Case studies in the framework of the training series:

Litigating European Union Law. Proceedings before the Court of Justice of the European Union (CJEU)

WORKSHOP FOR LAWYERS IN PRIVATE PRACTICE (ADVANCED TRAINING)

1. Fabrice Picod, Case study on preliminary reference proceedings (with a solution)
2. Daniel Sarmiento, Case study on direct actions (with a solution)

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Case study

Preliminary reference

Litigating European Union Law

ADVANCED TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By
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Miss X, a part-time employee, works more hours than the contractual weekly hours. The employer pays her at the same rate as for normal working hours. The collective agreement provides that overtime worked beyond the normal weekly working time for full-time workers (i.e., 39 hours) is subject to an increase of 15-25% of the hourly wage.

Miss X claimed the right to this additional pay for all hours worked beyond the contractual duration, without however reaching the normal weekly working time, and, in the face of her employer's refusal, challenged this decision, which, in her view, was contrary to Article 157 TFEU and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Miss X chooses you as her lawyer to assist her in her legal claim. She wants you to use all the potential of European Union law. In particular, she suggests that you bring an action for failure to fulfil obligations against France and a reference for a preliminary ruling to the Court of Justice.

Miss X wants to win her case quickly before the national court. She also wants her employer to be condemned by the Court of Justice.

The defendant strongly opposes a reference for a preliminary ruling. In particular, it argues that 'the reference for a preliminary ruling would be inadmissible on the ground that the annulment by the court of provisions of the collective agreement would create a legal vacuum which the Court could not fill'. It also points out that Article 157 TFEU and, *a fortiori,* the Directive cannot be invoked against a private person. Furthermore, the defendant contests the relevance of the EU law arguments, on the grounds that the employer's interpretation of the collective agreement does not establish discrimination on the grounds of sex. For all these reasons, the defendant considered that the case could not be validly referred to the Court.

Questions:

1. Do you think you would be able to make a reference for a preliminary ruling and an action for failure to fulfil obligations in such a case?

2. What advice would you give to Miss X who wants her employer to be "condemned by the Court of Justice"?

3. Do you consider the reference for a preliminary ruling inadmissible for the reasons given by Miss X's employer?

4. If a reference for a preliminary ruling is made to the Court of Justice, what role will Miss X's lawyer play in the proceedings?

5. How long would the case be suspended during the reference for a preliminary ruling?

Method:

Identify the relevant legal issues.
Identify the texts applicable to the relevant legal issues.
Identify the relevant case law of the Court of Justice.
Propose legally sound and realistic solutions.

Extracts from the applicable texts:

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 (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(4) Article 141(3) of the Treaty now provides a specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and

equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

(5) Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

TITLE I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) ‘harassment’: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) ‘sexual harassment’: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) ‘pay’: the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

(f) ‘occupational social security schemes’: schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (16) whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 3

Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

TITLE II

SPECIFIC PROVISIONS

CHAPTER 1

Equal pay

Article 4

Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct or indirect discrimination on grounds of sex shall be eliminated in all elements and conditions of remuneration.

In particular, where an occupational classification system is used to determine pay, it shall be based on criteria common to male and female workers and shall be established in such a way as to exclude discrimination on grounds of sex.

CHAPTER 2

Equal treatment in occupational social security schemes

Article 5

Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6

Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7

Material scope

1. This Chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

(i) sickness,

(ii) invalidity,

(iii) old age, including early retirement,

(iv) industrial accidents and occupational diseases,

(v) unemployment;

(b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Model answers:

1. As a lawyer, your task should be to assist and represent your client before the competent courts.

   In this case, the question is which court has jurisdiction to examine a reference for a preliminary ruling and an action for failure to fulfil obligations, in order to submit to them the alleged violations of European Union law described above, consisting of a breach of Article 157 TFEU and Directive 2006/54/EC.

   It is therefore necessary to examine successively the theory of an action for failure to fulfil obligations and that of a reference for a preliminary ruling.

   Theory of an action for failure to fulfil obligations. Under Articles 258 and 259 TFEU, an action may be brought before the Court of Justice for a declaration that a Member State "has failed to fulfil an obligation under the Treaties". This reference to a breach of the Treaties is to be understood in a broad sense, in that it refers to breaches of all sources of European Union law which have binding effect.

   Assuming that a collective agreement, given its binding nature, its method of entry into force and the control exercised by the public authorities, is to be regarded as a text falling within the competence of the Member States, an action for failure to fulfil obligations could be brought before the Court of Justice at the end of a pre-litigation procedure, seeking a declaration that the Member State in question had infringed Article 157 TFEU and Article 4 of Directive 2006/54/EC, both of which prohibit indirect discrimination between male and female workers.

   However, an action for failure to fulfil obligations may only be brought by the European Commission on the basis of Article 258 TFEU or by any Member State on the basis of Article 259 TFEU. There is no room for natural or legal persons to bring an action before the Court of Justice.

   Only a complaint could be made to the European Commission with a view to prompting it to initiate proceedings under Article 258 TFEU.

Theory of a preliminary ruling. Under Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings, in particular on the interpretation of the Treaties and of acts adopted by the institutions of the European Union. In this respect, the Court of Justice would have jurisdiction to rule on the interpretation of Article 157 TFEU and Directive 2006/54/EC, in particular Article 4 of the latter, which is at issue in this case. The Court of Justice has also had to rule on these provisions on numerous occasions.

The interpretation given by the Court of Justice must address the question of whether or not the applicable national law is compatible with EU law as interpreted by the Court of Justice.

The preliminary ruling procedure is an indirect way of assessing violations of European Union law. However, it is not a matter for individuals to initiate, as the preliminary ruling procedure can only be initiated by a court in one of the Member States.

Referral to the Court of Justice is reserved for the national court, as the parties to the proceedings before the national court can neither apply directly to the Court for such a request nor oblige the national court to suspend the proceedings (ECJ, 14 Dec. 1962, *Milchwerke Wöhrmann v. Commission*, joined cases 31 and 33/62, ECR p. 965, spec. 980).

The national court may refer a matter to the Court of Justice of its own motion (ECJ, 16 June 1981, *Salonia v Poidomani and Giglio*, Case 126/80, ECR p. 1563, para. 7; ECJ, 6 Oct. 1982, *CILFIT v Ministry of Health*, Case 283/81, ECR p. 3415, para. 9). This power to raise a question of EU law of its own motion presupposes that, in the view of the national court, either EU law should be applied, leaving national law unapplied if necessary, or national law should be interpreted in a way that is consistent with EU law (ECJ, 14 Dec. 2000, *Fazenda Pública*, Case C-446/98, ECR p. I-11435, para. 48).

In most cases, the national court will refer the matter to the Court of Justice at the request of the parties; the parties cannot, however, compel it to do so. In the present case, it would therefore be a matter of referring the matter to the competent national court and encouraging it to refer questions to the Court of Justice for a preliminary ruling with a view to obtaining a declaration that Article 157 TFEU and Directive 2006/54/EC are to be interpreted as prohibiting the discrimination found.

2. The question of the Court of Justice's conviction of the employer is irrelevant as the Court of Justice of the European Union has not been given any competence under the founding

treaties to convict natural or legal persons of Member States or third States. The Court of Justice of the European Union is not an international criminal court.

Some employees have complained about violations of EU law by their employers and have suggested that the national court in question should make a reference for a preliminary ruling in order to give their problems greater prominence. This has sometimes led to the use of the preliminary reference procedure.

However, it is not advisable to use the preliminary reference procedure to publicise a problem before the Court of Justice. A reference for a preliminary ruling must serve only the interests of law and justice.

3. The grounds for the 'inadmissibility' of the reference for a preliminary ruling put forward by Miss X's employer are threefold: firstly, the reference qualified as a 'preliminary ruling' would be inadmissible on the grounds that the annulment by the court of the provisions of the collective agreement would create a legal vacuum that the Court of Justice could not fill. Secondly, Article 157 TFEU and, *a fortiori,* Directive 2006/54/EC could not be invoked against a private person. Thirdly, the relevance of the EU law arguments would be questionable on the grounds that the employer's interpretation of the collective agreement does not establish discrimination on the grounds of sex.

   First of all, it should be noted that the preliminary ruling procedure is a judge-to-judge procedure and does not constitute a legal remedy of a contentious nature (see an explicit reminder of the Court in this sense in CJEU, 19 Jan. 1994, *SAT Fluggesellschaft*, Case C-364/92, ECR p. I-43, para. 9; CJEU, 26 Feb. 1996, *Biogen*, Case C-181/95, ECR p. I-717, para. 5). Thus, one cannot speak of a "preliminary ruling", as the expression is only used by certain less rigorous authors. Although it is not an action in the procedural sense of the term, a reference for a preliminary ruling lends itself to an examination of admissibility by the Court of Justice, which may take place of its own motion or at the request of one of the parties to the main proceedings or of one of the persons who submitted observations to the Court of Justice.

   Firstly, the prospect of a legal vacuum cannot be an obstacle to the initiation of a reference for a preliminary ruling. If the Court of Justice were to declare that European Union law as interpreted precludes the application of a collective agreement which leads to discrimination between male and female workers to the detriment of the latter, it would be

for the national court to set aside the provisions of that agreement so as to put an end to such discrimination.

Secondly, the argument that the provisions relied on do not create obligations for private persons is partly incorrect and, in any event, insufficient to declare a reference for a preliminary ruling inadmissible. Article 157 TFEU has long been recognised in case law (ECJ, 8 April 1976, *Defrenne*, Case 43/75, ECR p. 476) as being capable of creating obligations for public and private persons. Directives do not in themselves create obligations on individuals and companies, but national courts are required, as far as possible, to interpret the applicable national law in the light of the purpose of the Directive (ECJ, 14 July 1994, *Faccini Dori*, Case C-91/92, ECR p. I-3325). It follows that both Article 157 TFEU and Directive 2006/54/EC are sources which the court may have to apply and in relation to which it may question the meaning to be given to them. Such a question may logically be followed up by a reference to the Court of Justice for a preliminary ruling.

Thirdly, it should be noted that the Court of Justice cannot refuse to give a ruling on the grounds put forward by Miss X's employer. The Court thus recalls, in a synthetic formula, that the "Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law 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" (CJEU, 13 March 2001, *PreussenElektra*, Case C-379/98, ECR p. I-2099, para. 39; ECJ, 5 February 2004, *Schneider*, Case C-380/01, ECR p. I-1389, para. 22). The Court will assert its competence to provide the national court with the elements of interpretation under European Union law enabling it to judge this compatibility and to resolve the legal problem before it (see, for example, ECJ, 18 May 1977, *Officier van Justitie v Van den Hazel*, Case 111/76, ECR p. 901, para. 4; ECJ, 23 January 2003, *Makedoniko Metro and Michaniki*, Case C-57/01, ECR p. I-1091, para. 55). In the present case, the invocation of European Union law is in no way artificial and cannot be declared irrelevant to the dispute. It should be recalled that the Court of Justice ruled as early as 1990 that differences in treatment between full-time and part-time contracts were likely to result in discrimination against women in so far as the latter were more likely than men to hold part-time jobs.

4. The role of the lawyer in the preliminary ruling procedure is fundamental. It is not limited to suggesting a reference for a preliminary ruling and proposing questions to the competent national court. Once a reference for a preliminary ruling has been submitted by the national

court, the lawyer of the interested party in the main proceedings will have to follow the entire preliminary ruling procedure before the Court of Justice.

Under Article 23 of the Statute of the Court of Justice of the European Union, the decision of the national court or tribunal which suspends the proceedings and refers the case to the Court of Justice is to be notified by the Registrar of the Court to the parties concerned. Such notification shall have the effect of making known the reference for a preliminary ruling thus made and shall enable the parties to the main proceedings to submit observations to the Court of Justice within a period of two months. Observations may also be submitted by the Member States, the European Commission and the institutions of the Union which are the authors of the act in question, in this case the Parliament and the Council in the case of Directive 2006/54/EC. This shows the importance of such written observations.

Subsequently, if a hearing is held, in particular because the lawyer has requested it and his or her request has been deemed relevant, the lawyer's intervention will take the form of participation in the hearing by means of oral observations and answers to questions put by the members of the Court.

Failure to participate in the written procedure does not preclude participation in the oral procedure (Rules of Procedure, art. 96, § 2). The modalities of the application for participation have changed considerably over the last 25 years. In the previous version of the Rules of Procedure, it was provided that if, after having been informed, none of these persons submitted a request within one month setting out the reasons why they wished to be heard, the Court of Justice could decide, under the former Article 104(4) of the Rules of Procedure, to give judgment without holding a hearing. Now, under the new Article 76 of the Rules of Procedure, any reasoned requests for a hearing must be submitted within three weeks of service of the closure of the written procedure and it is the Court of Justice which decides, on a proposal from the Judge-Rapporteur, after hearing the Advocate General, whether to grant the request or whether to continue with the written procedure only if it is sufficiently well informed in the light of the written observations; this discretion is lost if the request for a hearing is made by a person who did not participate in the written procedure.

5. The effect of a reference for a preliminary ruling is to suspend the proceedings before the national court while the reference for a preliminary ruling is being processed. This

suspension begins when the reference for a preliminary ruling is notified to the Court of Justice and ends when the national court receives the judgment of the Court of Justice.

The period of suspension necessarily varies according to a number of parameters: the importance of the issues raised, the sensitivity of the problem, the bench selected, the conclusions of the Advocate General, measures of organisation of the procedure, the slowing down of the case due to a pilot case or other circumstances, etc.

It may also happen that the decision to refer a matter for a preliminary ruling is challenged before a higher national court. If the Court of Justice is not informed of a suspensive appeal, it considers that it is still validly seized to deal with the case. On the other hand, if the national court informs it of such an appeal against its decision, the Court will decide to stay the proceedings (Order, 3 June 1969, *Chanel v. Cepeha*, Case 31/68, ECR 1970, p. 403). It will take over the preliminary ruling if the order for reference is confirmed by the higher court. On the other hand, it will strike out the preliminary ruling if the order for reference is annulled.

After increasing steadily until the 1990s, the time taken to deal with preliminary ruling cases before the Court of Justice has decreased in recent years. The average time taken is between 15 and 16 months and has remained relatively stable over the last five years (see CJEU Judicial Statistics 2020, para. 228).

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Case study

Litigating European Union Law

ADVANCED TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By
Daniel Sarmiento

Banka Universia ("BU") is a significant credit institution subject to the prudential supervision of the European Central Bank ("ECB"). BU is established in Coreliana, a Member State of the EU. BU's Chief Executive Officer is J. Guppa, a renowned economist with more than thirty years of experience in the banking sector.

In the context of its supervisory activities, the ECB informed BU on December 2020, in a letter addressed to Mr. Guppa, of the decision of the supervisory board to undergo an onsite inspection to review the implementation and enforcement of cybersecurity measures in BU. As is known, BU is considered to be an essential infrastructure pursuant to Annex II of Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union. Furthermore, among the ECB's supervisory priorities for 2021, cybersecurity risks are a main target of the ECB's supervisory goals, in order to ensure that credit institutions are well shielded from potential attacks.

On 5 February 2021 a team of ECB staff, headed by the director of the on-site inspection, Mr. Collfu, arrived at Coreliana and met with BU staff in a kick-off meeting that took place in the premises of BU. Among other organizational matters, Mr. Collfu informed Mr. Guppa orally of the ECB's concerns about cybersecurity risks, but also, more generally, IT systems, data management and data protection compliance. Mr. Guppa and the Director General of IT expressed their surprise to Mr. Collfu about the broad scope of the inspection, referring to the fact that the initial letter of the ECB informing of the inspection only referred to cybersecurity risks. Mr. Collfu replied that the notion of cybersecurity has to be interpreted in a broad sense and thus it should include any risks derived from IT management and potential derivative regulatory breaches. In the course of the kick-off meeting, BU accepted the time-line proposed by the ECB, which included on-site work by ECB staff in the course of the upcoming two months. ECB staff were to have access to all relevant information at their request.

That evening, BU received through its official email account for communications with the ECB a Decision, signed by Mr. Collfu, informing BU of the start of the on-site inspection on cybersecurity risks. The Decision also specified the time line, the scope of the investigations and added that the ECB "will take all the appropriate measures to ensure BU's full compliance with regulatory standards and best practices".

In the course of the on-site inspection, ECB staff accessed BU's IT systems and underwent and intense analysis of past practice and systems management. While reviewing the functioning of email security, ECB staff had access to several emails in which the expression "ECB supervision – highly sensitive – security" was highlighted. When the ECB staff reviewed the content of these emails, they found eight messages in which the head of the legal service and secretary general of the Board of BU exchanged views with the director of risks, on the reappointment of Mr. Guppa as CEO of the bank. The subject of the correspondence was Mr. Guppa's conviction for tax fraud and money laundering in February 2019 in a criminal court in Fraudalia, a neighboring country that is not a member of the EU. The emails confirm the bank's concerns about Mr. Guppa's ability to receive ECB authorization of his reappointment in 2020. As a result of the exchanges, both staff members decided that the best course of action was not to disclose this information when applying for authorization of Mr. Guppa's reappointment. In one of the last emails in the exchange, the director of the legal service adds:

"*We keep it secret, we don't say a word to the bureaucrats in Frankfurt and the boss stays in his place. And so do we, my friend. If we lose him, you know that you and I are going out the door next".*

On 20 May 2021, the ECB forwarded to BU a draft inspection report. In its content, the report detailed the main findings of the inspection, enumerating an exhaustive list of areas of improvement on cybersecurity and IT systems. In its conclusions, the report adds that, in the course of the investigations, the on-site inspections team gathered other relevant information of concern in light of BU's supervisory obligations.

On 28 May 2021 a closing meeting took place, this time in the premises of the ECB in Frankfurt. Once Mr. Collfu finished enumerating the cybersecurity concerns and heard BU staff's observations on the matter, he pointed out to the email correspondence concerning Mr. Guppa's conviction in Fraudalia. Considering the gravity of the findings, Mr Collfu informed BU that the emails had been forwarded to the Joint Supervisory Team in charge of BU, with the aim that it acted and, if necessary, report the facts to the ECB's sanctions unit.

Mr. Guppa, visibly distressed, informed the ECB staff that the conviction had been quashed on appeal in late 2020, that he was innocent of any wrongdoing and that the investigations opened in Fraudalia were politically motivated by a prosecutor who was now ousted, following elections in that country in mid-2019. Mr. Collfu added that he was relieved to know that, but nevertheless the information had not been reported at the relevant time, in the course of Mr. Guppa's reappointment. Mr. Collfu also pointed

out to the email in which BU staff decided to elude all reference to these facts to the ECB, showing inappropriate corporate conduct and a clear and obvious willingness to circumvent the supervisor's prudential tasks.

Shortly after the meeting, BU was informed by letter of 15 June 2021 of the Joint Supervisory Team's decision to forward the relevant information, including the email correspondence on Mr. Guppa's conviction, to the ECB's sanctions unit.

On 1 September 2021 the ECB's sanctions unit referred a statement of objections to BU, informing of its decision to open a sanctions procedure in light of relevant supervisory facts, as revealed in the course of the 2021 on-site inspection. According to the ECB's sanctions unit, the revealed facts amounted to a breach of Art. 94 of the Framework Regulation[1], with several aggravated circumstances, including the conscious and aware intention of high-ranking UB staff to hide relevant information from the supervisory authorities, as well as the seriousness of the criminal offences for which Mr. Guppa was trialed and convicted. The statement of objections makes no reference to Mr. Guppa's eventual acquittal in 2020.

On 5 September 2021, the ECB forwarded UB the final version of the inspection report, following the closing meeting that took place on 28 May 2021 and the written observations submitted by UB. The inspection report insists in its concluding section on the relevance of the correspondence disclosed and the serious gravity of the offences that such correspondence could entail. Once again, no reference is made to Mr. Guppa's acquittal in 2020, despite the fact that, in BU's written observations, the bank had provided the ECB all the relevant documents confirming Mr. Guppa's acquittal of all charges in Fraudalia's courts.

On 20 September 2021 BU was served a Decision of the ECB, enacted by the Supervisory Board and dated 18 September 2021, enumerating the supervisory measures that BU was to introduce following the on-site inspection on cybersecurity risks. On the same day, the ECB's Supervisory Board issued a Recommendation requesting BU to take all necessary measures to prevent corporate governance malpractice, including the introduction of robust reporting systems on criminal investigations of management. In point 23 of the Recommendation, the ECB states:

"*It is requested of UB that it takes all necessary measures regarding the events of February 2019 in Fraudalia and UB's management of the situation. In particular, UB should implement all necessary measures, including termination of contracts with management, to ensure that precedents of serious supervisory breaches do not take place in the future*."

On 27 September 2021 the Central Bank of Coreliana, entrusted with banking supervisory tasks, issued an order to BU instructing its Board to undertake all measures to withdraw its decision of reappointment of Mr. Guppa in 2020. According to the

[1] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation)

Central Bank, in light of the information referred to it by the ECB following an on-site inspection, there is irrefutable evidence proving that BU committed serious unlawful acts with the aim of eluding reporting obligations in the course of the reappointment of Mr. Guppa's reappointment as CEO. The order has its legal base on Coreliana's Banking Law of 2016 and it is effective as of 1 January 2022, date in which BU shall have taken all the necessary corporate measures to undertake the removal of Mr. Guppa.

Questions

1. What is the challengeable act in case BU wishes to bring an action against the measures imposed resulting from the on-site inspection?

2. Could any of the measures of the ECB be challenged in national courts? If so, under what conditions?

3. In the case of the measures addressed to terminate the contract of staff, does BU have standing to bring such an action, or is it restricted to the employees only?

4. Can BU request interim measures?

5. In the case of the ECB's Decision and Recommendation, what grounds of annulment could BU invoke in its support?

6. Can the ECB make use of an on-site inspection with a specific subject-matter to investigate regulatory breaches of a different subject-matter? How does this issue affect BU's actions in court?

Answers

1. What is the challengeable act in case BU wishes to bring an action against the measures imposed resulting from the on-site inspection?

The issue of on-site inspections of the ECB is a novel area of practice, but it concerns the traditional notion of "preparatory acts", which, in principle, cannot be challengeable in a direct action. An on-site inspection is an investigative measure which might ensue in binding decisions at an ulterior stage. Therefore, challenges should be brought directly against the final measures imposed on the undertaking. The only cases in which the Court of Justice has allowed exceptions to this principle, is when the preparatory measure raises an essential procedural issue that may not be remedied when challenging the final act.[1]

It will be up to the applicants to argue whether the on-site inspection, both at the preliminary stage when is notified to BU, but also when the inspection report is issued, is a preparatory act that raises an essential procedural issue. This matter is currently open to discussion because the Court of Justice has not ruled on the legal effects of ECB on-site inspections.

It will be difficult to argue that the letter informing BU of the on-site inspection, or the final inspection report, is a challengeable act. This can be clearly seen from the fact that, as a result of the on-site inspection, several ECB and national acts were introduced. Therefore, actions should be brought against these final acts and not the acts on which the on-site inspection was based.

However, it could be argued by the applicants that the question of the scope of the on-site inspection is an essential substantive issue that must be dealt prior to the inspection. Although Regulation 468/2014[2] does not specify that on-site inspections must have a predefined scope, the case-law of the Court of Justice in field of competition has raised the importance of a clear scope in order to ensure the procedural guarantees of the undertaking. Therefore, it could be argued that for the specific purposes of challenging the scope of the on-site inspection, and thus to avoid ulterior errors of law in the final decisions that might ensue from the on-site inspection, these preparatory acts could be directly challengeable in an action of annulment.

Finally, in the case of the Recommendation, the Court of Justice has stated it is not sufficient that an institution adopts a recommendation which allegedly disregards certain principles or procedural rules in order for that recommendation to be amenable to an action for annulment, although it does not produce binding legal effects.

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[1] Judgment in Joined Cases 23/63, 24/63 and 52/63 Usines Emile Henricot and Others v High Authority ([1963] ECR 217).

[2] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17).

> "However, in exceptional cases, the impossibility of bringing an action for annulment against a recommendation does not apply if the contested act, by reason of its content, does not constitute a genuine recommendation.
>
> In that regard, during the analysis of the content of the contested act with a view to determining whether that act produces binding legal effects, account must be taken of the fact that, as was noted in paragraph 25 above, recommendations are, in accordance with Article 263 TFEU, excluded from the scope of that provision and that, pursuant to the fifth paragraph of Article 288 TFEU, they have no binding force".[3]

In other words, the Recommendation has to be a covert binding act, a matter that must be analysed in light of the wording and context of the act. In this particular case, the language is imperative and it leaves no doubt as to the aims of the measure: "it is requested", "UB should implement", a wording that leaves no margin of discretion to UB, particularly when the instruction is coming from its prudential supervisor. Therefore, the applicants can argue that the Recommendation, in light of the case-law of the Court, is in fact a binding act and therefore challengeable under Art. 263 TFEU.

2. Could any of the measures of the ECB be challenged in national courts? If so, under what conditions?

In principle, any EU act can be challenged in national courts by way of a preliminary reference of validity. However, it is necessary for these EU acts to be implemented in the Member State, therefore it will always be an indirect challenge of validity, channeled through an action against a national implementing act. In addition, an applicant must prove that it did not have standing to bring a direct action against the EU act in procedures before the Union courts. This is the result of the TWD case-law,[4] which requires that an applicant makes use of the preliminary reference of validity only to indirectly challenge EU acts that he or she did not have standing to challenge within the prescribed time-limit.

The Court of Justice has recently confirmed this line of case law in the field of the Banking Union in the case of Iccrea Banca,[5] in which it stated that EU acts that can be directly challenged before Union courts by applicants with standing to bring such action, are precluded from requesting review through a preliminary reference of validity.

3. In the case of the measures addressed to terminate the contract of staff, does BU have standing to bring such an action, or is it restricted to the employees only?

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[3] Judgment of 20 February 2018, Belgium/Commission (C-16/16 P, EU :C:2018:79, paragraphs 29 and 30).
[4] Judgment of 9 March 1994, TWD Textilwerke Deggendorf (C-188/92, EU:C:1994:90).
[5] Judgment of 3 December 2019 (Iccrea Banca, C-414/18, EU:C:2019:1036).

In the case the Recommendation instructing the termination of contracts of staff, the question of standing is only relevant if the Court decides that the Recommendation is a binding measures and therefore a challengeable act. Having resolved that point, the question of standing must be scrutinized in light of Article 263, paragraph four TFEU.

In the case of individual acts with an addressee, it is clear in the case-law that the addressee has standing to bring an action, as long as it has an interest to bring an action (its legal position will improve in case of a successful action). Therefore, BU will have standing to bring an action against the Recommendation. A different matter is whether the employees concerned have standing in this case, since they are not individualized in the Recommendation, although it is obvious that the act is referring to the head of the legal service and the director of risk. In this case, applicants should rely on the case-law that refers to standing against direct actions brought by applicants with an individual and direct concern. The second requirement (direct concern) is critical here, because the case-law requires that an applicant will lack direct concern if the challenged measure requires further implementing and discretional acts. Although the Recommendation refers to "termination of contracts", it also mentions "all necessary measures" in a vague way, thus allowing for a broad variety of measures to be enacted by BU. Thus, the defendants will argue successfully that in the case of staff they will have to bring those actions in national courts, probably in national labor courts, a forum in which they will be able to request the court to make a preliminary reference of validity to the Court of Justice to question the Recommendation's legality.

When it comes to the termination of contract of Mr. Guppa, this is a measure that belongs to the national Central Bank and therefore the question of standing will pertain to national law. However, even though this is a matter of national law, all national procedural rules must abide with the EU principles of effectiveness and equivalence, so that the applicant has all the necessary courses of action at his disposal.

4. Can BU request interim measures?

BU can request interim measures from Union courts when lodging an action of annulment. This request has to be brought at the same time that the main application is lodged, and it must comply with several substantive requirements: a risk of an irreparable damage, an appearance of illegality and a balancing of interests.

BU can request suspensive interim measures so that the effects of the ECB's Decision and Recommendation are stayed during the time in which the action is heard by the General Court.

However, in the case of national courts, interim measures shall be enacted by the national courts in accordance with national law. However, in exceptional cases the national court will have the power to suspend EU acts, as long as the requirements

mentioned above are complied with, and the national court refers the issue of legality to the Court of Justice by way of a preliminary reference of validity.[6]

5. In the case of the ECB's Decision and Recommendation, what grounds of annulment could BU invoke in its support?

Article 263 TFEU provides a fixed list of grounds of review which the applicant has to rely on: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

In this case, BU can invoke "essential procedural requirements" by alleging that the on-site inspection was essential flawed from its start, when it authorized the inspection team to observe any other relevant regulatory breaches, not only those related to cybersecurity risks.

[6] Judgments of 21 February 1991, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest (C-143/88 and C-92/89, EU:C:1991:65, paragraph 16), and of 9 November 1995, Atlanta Fruchthandelsgesellschaft and Others (I) (C-465/93, EU:C:1995:369, paragraph 20).