



**COUNCIL OF  
THE EUROPEAN UNION**

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**JUR 528**

#### **INFORMATION NOTE**

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Subject: Case law of the Court of Justice of the EU in cases involving the Council  
(1 January to 30 June 2011)

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1. In the first half of 2011, 43 cases involving the Council were closed by the three courts comprising the Court of Justice of the European Union, i.e. the Court of Justice, the General Court and the Civil Service Tribunal (hereafter the CST)<sup>1 2</sup>.

Twenty-five of the cases were closed by 24 judgments, orders or opinions the main content of which is set out in this six-monthly note<sup>3</sup>. The main purpose of this note is to highlight the aspects of those rulings which are of particular relevance for the Council's future conduct. A list of these rulings is provided in the Annex.

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<sup>1</sup> In the same period 107 new cases involving the Council were notified to it by the Court of Justice, the General Court and the CST.

<sup>2</sup> At the end of June 2011, there were 243 cases involving the Council pending before the EU courts. The breakdown was as follows:

- 177 direct cases with the Council as main party;
- 55 direct cases between parties other than the Council, with the Council intervening to uphold the legality of one of its acts;
- 11 preliminary ruling cases concerning the validity of a Council act.

<sup>3</sup> The remaining 18 closed cases have not been included in this note either because of their specific nature (e.g. legal aid proceedings or taxation of costs) or because of the way in which they were closed (e.g. by removal).

2. Twelve of the rulings were handed down in direct cases with the Council as main party (see section I below), eight were handed down in direct cases with the Council intervening (see section II below), while three were handed down in preliminary ruling cases on the validity of Council acts (see section III below). In the course of the past six months, the Court has also given an opinion under Article 218(11) TFEU (see section IV below).
3. In 19 of the 24 aforementioned rulings, the European Union courts upheld the Council's arguments. The Council failed in its submissions in four cases (Nos 1, 7, 9 and 19 on the list). In one case, that of the Court's opinion 1/09 (No 2 on the list) the Council's request for an opinion was couched in neutral terms, so that the opinion cannot be considered as either supporting or rejecting the Council's arguments.

## **I. DIRECT CASES WITH THE COUNCIL AS MAIN PARTY**

### **A. ACTIONS FOR ANNULMENT**

1. The Court heard only one action for annulment of a Council act in the first half of 2011.
2. Luxembourg brought this action (No 5 on the list) to request annulment of Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, on the grounds that it was in breach of the principles of equal treatment, proportionality and subsidiarity.

With particular reference to the first of these principles, Luxembourg contended, on the one hand, that comparable situations had been treated differently (Luxembourg-Findel airport being covered by the Directive, whereas regional airports of the same size, such as Charleroi or Hahn, were not) and, on the other hand, that different situations had been treated in the same way (Luxembourg-Findel was treated in the same way as airports whose annual traffic exceeded 5 million passengers, despite the fact that it had neither the same position of strength as regards airlines nor the same economic power as the latter airports).

The General Court held that in adopting the Directive, the EU legislature had not manifestly exceeded the limits of its broad legislative powers in the field, rejected all the applicant State's pleas, and dismissed its application.

3. During the first half of 2011, six actions for annulment of acts adopted by the Council were heard by the General Court.
4. Pointing out that the first of these actions (No 8 on the list) had clearly been lodged late, the General Court dismissed it as inadmissible without even giving prior notification to the defendants, the Council and the Parliament. The action in question sought annulment of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, since Annex II thereto excluded certain ultralight aircraft from its scope.

5. In the second of these actions (No 9 on the list) the applicant, Access Info Europe, sought annulment of a Council decision of 26 February 2009 refusing access to certain information contained in an internal note to the Council of 26 November 2008 concerning a proposal for a Regulation regarding public access to European Parliament, Council and Commission documents.

In support of its action, the applicant put forward two pleas in law. The first alleged infringement of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 on public access to European Parliament, Council and Commission documents. The applicant alleged that the Council had infringed this provision of Regulation No 1049/2001 by refusing, in the contested decision, to disclose information on the identity of the delegations which had proposed the amendments to the proposal for a Regulation set out in the requested document, on the grounds that it would seriously undermine its decision-making process. The second plea alleged failure to state sufficient reasons.

Accepting the first plea, the General Court allowed the action and annulled the decision<sup>4</sup>.

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<sup>4</sup> For a detailed analysis of this judgment and its implications for the Council's handling of requests for public access to Council documents containing delegations' positions in ongoing legislative procedures, see 8421/11 JUR 137 API 30. For the reasons set out in this document, the Council has decided to appeal against the General Court's ruling (case C-280/11 P; see 9491/11 JUR 200 API 35).

6. The third of the above actions (No 19 on the list) sought annulment of, firstly, Council Decision 2011/18/CFSP of 14 January 2011 amending Council Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire and, secondly, Council Regulation (EU) No 25/2011 of 14 January 2011 amending Regulation No 560/2005 imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire, in so far as they concerned the applicant.

In support of her action, the applicant put forward two pleas in law: the first alleging an infringement of the rights of the defence and of the right to a fair hearing and the second alleging an infringement of the right to respect for property. As regards the first plea, the applicant contended, in particular, that the reasons given for the contested acts did not allow her to contest their validity in court or the court to verify their legality.

The General Court pointed out first of all that the statement of reasons for a Council act imposing restrictive measures **must** refer not only to the legal conditions of application of that act, but also to the actual and specific reasons why the Council considers, in the exercise of its discretion, that the person concerned must be made the subject of such measures (see paragraph 47 of the grounds). It then held that in the statement of reasons for the contested acts, the Council had simply set out vague and general considerations (paragraph 51 of the grounds).

The General Court therefore annulled the acts contested in so far as they concerned the applicant<sup>5 6</sup>.

7. The fourth of the above actions (No 20 on the list) sought annulment of Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. As the applicant was not directly concerned by the Regulation, the application was dismissed as inadmissible.
8. In the context of disputes relating to anti-dumping duties, the General Court upheld one action for annulment of a Council Regulation and dismissed another.

The action which was allowed (No 7 on the list) sought annulment of Council Regulation (EC) No 1355/2008 of 18 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins etc.) originating in the People's Republic of China.

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<sup>5</sup> As regards the timing of the effects of this annulment, the General Court decided, pursuant to the second paragraph of Article 264 of the TFEU, *mutatis mutandis*, that the effects of Decision 2011/18 should be deemed to be maintained until the annulment of Regulation No 25/2011 took effect. It should be noted, in this context, that in accordance with the second paragraph of Article 60 of the Statute of the CJEU, decisions by the General Court declaring a Regulation to be void take effect only as from the expiry of the period referred to in the first paragraph of Article 56 of that Statute or, if an appeal is brought within that period, as in the case in point (see footnote 6 below) as from the date of dismissal of the appeal.

<sup>6</sup> The Council has appealed (case C-417/11 P) against this judgment on the grounds set out in 12700/11 JUR 360 RELEX 769 PESC 937 COAFR 231 COARM 118 FIN 512.

In support of their action, the applicants put forward pleas in law alleging, amongst other things, infringement of the rights of the defence, of the duty to state reasons and of the principle of sound administration and a manifest error of assessment as regards the account taken of post-importation costs in the calculation of the price of products originating in China. In particular, the applicants complained that they were not given access to the necessary information to determine whether a particular adjustment used by the Commission to define the injury margin was appropriate in that it made it possible to compare the export price and the Community industry price at the same level of trade. Agreeing that this complaint was well-founded, the General Court upheld the application and annulled the contested Regulation on the grounds that it infringed the rights of the defence and failed to set out reasons in so far as the applicants were concerned<sup>7</sup>.

The action which was dismissed (No 16 on the list) sought annulment of Council Regulation (EC) No 192/2007 of 22 February 2007 imposing a definitive anti-dumping duty on imports of certain polyethylene terephthalate originating in India, Indonesia, Malaysia, the Republic of Korea, Thailand and Taiwan following an expiry review and a partial interim review pursuant to Article 11(2) and Article 11(3) of Regulation (EC) No 384/96.

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<sup>7</sup> This judgment is currently the subject of an appeal to the Court of Justice by the Commission (Case C-195/11 P). In its response, in this case, the Council has fully supported the Commission's conclusions and also lodged a cross-appeal.

9. In the context of civil service disputes, the CST dismissed an action brought by an official for annulment of the Council's decision not to promote him to grade 13 under the 2009 promotion procedure and for compensation for the non-pecuniary loss and professional damage he claimed to have suffered (No 23 on the list)<sup>8</sup>:

B. APPEALS

Ruling on appeal, the General Court confirmed a CST<sup>9</sup> judgment dismissing as irrelevant an objection of illegality against the second paragraph of Article 32 of the Staff Regulations of Officials, which places a maximum limit of 24 months on the additional seniority that can be granted when grading a new official (No 21 on the list).

C. SPECIAL PROCEEDINGS

1. Two applications for interim measures and an application for revision were heard during the first half of 2011.
2. In the first application for interim measures (No 6 on the list), the President of the Court was requested to order, pursuant to Article 279 TFEU, that the effects of a CFI judgment<sup>10</sup> annulling Article 1 of Council Regulation (EC) No 1683/2004<sup>11</sup> should not be suspended pending the outcome of the Council's appeal against the judgment (case C-337/09 P).

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<sup>8</sup> This judgment is currently the subject of an appeal to the General Court (case T-281/11 P).

<sup>9</sup> Judgment of 10 September 2009, *Rosenbaum v Commission*, case F-9/08, not yet published in the ECR.

<sup>10</sup> Judgment of 17 June 2009, *Zhejiang Xinan Chemical Industrial Group v Council*, case T-498/04, ECR p. II-1969.

<sup>11</sup> Council Regulation (EC) No 1683/2004 of 24 September 2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China.



Since in the meantime, under Council Implementing Regulation (EU) No 1187/2010 of 13 December 2010, the entire anti-dumping proceeding for glyphosate originating in China had been terminated and the anti-dumping duties in question removed, the President of the Court considered that the application for interim measures in question could not have any relevance whatever in guaranteeing the effectiveness of the General Court's annulment of Regulation No 1683/2004. It therefore decided that it was no longer necessary to rule on this application.

3. In the second application for interim measures (No 17 on the list), the President of the General Court had been asked to order suspension of the application of Article 28 of Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine, as maintained by Article 128(3) of Regulation No 479/2008<sup>12</sup>, and also a number of other provisional measures.

Concerning the first matter, the President of the General Court pointed out that, in their main proceedings (an action for damages) the applicants were not seeking to obtain annulment of the said Article 28. This claim was therefore declared inadmissible on grounds of lack of concordance with the main proceedings.

The other matters were also rejected on grounds of lack of urgency.

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<sup>12</sup> Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) Nos 1493/1999, 1782/2003, 1290/2005 and 3/2008 and repealing Regulations (EEC) Nos 2392/86 and 1493/1999 (OJ L 148, 6.6.2008, p. 1)

4. The abovementioned application for revision (No 24 on the list) sought revision of the judgment of the CST on 30 September 2010, *Lebedef et Jones v Commission*, Case F-29/09<sup>13</sup>. As none of the points cited by the applicants for revision could be described as a new fact within the meaning of Article 44 of the Statute of the Court, the CST rejected the application in question as inadmissible.

## II. DIRECT CASES WITH THE COUNCIL INTERVENING

1. Eight direct cases between parties other than the Council, in which the latter intervened, were heard by the General Court during the first half of 2011.

The reasons for the Council's intervention in those cases was the need to defend the legality of its actions, which had been challenged as incidental questions through three objections of illegality within the meaning of Article 277 TFEU.

2. The objections had been raised with regard to:
  - Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Nos 10, 11, 12, 13, 14 and 15 on the list); after rejecting the main action as manifestly inadmissible before even ruling on the request for intervention made by the Council, the General Court did not need to rule on this objection of illegality;

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<sup>13</sup> For a short summary of this judgment, see 8771/11 JUR 157, II(4), second indent.

- Article 4(5) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (No 18 on the list); after allowing the main action on grounds other than the objection of illegality in question, the General Court did not have to decide on that objection;
- Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (No 22 on the list); noting that there was no need to rule on the action in view of the applicant's death and the absence of any resumption of the proceedings by his successors, the General Court did not decide on this objection of illegality either.

### **III. PRELIMINARY RULINGS ON THE VALIDITY OF COUNCIL ACTS**

1. Four preliminary rulings on the validity of Council acts were given by the Court of Justice during the first half of 2011.

2. In the first of these cases (No 1 on the list), the *Cour constitutionnelle* (Belgium) in essence asked whether the derogation laid down in Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services was valid in view of the principle of equality between men and women<sup>14</sup>.

In assessing the validity of the said derogation in the light of Articles 21 and 23 of the Charter of Fundamental Rights of the EU, which relate respectively to the principles of non-discrimination and equality between men and women, the Court first conceded that the Union's legislature could implement the principle of equality between men and women, or more precisely the application of the rule of unisex premiums and benefits, in a gradual manner with appropriate transitional periods. The Court also pointed out, however, that the derogation provided for in Article 5(2) of Directive 2004/113 benefiting Member States in which national law did not already apply this rule at the time of adoption of the Directive was not accompanied by any provision on the length of time of the application of these differences.

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<sup>14</sup> Article 5(1) and (2) of Directive 2004/113 read as follows:

"1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission."

In the circumstances, there was in the Court's view a risk that the derogation from equality of treatment between men and women might be permitted indefinitely by Union law. Such a derogation was therefore deemed to be contrary to the attainment of the goal of equal treatment between men and women as pursued by Directive 2004/113 and incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the EU.

Having regard to these considerations, the Court ruled that the provision in Article 5(2) of Directive 2004/113 was to be considered invalid after the expiry of a suitable transitional period, i.e. with effect from 21 December 2012.

3. In a number of the questions it raised in the second of the abovementioned cases (No 3 on the list), the *Prim 'Awla tal-Qorti Ċivili* (Malta) doubted the validity of Commission Regulation (EC) No 530/2008 of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45°W, and in the Mediterranean Sea, and of Article 7 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, on the basis of which Regulation No 530/2008 had been adopted. More specifically, the referring court had asked the Court whether Article 7(2) of Council Regulation No 2371/2002 was invalid in that it did not make provision, at the time of the adoption (by the Commission acting *ex officio*) of the emergency measures laid down in paragraph 1 of that Article, for collecting the comments of operators who might be affected by those measures, which would be a violation of the adversarial principle and of the principles set out in Article 47 of the Charter of Fundamental Rights of the EU.

Noting that Article 41 of the Charter (the right to good administration) does not cover the processes of enacting measures of general application and that Article 47 thereof (the right to an effective remedy and to a fair trial) is not applicable in the case under discussion, the Court concluded that examination of the questions posed by the referring court did not disclose anything that might affect the validity of Article 7(2) of Regulation No 2371/2002 as regards the adversarial principle and the principle of effective judicial protection.

4. In the last two of the cases mentioned, joined because their subjects are connected (No 4 on the list), the *First-Tier Tribunal* (Tax Chamber) (United Kingdom) asked the Court whether "combined nomenclature" of goods (CN) should be interpreted as meaning that set-top boxes equipped with hard disk drives belonged under subheading 8528 71 13 notwithstanding the explanatory notes on the CN published on 7 May 2008, from which it would appear that such modules come under subheading 8521 90 00; and, if not, whether the levying of customs duties as a result of the classification of such set-top boxes under the latter subheading would constitute a violation of the EU's obligations under the Agreement on trade in information technology products adopted on 13 December 1996 at the time of the first WTO meeting in Singapore<sup>15</sup>. Having replied in the affirmative to the first question, the Court did not need to reply to the second.

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<sup>15</sup> The agreement, and a communication on its implementation, were approved on behalf of the Community by Council Decision 97/359/EC of 24 March 1997 concerning the elimination of duties on information technology products (OJ L 155, 12.6.1997, p. 1).

#### IV. OPINION

Having received a request for an opinion submitted by the Council pursuant to Article 218(11) of the TFEU relating to the compatibility of a contemplated agreement creating a unified patent litigation system with the provisions of the EC Treaty the Court, on 8 March 2011, delivered its Opinion 1/09 (No 2 on the list), pursuant to which:

*"The envisaged agreement creating a unified patent litigation system (currently called "European and Community Patents Court") is not compatible with the provisions of the EU Treaty and the FEU Treaty".*

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**I. COURT OF JUSTICE \***

1. Judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats e.a.*, Case C-236/09, not yet published in the ECR
2. Opinion 1/09 of 8 March 2011 pursuant to Article 218(11) TFEU
3. Judgment of 17 March 2011, *AJD Tuna*, Case C-221/09, not yet published in the ECR
4. Judgment of 14 April 2011, *British Sky Broadcasting Group and Pace*, Joined Cases C-288/09 and C-289/09, not yet published in the ECR
5. Judgment of 12 May 2011, *Luxembourg v Parliament and Council*, Case C-176/09, not yet published in the ECR
6. Order of 18 May 2011, *Council v Zhejiang Xinan Chemical Industrial Group*, Case C-337/09 P-R, not yet published in the ECR

**II. GENERAL COURT \***

7. Judgment of 17 February 2011, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods v Council*, Case T-122/09, not yet published in the ECR
8. Order of 3 March 2011, *Groppo et al. v Parlement and Council*, Case T-79/11, not yet published in the ECR
9. Judgment of 22 March 2011, *Access Info Europe v Council*, Case T-233/09, not yet published in the ECR
10. Order of 11 April 2011, *Département du Gers v Commission*, Case T-478/10, not yet published in the ECR
11. Order of 11 April 2011, *Département du Gers v Commission*, Case T-479/10, not yet published in the ECR
12. Order of 11 April 2011, *Département du Gers v Commission*, Case T-480/10, not yet published in the ECR
13. Order of 11 April 2011, *Département du Gers v Commission*, Case T-481/10, not yet published in the ECR



14. Order of 11 April 2011, *Département du Gers v Commission*, Case T-482/10, not yet published in the ECR
15. Order of 11 April 2011, *Département du Gers v Commission*, Case T-502/10, not yet published in the ECR
16. Judgment of 13 April 2011, *Far Eastern New Century v Council*, Case T-167/07, not yet published in the ECR
17. Order of 11 May 2011, *Cahier et al. v Council and Commission*, Case T-195/11 R, not yet published in the ECR
18. Judgment of 24 May 2011, *NLG v Commission*, Case T-444/05, not yet published in the ECR
19. Judgment of 8 June 2011, *Bamba v Council*, Case T-86/11, not yet published in the ECR
20. Order of 15 June 2011, *Ax v Council*, Case T-259/10, not yet published in the ECR
21. Order of 21 June 2011, *Rosenbaum v Commission*, Case T-452/09 P, not yet published in the ECR
22. Order of 30 June 2011, *Al Saadi v Commission*, Case T-4/10, not yet published in the ECR

### III. CIVIL SERVICE TRIBUNAL\*

23. Judgment of 24 March 2011, *Canga Fano v Council*, Case F-104/09, not yet published in the ECR
24. Judgment of 13 April 2011, *Lebedef et Jones v Commission*, Case F-29/09 REV, not yet published in the ECR

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\* The texts of the rulings mentioned in this list but not published or not yet published in the European Court Reports are available on the website of the Court of Justice at [www.curia.europa.eu](http://www.curia.europa.eu).