 — Obligation to interpret national law in conformity with EU law — Charter of Fundamental Rights of the European Union — Article 31(2) — Whether it may be relied upon in a dispute between individuals)

In Case C-684/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 13 December 2016, received at the Court on 27 December 2016, in the proceedings

Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.

v

Tetsuji Shimizu,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Prechal (Rapporteur), M. Vilaras, T. von Danwitz, F. Biltgen, K. Jürimäe, and C. Lycourgos, Presidents of Chambers, M. Ilešič, J. Malenovský, E. Levits, L. Bay Larsen and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2018,

after considering the observations submitted on behalf of:

– Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., by J. Röckl, Rechtsanwalt,

– Mr Shimizu, by N. Zimmermann, Rechtsanwalt,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the French Government, by D. Colas and R. Coesme, acting as Agents,

– the Hungarian Government, by E. Sebestyén and M.Z. Fehér, acting as Agents,

– the European Commission, by M. van Beek and T.S. Bohr, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2018,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Article 7 of 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) and of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. ('Max-Planck') and Mr Tetsuji Shimizu, one of its former employees, concerning the refusal of Max-Planck to pay him an allowance in lieu of paid annual leave not taken before the termination of the employment relationship between them.

Legal context

European Union law

3 The fourth recital of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) stated:

'Whereas the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 by the Heads of State or of Government of 11 Member States, and in particular ... [point] 8 ... thereof, declared that:

"...

8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices.

..."'

4 As is apparent from recital 1, Directive 2003/88, which repealed Directive 93/104, codified the provisions of the latter.

5 According to recitals 4 to 6 of Directive 2003/88:

'(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. ...

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.'

6 Article 7 of Directive 2003/88, which is identical to Article 7 of Directive 93/104, is worded as follows:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

7 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. However, no derogation is permitted in respect of Article 7 of the directive.

German law

8 Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave), of 8 January 1963 (BGBl. 1963, p. 2), in its version of 7 May 2002 (BGBl. 2002 I, p. 1529) ('the BUrlG'), provides:

'(1) In determining the dates on which leave may be taken, consideration shall be given to a worker's wishes, save where consideration thereof is precluded by imperative operational interests or the wishes of other workers who deserve to be given priority for social reasons. Leave shall be granted when requested in connection with preventive or post-care medical treatment.

...

(3) Leave must be granted and taken in the course of the current calendar year. The carrying-over of leave to the next calendar year shall be permitted only if justified on compelling operational grounds or for reasons personal to the employee. ...

(4) If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.'

9 The Tarifvertrag für den öffentlichen Dienst (Collective agreement for public service employees) includes Paragraph 26, entitled 'Annual leave', which provides, in subparagraph 1 thereof:

'... Annual leave must be granted in the course of the current calendar year; ...

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Mr Shimizu was employed by Max-Planck under several fixed-term contracts between 1 August 2001 and 31 December 2013. The employment relationship between the parties was governed by the provisions of the BUrlG and of the Collective agreement for public service employees.

11 By letter dated 23 October 2013, Max-Planck invited Mr Shimizu to take his leave before the employment relationship was terminated, but did not force him to take it on dates it had set. Mr Shimizu took two days' leave, on 15 November and 2 December 2013.

12 After having, by letter of 23 December 2013, unsuccessfully sought payment from Max-Planck of an allowance in the amount of EUR 11 979 corresponding to 51 days' paid annual leave for 2012 and 2013 which had not been taken, Mr Shimizu brought an action seeking that Max-Planck be ordered to pay that allowance.

13 That action having been upheld both at first instance and on appeal, Max-Planck appealed to the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany), on a point of law.

14 That court states that the entitlements to paid annual leave at issue in the main proceedings lapsed under Paragraph 7(3) of the BUrlG, since they were not taken during the year for which the leave had been granted. Under Paragraph 7(3) of the BUrlG, a worker's leave which has not been taken in the year in respect of which it was granted expires, in principle, at the end of that year, unless the conditions for its carry-over laid down in that provision are met. Thus, where the worker was able to take his leave in the leave year in respect of which it was granted, his right to paid annual leave lapses at the end of that year. As a result of the loss of that right, it may no longer be converted into an entitlement to an allowance under Article 7(4) of the BUrlG. It would be otherwise only if, despite the worker's timely submission of a request for leave to his employer, the latter had refused him the leave. In contrast, Article 7 of the BUrlG cannot be interpreted as meaning that the employer is required to oblige the worker to take paid annual leave.

15 The referring court takes the view that the Court's case-law does not make it possible to determine whether national legislation which has the effects described in the preceding paragraph is consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the legal literature, moreover, being divided in that regard. In particular, the question arises whether the employer is obliged, under

Article 7(1) of Directive 2003/88, to determine unilaterally the dates of leave or if the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755) must be understood as meaning that the right to paid annual leave does not lapse at the end of the reference year or carry-over period, even if the worker was in a position to exercise it.

16 Furthermore, the referring court states that Max-Planck is a non-profit-making organisation governed by private law which is, admittedly, largely financed from public funds but which, however, has no special powers as compared to the rules applicable between individuals, so that it should be regarded as an individual. In those circumstances, it is for the Court to clarify whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter has direct effect in relations between individuals.

17 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 7(1) of Directive [2003/88] or Article 31(2) of the [Charter] preclude national legislation, such as Paragraph 7 of the [BUrlG], under which, as one of the methods of exercising the right to annual leave, an employee must apply for such leave with an indication of his preferred dates so that the leave entitlement does not lapse at the end of the relevant period without compensation and under which an employer is not required, unilaterally and with binding effect for the employee, to specify when that leave be taken by the employee within the relevant period?

(2) If the first question referred is answered in the affirmative:

Does this apply even where the employment relationship is between two private persons?’

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, in the event that the worker did not ask to be able to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period, the days of paid annual leave acquired under those provisions in that period, and, accordingly, his entitlement to payment of an allowance in lieu of annual leave not taken where the employment relationship is terminated.

19 It should be recalled as a preliminary point that, according to the settled case-law of the Court, every worker’s right to paid annual leave must be regarded as a particularly important principle of EU social law from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 15 and the case-law cited).

20 Moreover, the right to paid annual leave, as a principle of EU social law, is not only particularly important, but is also expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 20 and the case-law cited).

21 As regards, first, Article 7 of Directive 2003/88, it should be noted at the outset that the case in the main proceedings relates to a refusal to pay an allowance in lieu of paid annual leave not taken on the date of the termination of the employment relationship between the parties in the main proceedings.

22 In that regard, it should be recalled that upon termination of the employment relationship, the actual taking of paid annual leave to which a worker is entitled is no longer possible. In order to prevent this impossibility from leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance

in lieu for the days of annual leave not taken (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 17 and the case-law cited).

23 The Court has held that Article 7(2) of Directive 2003/88 lays down no condition for entitlement to an allowance in lieu other than that relating to the circumstance, first, that the employment relationship has ended and, second, that the worker has not taken all the annual leave to which he was entitled on the date that that relationship ended (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 27 and the case-law cited).

24 In that regard, it is apparent from the case-law of the Court that that provision precludes national legislation or practices which provide that, upon termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has not been able to take all the annual leave to which he was entitled before the end of that employment relationship, in particular because he was on sick leave for all or part of the leave year and/or of a carry-over period (judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 62; of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 31; and of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 65).

25 The Court has also held that Article 7 of Directive 2003/88 cannot be interpreted as meaning that the right to paid annual leave and therefore, to the allowance in lieu provided for in paragraph 2 of this Article, may lapse because of the worker's death. In that regard, the Court has in particular pointed out that, if the obligation to pay such an allowance were to lapse because of the termination of the employment relationship resulting from the worker's death, the consequence of that circumstance would be an unintended occurrence retroactively leading to the total loss of the entitlement to paid annual leave itself (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 25, 26 and 30).

26 The loss of a worker's acquired right to paid annual leave or of his corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right (see, to that effect, judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 32).

27 As regards the case in the main proceedings, it should be noted that, according to the explanations provided by the referring court, the refusal of Mr Shimizu's former employer to pay him an allowance in lieu of paid annual leave not taken before the employment relationship was terminated is based on a rule of national law, under which the right to such leave lapses, in principle, not as a consequence of the termination of the employment relationship as such, but as a consequence of the fact that the worker did not, during the employment relationship, apply to take that leave during the reference period to which it relates.

28 The referring court is therefore essentially asking in the present case whether, in the light of the case-law of the Court cited in paragraph 23 of the present judgment, on the date on which the employment relationship at issue in the main proceedings was terminated, Mr Shimizu was still entitled to paid annual leave capable of being converted into an allowance in lieu on account of the termination of that relationship.

29 That question thus relates, first and foremost, to the interpretation of Article 7(1) of Directive 2003/88 and seeks to ascertain whether that provision precludes (i) the maintenance of the entitlement to paid annual leave not taken at the end of a reference period from being made subject to the condition that the worker requested to exercise that right during that period, and (ii) that it be declared lost if no such request was made, without the employer being obliged to decide unilaterally and with binding effect for the worker the leave dates during that period.

30 In that regard, first, it cannot be inferred from the Court's case-law mentioned in paragraphs 22 to 25 of the present judgment that Article 7 of Directive 2003/88 should be interpreted as meaning that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the

termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2).

31 Secondly, while it is, admittedly, settled case-law that, in order to ensure compliance with the fundamental workers' right to paid annual leave affirmed in EU law, Article 7 of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 22 and the case-law cited), it must also be noted, however, that the holiday pay required by Article 7(1) is intended to enable the worker actually to take the leave to which he is entitled (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 49).

32 According to the settled case-law of the Court, the right to annual leave laid down in Article 7 of Directive 2003/88 is intended to enable the worker to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 34 and the case-law cited).

33 Thus, by providing that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated, Article 7(2) of Directive 2003/88 also aims to ensure that workers are entitled to actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 60 and the case-law cited).

34 Thirdly, as is apparent from the very wording of Article 7 of Directive 2003/88 and the case-law of the Court, it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise the right (judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 28 and the case-law cited).

35 In that regard, the Court has in particular held that Article 7(1) of Directive 2003/88 does not in principle preclude national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive (judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 43).

36 National legislation such as Paragraph 7(1) and (3) of the BUrlG, which provides that it is necessary, when determining the dates of leave, to take account of the worker's wishes in that respect, unless there are overriding reasons relating to the interests of the undertaking or the wishes of other workers who, because of social considerations, deserve priority, or that the leave should as a rule be taken during the reference year, are covered by the rules governing paid annual leave, within the meaning of Article 7(1) of Directive 2003/88 and the Court's case-law referred to in the previous paragraph.

37 Such legislation forms part of the rules and procedures of national law applicable to the scheduling of workers' leave, which seek to take into account the various interests involved (see, to that effect, judgment of 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:542, paragraph 22).

38 However, and as is apparent from paragraph 35 of the present judgment, it is important to ensure that the application of those provisions of national law cannot lead to the loss of the rights to paid annual leave acquired by the worker, even though he has not actually had the opportunity to exercise those rights.

39 In the present case, it should be noted that it is apparent from the order for reference that the national provisions mentioned in paragraph 36 of the present judgment are interpreted as meaning that the fact that a worker has not requested any paid annual leave during the relevant reference period in principle results in the worker losing his entitlement to leave at the end of that period and, accordingly, his entitlement to an allowance in lieu of the leave which is not taken upon termination of the employment relationship.

40 As noted by the Advocate General in point 32 of his Opinion, such an automatic loss of the entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise that right, fails to have regard to the limits, recalled in paragraph 35 of the present judgment, which are binding on Member States when specifying the conditions for the exercise of that right.

41 The worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose upon him a restriction of his rights. On account of that position of weakness, such a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker (see, to that effect, judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraphs 80 and 81 and the case-law cited).

42 In addition, incentives not to take annual leave or encouraging employees not to do so are incompatible with the objectives of the right to paid annual leave, as recalled in paragraphs 32 and 33 of the present judgment, relating in particular to the need to ensure that workers enjoy a period of actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging*, C-124/05, EU:C:2006:244, paragraph 32). Thus, any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 39 and the case-law cited).

43 In those circumstances, it is important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker, while the employer may, as a result thereof, take free of the need to fulfil its own obligations by arguing that no application for paid annual leave was submitted by the worker.

44 While it should be made clear in the response, in that regard, to the first question, that compliance with the requirement, for employers, under Article 7 of Directive 2003/88 should not extend to requiring employers to force their workers to actually exercise their right to paid annual leave (see, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 43), the fact remains that employers must, however, ensure that workers are in a position to exercise such a right (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 63).

45 To that end, as the Advocate General also observed in points 41 to 43 of his Opinion, the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period.

46 In addition, the burden of proof in that respect is on the employer (see, by analogy, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 68). Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Directive 2003/88.

47 However, if the employer is able to discharge the burden of proof in that regard, as a result of which it appears that it was deliberately and in full knowledge of the ensuing consequences that the worker refrained from taking the paid annual leave to which he was entitled after having been given the

opportunity to exercise his right thereto, Article 7(1) and (2) of Directive 2003/88 does not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of the paid annual leave not taken.

48 As noted by the Advocate General in points 50 and 51 of his Opinion, any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable authorised reference or carry-over periods in order to increase his remuneration upon the termination of the employment relationship is, as is apparent from paragraph 42 of the present judgment, incompatible with the objectives pursued by the introduction of the right to paid annual leave.

49 As regards, secondly, Article 31(2) of the Charter, it should be recalled that it is settled case-law of the Court that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (see, inter alia, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 42 and the case-law cited).

50 Since the legislation at issue in the main proceedings is an implementation of Directive 2003/88, Article 31(2) of the Charter is intended to apply to the case in the main proceedings (see, by analogy, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 43).

51 In that regard, it follows, first, from the wording of Article 31(2) of the Charter that that provision enshrines the 'right' of all workers to an 'annual period of paid leave'.

52 Next, according to the explanations relating to Article 31 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for the interpretation of the Charter, Article 31(2) of the Charter is based on Directive 93/104 and Article 2 of the European Social Charter, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996, and on point 8 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council in Strasbourg on 9 December 1989 (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 27).

53 As is apparent from the first recital of Directive 2003/88, the directive codified Directive 93/104. Article 7 of Directive 2003/88 concerning the right to paid annual leave reproduces the terms of Article 7 of Directive 93/104 exactly (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 28).

54 In that context, it should, finally, be recalled that limitations may be imposed on the fundamental right to annual paid leave affirmed in Article 31(2) of the Charter only in compliance with the strict conditions laid down in Article 52(1) thereof and, in particular, the essential content of that right. Thus, Member States may not derogate from the principle flowing from Article 7 of Directive 2003/88 read in the light of Article 31(2) of the Charter, that the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 56).

55 It follows from those considerations that both Article 7 of Directive 2003/88 and, as regards situations falling within the scope of the Charter, Article 31(2) thereof, must be interpreted as meaning that they preclude national legislation pursuant to which the fact that a worker has not requested to exercise his right to paid annual leave acquired under those provisions during the reference period automatically entails, without prior verification that the worker has actually been given the opportunity to exercise that right, the consequence that the worker loses the benefit of that right and, accordingly, his entitlement toan allowance in lieu of paid annual leave not taken in the event of the termination of the employment relationship.

56 On the other hand, where the worker has refrained from taking his paid annual leave deliberately and in full knowledge of the ensuing consequences, after having been given the opportunity actually to exercise his right thereto, Article 7(1) and (2) of Directive 2003/88 and Article 31(2) of the Charter do

not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of paid annual leave not taken, without the employer being required to force that worker to actually exercise that right.

57 It is for the referring court to ascertain whether the national legislation at issue in the main proceedings may be interpreted in accordance with Article 7(1) and (2) of Directive 2003/88 and Article 31(2) of the Charter.

58 In that regard, it should be recalled that it is settled case-law of the Court that, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

59 The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited).

60 As has also been held by the Court, that requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 72 and 73 and the case-law cited).

61 In the light of the foregoing, the answer to the first question is that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period — automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information — the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.

The second question

62 By its second question, the referring court asks, in essence, whether, in the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, those provisions of EU law must be interpreted as meaning that, in the context of a dispute between the worker and his former employer who is a private individual, they result in the national legislation having to be disapplied by the national court, and the worker having to be granted by the employer an allowance in lieu of the annual leave acquired under those provisions and not taken at the time that the employment relationship was terminated.

63 As regards, first, the possible direct effect that it may be appropriate to acknowledge Article 7 of Directive 2003/88 as producing, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited). In addition, where a

person involved in legal proceedings is able to rely on a directive against a State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case, it is necessary to prevent the State from taking advantage of its own failure to comply with EU law (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited).

64 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, in particular against a Member State and all the organs of its administration, including decentralised authorities, but also against organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 45 and the case-law cited).

65 In the present case, it is for the referring court, which alone has the relevant information in that regard, to carry out the necessary checks in respect thereof. That court held, as is apparent from paragraph 16 of the present judgment, that Max Planck had to be considered an individual.

66 In the light of the foregoing, it should be recalled, first, that, according to the settled case-law of the Court, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 42 and the case-law cited).

67 Thus, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 43 and the case-law cited).

68 Accordingly, although Article 7(1) and (2) of Directive 2003/88 fulfilled the criteria of unconditionality and sufficient precision required in order to produce a direct effect (see, to that effect, judgment of today's date, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraphs 71 to 73), those provisions cannot be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law (judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 48).

69 As regards, secondly, Article 31(2) of the Charter, a provision for which it was established, in paragraphs 49 to 55 of the present judgment, that it is intended to apply to situations such as those in the main proceedings and must be interpreted as meaning that it precludes legislation such as that at issue in the main proceedings, it should be recalled at the outset that the right to paid annual leave constitutes an essential principle of EU social law.

70 That principle is itself mainly derived both from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter, to which all Member States are parties in so far as they are party to it in its original version, its revised version or in both versions, also referred to in Article 151 TFEU. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which, as the Court noted in paragraphs 37 and 38 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), sets out principles of that organisation which recital 6 of Directive 2003/88 states must be taken account of.

71 In that regard, the fourth recital of Directive 93/104 states, in particular, that paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers provides that every worker in the

Union has a right, inter alia, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices (see, to that effect, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 39).

72 Article 7 of Directive 93/104 and Article 7 of Directive 2003/88 have not therefore themselves established the right to paid annual leave, which is based in particular on various international instruments (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75) and is, as an essential principle of EU social law, mandatory in nature (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraphs 48 and 68), that essential principle including the right to 'paid' annual leave as such and the right, inherent in the former, to an allowance in lieu of annual leave not taken upon termination of the employment relationship (see judgment of today's date, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 83).

73 By providing, in mandatory terms, that 'every worker' has 'the right' 'to an annual period of paid leave' without referring in particular in that regard — like, for example, Article 27 of the Charter which led to the judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2) — to the 'cases' and 'conditions provided for by Union law and national laws and practices', Article 31(2) of the Charter, reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.

74 The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

75 Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, that the national court must disapply national legislation negating the principle, recalled in paragraph 54 of this judgment, that a worker cannot be deprived of an acquired right to paid annual leave at the end of the leave year and/or of a carry-over period fixed by national law when the worker has been unable to take his leave, or correspondingly, of the entitlement to the allowance in lieu thereof upon termination of the employment relationship, as a right which is consubstantial with the right to 'paid' annual leave. Under that provision, nor may employers rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.

76 With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.

77 First of all, as noted by the Advocate General in point 78 of his Opinion in Joined Cases *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:337), the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).

78 Next, the Court has, in particular, already held that the prohibition laid down in Article 21(1) of the Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a

dispute with another individual (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76), without, therefore, Article 51(1) of the Charter precluding it.

79 Finally, as regards, more specifically, Article 31(2) of the Charter, it must be noted that the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave or an allowance in lieu of paid annual leave not taken upon termination of the employment relationship.

80 In the event that it is impossible to interpret the national legislation at issue in the main proceedings in a manner consistent with Article 31(2) of the Charter, it will therefore be for the referring court, in a situation such as that at issue in the main proceedings, to ensure within its jurisdiction the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

81 In the light of all the foregoing considerations, the answer to the second question is that, in the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 7 of 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 and of Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period — automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information — the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.**

2. **In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and**

in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.

[Signatures]

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* Language of the case: German.

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i The wording of paragraph 73 of this document has been modified after it was first put online.

JUDGMENT OF THE COURT (Grand Chamber)

20 April 2021 (*)

(Reference for a preliminary ruling – Article 2 TEU – Values of the European Union – Rule of law – Article 49 TEU – Accession to the European Union – No reduction in the level of protection of the values of the European Union – Effective judicial protection – Article 19 TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Scope – Independence of the members of the judiciary of a Member State – Appointments procedure – Power of the Prime Minister – Involvement of a judicial appointments committee)

In Case C-896/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Prim'Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta), made by decision of 25 November 2019, received at the Court on 5 December 2019, in the proceedings

Repubblika

v

Il-Prim Ministru,

intervening party:

WY,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, M. Ilešič and N. Piçarra, Presidents of Chambers, C. Toader, M. Safjan, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb and L.S. Rossi (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2020,

after considering the observations submitted on behalf of:

– Repubblika, by J. Azzopardi, avukat, S. Busuttil, advocate, and T. Comodini Cachia, avukat,

– the Maltese Government, by V. Buttigieg and A. Buhagiar, acting as Agents, and by D. Sarmiento Ramirez-Escudero and V. Ferreres Comella, abogados,

– the Belgian Government, by C. Pochet, M. Jacobs and L. Van den Broeck, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,

– the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,

– the Swedish Government, by C. Meyer-Seitz, H. Shev, H. Eklinder, R. Shahsavan Eriksson, A.M. Runeskjöld, M. Salborn Hodgson, O. Simonsson and J. Lundberg, acting as Agents,

– the European Commission, initially by K. Mifsud-Bonnici, P.J.O. Van Nuffel, H. Krämer and J. Aquilina, and subsequently by K. Mifsud-Bonnici, P.J.O. Van Nuffel and J. Aquilina, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 19 TEU and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Repubblika, an association registered as a legal person in Malta, the purpose of which is to promote the protection of justice and the rule of law in that Member State, and Il-Prim Ministru (Prime Minister, Malta) relating to an *actio popularis* concerning, inter alia, the conformity with EU law of the provisions of the Constitution of Malta ('the Constitution') governing the procedure for the appointment of members of the judiciary.

Legal framework

3 Chapter VIII of the Constitution contains rules on the judiciary, including those governing the procedure for the appointment of members of the judiciary.

4 In Chapter VIII, Article 96 of the Constitution provides:

'(1) The judges of the Superior Courts shall be appointed by the President acting in accordance with the advice of the Prime Minister.

(2) A person shall not be qualified to be appointed a judge of the Superior Courts unless for a period of, or periods amounting in the aggregate to, not less than twelve years he has either practised as an advocate in Malta or served as a magistrate in Malta, or has partly so practised and partly so served.

(3) Without prejudice to the provisions of sub-article (4), before the Prime Minister gives his advice in accordance with sub-article (1) in respect of the appointment of a judge of the Superior Courts (other than the Chief Justice), the evaluation by the Judicial Appointments Committee established by Article 96A of this Constitution as provided in paragraphs (c), (d) or (e) of sub-article (6) of the said article 96A shall have been made.

(4) Notwithstanding the provisions of sub-article (3), the Prime Minister shall be entitled to elect not to comply with the result of the evaluation referred to in sub-article (3):

Provided that after the Prime Minister shall have availed himself of the power conferred upon him by this sub-article, the Prime Minister or the Minister responsible for justice shall:

(a) publish within five days a declaration in the [*Malta Government Gazette*; the Gazette] announcing the decision to use the said power and giving the reasons which led to the said decision; and

(b) make a statement in the House of Representatives about the said decision explaining the reasons upon which the decision was based by not later than the second sitting of the House to be held after the advice was given to the President in accordance with sub-article (1):

Provided further that the provisions of the first proviso to this sub-article shall not apply in the case of appointment to the office of Chief Justice.'

5 Article 96A of the Constitution is worded as follows:

'(1) There shall be a Judicial Appointments Committee, hereinafter in this article referred to as "the Committee", which shall be a subcommittee of the Commission for the Administration of Justice established by article 101A of this Constitution and which shall be composed as follows:

(a) the Chief Justice;

(b) the Attorney General;

(c) the Auditor General;

(d) the Commissioner for Administrative Investigations (Ombudsman); and

(e) the President of the Chamber of Advocates:

…

(2) The Committee shall be chaired by the Chief Justice or, in his absence, by the judge who substitutes him in accordance with paragraph (d) of sub-article (3).

(3) (a) A person shall not be qualified to be appointed or to continue to hold office as a member of the Committee if he is a Minister, a Parliamentary Secretary, a Member of the House of Representatives, a member of a local government or an official or a candidate of a political party:

…

(4) In the exercise of their functions the members of the Committee shall act on their individual judgment and shall not be subject to the direction or control of any person or authority.

…

(6) The functions of the Committee shall be:

(a) to receive and examine expressions of interest from persons interested in being appointed to the office of judge of the Superior Courts (other than the office of Chief Justice) or of magistrate of the Inferior Courts, except from persons to whom paragraph (e) applies;

(b) to keep a permanent register of expressions of interest mentioned in paragraph (a) and to the acts relative thereto, which register shall be kept secret and shall be accessible only to the members of the Committee, to the Prime Minister and to the Minister responsible for justice;

(c) to conduct interviews and evaluations of candidates for the abovementioned offices in such manner as it deems appropriate and for this purpose to request information from any public authority as it considers to be reasonably required;

(d) to give advice to the Prime Minister through the Minister responsible for justice about its evaluation on the eligibility and merit of the candidates for appointment to the abovementioned offices;

(e) when requested by the Prime Minister, to give advice on the eligibility and merit of persons who already occupy the offices of Attorney General, Auditor General, Commissioner for Administrative Investigations (Ombudsman) or of magistrate of the Inferior Courts to be appointed to an office in the judiciary;

(f) to give advice on appointment to any other judicial office or office in the courts as the Minister responsible for justice may from time to time request:

Provided that the evaluation referred to in paragraph (d) shall be made by not later than sixty days from when the Committee receives the expression of interest and the advice mentioned in paragraphs (e) and (f) shall be given by not later than thirty days from when it was requested, or

within such other time limits as the Minister responsible for justice may, with the agreement of the Committee, by order in the Gazette establish.

(7) The proceedings of the Committee shall be confidential and shall be held *in camera* and no member or secretary of the Committee may be called to give evidence before any court or other body with regard to any document received by or any matter discussed or communicated to or by the Committee.

(8) The Committee shall regulate its own procedure and shall be obliged to publish, with the concurrence of the Minister responsible for justice, the criteria on which its evaluations are made.'

6 Article 97 of the Constitution provides:

'(1) Subject to the provisions of this article, a judge of the Superior Courts shall vacate his office when he attains the age of sixty-five years.

(2) A judge of the Superior Courts shall not be removed from his office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.

(3) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the inability or misbehaviour of a judge of the Superior Courts under the provisions of the last preceding sub-article.'

7 Article 100 of the Constitution provides:

'(1) Magistrates of the Inferior Courts shall be appointed by the President acting in accordance with the advice of the Prime Minister.

(2) A person shall not be qualified to be appointed to or to act in the office of magistrate of the Inferior Courts unless he has practised as an advocate in Malta for a period of, or periods amounting in the aggregate to, not less than seven years.

(3) Subject to the provisions of sub-article (4) of this article, a magistrate of the Inferior Courts shall vacate his office when he attains the age of sixty-five years.

(4) The provisions of sub-articles (2) and (3) of article 97 of this Constitution shall apply to magistrates of the Inferior Courts.

(5) Without prejudice to the provisions of sub-article (6), before the Prime Minister gives his advice in accordance with sub-article (1) in respect of the appointment of a magistrate of the Inferior Courts the evaluation by the Judicial Appointments Committee established by article 96A of this Constitution as provided in paragraph (c), (d) or (e) of sub-article (6) of the said article 96A shall have been made.

(6) Notwithstanding the provisions of sub-article (5), the Prime Minister shall be entitled to elect not to comply with the result of the evaluation referred to in sub-article (5):

Provided that, after the Prime Minister shall have availed himself of the power conferred upon him by this sub-article, the Prime Minister or the Minister responsible for justice shall:

(a) publish within five days a declaration in the Gazette announcing the decision to use the said power and giving the reasons which led to the said decision; and

(b) make a statement in the House of Representatives about the said decision explaining the reasons upon which the decision was based by not later than the second sitting of the House to be held after the advice was given to the President in accordance with sub-article (1).'

8 Article 101B(1) of the Constitution states:

‘There shall be a Committee for Judges and Magistrates … which shall be a subcommittee of the Commission for the Administration of Justice and which shall consist of three members of the judiciary who are not members of the Commission for the Administration of Justice and who shall be elected from amongst judges and magistrates according to regulations issued by the Commission for the Administration of Justice so however that in disciplinary proceedings against a magistrate two of the three members shall be magistrates and in the case of disciplinary proceedings against a judge two of the three members shall be judges.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 On 25 April 2019, Repubblika brought an action, described as an *actio popularis*, before the referring court under Article 116 of the Constitution, seeking a declaration that, by reason of the existing system for the appointment of members of the judiciary, as governed by Articles 96, 96A and 100 of the Constitution, the Republic of Malta is in breach of its obligations under, inter alia, the combined provisions of the second subparagraph of Article 19(1) TEU and of Article 47 of the Charter. Repubblika also requests that any judicial appointment made under the existing system during the proceedings initiated by that *actio popularis* be declared null and void, and that no other members of the judiciary be appointed except in accordance with the recommendations outlined in Opinion No 940/2018 of the European Commission for Democracy through Law (‘the Venice Commission’) of 17 December 2018 on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement in Malta (CDL-AD (2018)028), together with Article 19(1) TEU and Article 47 of the Charter.

10 In support of its application, Repubblika claims that the Prime Minister’s discretion to appoint members of the judiciary, as provided for in Articles 96, 96A and 100 of the Constitution, raises doubts as to the independence of those judges and magistrates. It submits, in that regard, that a number of members of the judiciary appointed since 2013 were very active in the Partit laburista (Labour Party), which is in government, or have been appointed in such a way as to give rise to suspicion of political interference in the judiciary.

11 Repubblika also states that it is specifically challenging all of the appointments made on 25 April 2019 concerning three magistrates of the Inferior Courts appointed as judges of the Superior Courts together with three new magistrates of the Inferior Courts (‘the appointments of 25 April 2019’), as well as any other appointment which might be made at a later date. It argues, in that regard, that those appointments were made in disregard of Opinion No 940/2018 of the Venice Commission of 17 December 2018.

12 The Prime Minister contends, on the contrary, that the appointments of 25 April 2019 are compliant with the Constitution and with EU law. There is, he submits, no difference between those appointments and any other judicial appointment made since the Constitution was adopted in 1964, apart from the fact that, unlike appointments made before 2016, the suitability of the candidates presented over the course of 2019 for the duties in question was examined by the Judicial Appointments Committee established by Article 96A of the Constitution. Repubblika’s arguments thus relate, in reality, to any judicial appointment made up to the present.

13 The Prime Minister takes the view that the appointments procedure at issue is in conformity with the requirements of the second subparagraph of Article 19(1) TEU and of Article 47 of the Charter, as interpreted by the Court.

14 The referring court considers that, in the present case, the aspect which merits examination by the Court, from the point of view of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, concerns the discretion which Articles 96, 96A and 100 of the Constitution confer on the Prime Minister in the procedure for appointing members of the judiciary. Furthermore, in its view, the question arises as to whether the constitutional amendment carried out in 2016 brought about an improvement to the procedure in question.

15 In those circumstances, the Prim’Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta) decided to stay the proceedings and to refer

the following questions to the Court for a preliminary ruling:

‘(1) Should the second [subparagraph] of Article 19(1) TEU and Article 47 of the [Charter], read separately or together, be considered to be applicable with respect to the legal validity of Articles 96, 96A and 100 of the Constitution of Malta?

(2) If the first question elicits an affirmative answer, should the power of the Prime Minister in the process of the appointment of members of the judiciary in Malta be considered to be in conformity with Article 19(1) TEU and with Article 47 of the [Charter], considered as well in the light of Article 96A of the Constitution, which entered into effect in 2016?

(3) If the power of the Prime Minister is found to be incompatible, should this fact be taken into consideration with regard to future appointments or should it affect previous appointments as well?’

The request for a preliminary ruling and the procedure before the Court

16 In its order for reference, the Prim’Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court) requested that the present reference for a preliminary ruling be dealt with under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice.

17 In support of its request, the referring court submitted, in essence, that the questions forming the subject matter of the present case are of national importance, since an answer to them may affect the legal certainty associated with judicial decisions already delivered by the various Maltese courts – including by members of the judiciary appointed in April 2019 – as well as the foundations and continuity of the Maltese judicial system. In addition, it has pointed out that several members of the judiciary will reach retirement age in the near future and if, during the course of the present proceedings, those judges and magistrates are not replaced by others, the pressure resulting from that situation on the work of members of the judiciary still in office could be detrimental to the fundamental right to a fair trial within a reasonable period.

18 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

19 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 48).

20 Furthermore, it is also apparent from the Court’s case-law that the expedited procedure may not be applied where the sensitive and complex nature of the legal problems raised by a case does not lend itself easily to the application of such a procedure, in particular where it is not appropriate to shorten the written part of the procedure before the Court (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 49).

21 In the present case, on 19 December 2019, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the referring court’s request referred to in paragraph 16 above.

22 First of all, the referring court itself considered that the case in the main proceedings was not so urgent as to justify the adoption of interim measures. Next, the significance of the effects of the Court’s judgment in the present case on the Maltese judicial system is not, as such, a reason establishing the urgency necessary to justify an expedited procedure. Lastly, the present case raises sensitive and complex questions which justified the decision not to deviate from the ordinary rules of procedure applicable to references for a preliminary ruling.

23 On the same day, the President of the Court also decided to give priority treatment to the present case in accordance with Article 53(3) of the Rules of Procedure.

24 At the hearing held on 27 October 2020, the Court was informed of the fact that certain amendments had been made to the Constitution in July 2020 further to recommendations concerning the system for judicial appointments set out in Opinion No 940/2018 of the Venice Commission of 17 December 2018, and that those amendments had been the subject of Opinion No 993/2020 of that commission of 8 October 2020 on the 10 acts and bills implementing legislative proposals subject of the Opinion of the Venice Commission of 17 December 2018 (CDL-AD (2020)019).

Consideration of the questions referred

Admissibility

25 The Polish Government submits that the questions referred are inadmissible for three reasons.

26 That government observes, in the first place, that the referring court has referred its questions to the Court for a preliminary ruling in order that, on the basis of the answers to those questions, it can decide whether the provisions of Maltese law at issue in the main proceedings are compliant with EU law. It is argued that jurisdiction to assess, under Articles 258 and 259 TFEU, whether provisions of national law are compatible with EU law belongs, however, to the Court alone, to the exclusion of national courts, and that only the European Commission or a Member State can bring proceedings under those provisions of EU law. Consequently, a national court cannot, without circumventing the procedure laid down in Articles 258 and 259 TFEU, rule on the compatibility of national law with EU law on the basis of the interpretation of the latter provided in the context of the preliminary-ruling procedure, in so far as the Court itself considers that it does not have jurisdiction to carry out such a review of conformity under that latter procedure. The interpretation of EU law provided by the Court in the present proceedings cannot therefore be regarded as necessary in order to resolve the dispute in the main proceedings, within the meaning of Article 267 TFEU.

27 In that connection, it should be observed that, as is apparent from the present request for a preliminary ruling, the referring court considers that it must obtain from the Court an interpretation of the second subparagraph of Article 19(1) TEU and of Article 47 of the Charter in view of its doubts, in the context of an *actio popularis* brought before it under national law, as to whether the national provisions relating to the process for appointing members of the judiciary are in conformity with those provisions of EU law.

28 The preliminary-ruling procedure established by Article 267 TFEU is precisely a procedure for direct cooperation between the Court of Justice and the courts and tribunals of the Member States. Under that procedure, which is based on a clear separation of functions between national courts and the Court, any assessment of the facts of the case is a matter for the national court, which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, while the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (judgments of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 27, and of 30 May 2018, *Dell'Acqua*, C-370/16, EU:C:2018:344, paragraph 31).

29 In that regard, the task of the Court must be distinguished according to whether it is requested to give a preliminary ruling, as in this case, or to rule on an action for failure to fulfil obligations. Whereas, in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State contravenes EU law in general, without there being any need for there to be a corresponding dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 47).

30 It should also be borne in mind that, although it is not the task of the Court, in preliminary-ruling proceedings, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, the Court does, however, have jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it (judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 23 and the case-law cited). It is for the referring court to carry out such an assessment, in the light of the guidance thus provided by the Court.

31 It follows that the Polish Government's objection, referred to in paragraph 26 of the present judgment, that an answer to the questions raised by the referring court in the present case under Article 267 TFEU would circumvent Articles 258 and 259 TFEU must be rejected.

32 In the second place, the Polish Government points out that the second subparagraph of Article 19(1) TEU, under which Member States are required to provide effective remedies in the fields covered by EU law, does not alter the substance of the principle of conferral or the extent of the European Union's powers. On the contrary, it argues, that provision is based on the premiss that, in the absence of EU competence in the field of organisation of judicial systems, it is for the Member States to designate the courts and tribunals that have jurisdiction and to lay down appropriate procedural rules intended to safeguard the rights which individuals derive from the legal order of the European Union. Consequently, no specific rule governing the appointment of members of the judiciary or the organisation of national courts and tribunals can be derived from the second subparagraph of Article 19(1) TEU. It is further submitted that Article 47 of the Charter is inapplicable in the present case. Repubblika has brought an *actio popularis*, but it does not rely on a subjective right which it derives from EU law. Thus, in the present case, there is no 'implementation' of EU law within the meaning of Article 51(1) of the Charter.

33 In that regard, it is sufficient to note that the objections thus raised by the Polish Government relate, in essence, to the actual scope of EU law and, in particular, to that of Article 19 TEU and Article 47 of the Charter, and, therefore, to the interpretation of those provisions. Such arguments, which relate to the substance of the questions referred, cannot therefore, by their very nature, lead to the inadmissibility of those questions (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 80).

34 Consequently, the questions referred for a preliminary ruling are admissible.

The first question

35 By its first question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU and Article 47 of the Charter must be interpreted as meaning that they may be applied in a case in which a national court is seised of an action provided for by national law and seeking a ruling on the compatibility with EU law of national provisions governing the procedure for the appointment of members of the judiciary of the Member State to which that court belongs.

36 As regards, on the one hand, the material scope of the second subparagraph of Article 19(1) TEU, it should be recalled that that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter (judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 29, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 111 and the case-law cited).

37 Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 112 and the case-law cited).

38 In that connection, it is common ground that Maltese judges and magistrates may be called upon to rule on questions relating to the application or interpretation of EU law and that they form part, as

‘courts or tribunals’ as defined by that law, of the Maltese judicial system in the ‘fields covered by Union law’, within the meaning of the second subparagraph of Article 19(1) TEU, meaning that those courts must meet the requirements of effective judicial protection (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 114 and the case-law cited).

39 Furthermore, it follows from the request for a preliminary ruling and from paragraphs 9 to 11 above that the referring court is seised of an action, provided for by national law, in which Repubblika challenges the conformity of provisions concerning the procedure for the appointment of members of the Maltese judiciary with, in particular, the requirements for the independence of the judicial system of the Member States, laid down by EU law. The second subparagraph of Article 19(1) TEU is intended to apply in the context of an action the purpose of which is thus to challenge the conformity with EU law of provisions of national law which it is alleged are liable to affect judicial independence (see, by analogy, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 11 to 13 and 46 to 52).

40 As regards, on the other hand, Article 47 of the Charter, it must be recalled that that provision, which constitutes a reaffirmation of the principle of effective judicial protection, enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by EU law are infringed (judgments of 27 June 2013, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 59, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 87 and the case-law cited).

41 Thus, the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law (judgments of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)*, C-245/19 and C-246/19, EU:C:2020:795, paragraph 55, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 88).

42 It is, however, not apparent from the information contained in the order for reference that, in the dispute in the main proceedings, Repubblika is relying on a right conferred on it by a provision of EU law. In that dispute, the conformity with EU law of the constitutional provisions governing the appointment of members of the judiciary is called into question.

43 Admittedly, Repubblika also disputes the lawfulness of the appointments of 25 April 2019 and of any subsequent appointment which is not in accordance with the recommendations made in Opinion No 940/2018 of the Venice Commission of 17 December 2018 and with Article 19(1) TEU and Article 47 of the Charter. However, Repubblika’s challenge in that regard rests solely on the alleged non-conformity with EU law of those constitutional provisions pursuant to which those appointments were made, without Repubblika’s invoking any infringement, arising from those appointments, of a right conferred on it under a provision of EU law.

44 In those circumstances, in accordance with Article 51(1) of the Charter, Article 47 thereof is not, as such, applicable to the dispute in the main proceedings.

45 However, since the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, within the meaning in particular of Article 47 of the Charter, that latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU (judgments of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 54, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 143 and the case-law cited).

46 In the light of the foregoing, the answer to the first question is that the second subparagraph of Article 19(1) TEU must be interpreted as meaning that it may be applied in a case in which a national court is seised of an action provided for by national law and seeking a ruling on the conformity with EU law of national provisions governing the procedure for the appointment of members of the

judiciary of the Member State to which that court belongs. Article 47 of the Charter must be duly taken into consideration for the purposes of interpreting that provision.

The second question

47 By its second question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of a body responsible for, inter alia, assessing candidates for judicial office and providing an opinion to that Prime Minister.

48 In that connection, it should be borne in mind that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law. That may be the case, in particular, as regards national rules relating to the adoption of decisions appointing members of the judiciary (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 68 and the case-law cited, and paragraph 79).

49 Article 19 TEU entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108).

50 In that regard, and as provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law and to ensure that courts and tribunals within that system, and which may rule on the application or interpretation of EU law, satisfy the requirements of effective judicial protection (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 109 and 112 and the case-law cited).

51 In that context, the independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects (judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 45). It is, thus, essential to the proper working of the judicial-cooperation system embodied by the preliminary-ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (see, inter alia, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 56 and the case-law cited). Furthermore, the requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial as provided for by Article 47 of the Charter, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (see, to that effect, judgments of 26 March 2020, *Review Simpson* v *Council and HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraphs 70 and 71, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 116 and the case-law cited).

52 Thus, while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.

53 It is settled case-law of the Court that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel 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 (judgments of 19 September

2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 53 and the case-law cited; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66; and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 117 and the case-law cited).

54 In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 124, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 118).

55 In that regard, it is necessary that judges should be protected from external intervention or pressure liable to jeopardise their independence. The rules mentioned in paragraph 53 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 112, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 119).

56 As regards, in particular, the circumstances in which decisions to appoint members of the judiciary are made, the Court has already had occasion to state that the mere fact that the judges concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 133, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 122).

57 However, the Court has also stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of those appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed as judges, and that it is important, inter alia, in that perspective, that those conditions and procedural rules should be drafted in a way which meets the requirements set out in paragraph 55 above (judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 134 and 135, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 123).

58 In the present case, the referring court's doubts in the light of the second subparagraph of Article 19(1) TEU relate, in essence, to the national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of a body responsible, inter alia, for assessing candidates for judicial office and providing an opinion to that Prime Minister.

59 In that connection, it should be noted, first, that, as is apparent from the documents before the Court, the constitutional provisions relating to the appointment of members of the judiciary remained unchanged from their adoption in 1964 until the 2016 reform of the Constitution, which established the Judicial Appointments Committee referred to in Article 96A of the Constitution. Prior to that reform, the Prime Minister's power was limited only by the requirement that candidates for judicial office satisfy the conditions laid down by the Constitution in order to be eligible for such office.

60 It was therefore on the basis of the provisions of the Constitution in force prior to that reform that the Republic of Malta acceded to the European Union under Article 49 TEU.

61 Article 49, which provides for the possibility for any European State to apply to become a member of the European Union, states that the European Union is composed of States which have freely and

voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them

62 In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in that article (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 168, and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 30).

63 It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108).

64 The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary (see, by analogy, judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 40).

65 In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence (see, to that effect, judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153).

66 By contrast, the involvement, in the context of a process for appointing members of the judiciary, of a body such as the Judicial Appointments Committee established, when the Constitution was reformed in 2016, by Article 96A of the Constitution may, in principle, be such as to contribute to rendering that process more objective, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard. It is also necessary that such a body should itself be sufficiently independent of the legislature, the executive and the authority to which it is required to submit an opinion on the assessment of candidates for a judicial post (see, by analogy, judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 137 and 138, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 124 and 125).

67 In the present case, a series of rules mentioned by the referring court appear to be such as to guarantee the independence of the Judicial Appointments Committee vis-à-vis the legislature and the executive. The same applies to the rules, contained in Article 96A(1) to (3) of the Constitution, relating to the composition of that committee and the prohibition on politicians sitting in that committee, the obligation imposed on members of that committee by Article 96A(4) of the Constitution to act on their individual judgment and not to be subject to direction or control by any person or authority, and the obligation for that committee to publish, with the consent of the Minister responsible for justice, the criteria which it has drawn up, and also its assessments, something which was, moreover, done, as the Advocate General observes in point 91 of his Opinion.

68 Furthermore, the referring court has not, in the present case, expressed any doubts as to the conditions under which the members of the Judicial Appointments Committee established by Article 96A of the Constitution were appointed or as to how that body actually performs its role.

69 It is thus apparent that the introduction of the Judicial Appointments Committee by Article 96A of the Constitution serves to reinforce the guarantee of judicial independence.

70 In the second place, it should be noted that, as pointed out, in particular, by the Commission, although the Prime Minister has, in accordance with the national provisions at issue in the main proceedings, a certain power in the appointment of members of the judiciary, the fact remains that the exercise of that power is circumscribed by the requirements of professional experience which must be satisfied by candidates for judicial office, which requirements are laid down in Article 96(2) and Article 100(2) of the Constitution.

71 Furthermore, while it is true that the Prime Minister may decide to submit to the President of the Republic the appointment of a candidate not put forward by the Judicial Appointments Committee established by Article 96A of the Constitution, he or she is nevertheless required, in such a situation, under Article 96(4) and Article 100(6) of the Constitution, to communicate his or her reasons to the House of Representatives and, except as regards the appointment of the Chief Justice, by means of a declaration published in the Gazette. Inasmuch as the Prime Minister exercises that power only in quite exceptional circumstances and adheres to strict and effective compliance with that obligation to state reasons, that power is not such as to give rise to legitimate doubts concerning the independence of the candidates selected.

72 In the light of all of those factors, it does not appear that the national provisions at issue in the main proceedings relating to judicial appointments are, per se, such as to give rise to legitimate doubts, in the minds of individuals, as to the imperviousness of appointed members of the judiciary to external factors – in particular, to direct or indirect influence from the legislature or the executive – and as to their neutrality vis-à-vis the interests before them, and thus lead to those members of the judiciary not being regarded as independent or impartial, the consequence of which would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

73 In the light of all of the foregoing considerations, the answer to the second question is that the second subparagraph of Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister.

The third question

74 Having regard to the answer given to the second question, there is no need to answer the third question.

Costs

75 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The second subparagraph of Article 19(1) TEU must be interpreted as meaning that it may be applied in a case in which a national court is seised of an action provided for by national law and seeking a ruling on the conformity with EU law of national provisions governing the procedure for the appointment of members of the judiciary of the Member State to which that court belongs. Article 47 of the Charter of Fundamental Rights of the European Union must be duly taken into consideration for the purposes of interpreting that provision.**

2. **The second subparagraph of Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for**

the involvement, in that process, of an independent body responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister.

[Signatures]

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* Language of the case: Maltese.