European Union, CJEU, Texdata, judgment of 26 September 2013

Deciding bodies and decisions

CJEU, judgment of 26 September 2013, Case C?418/11, Texdata, EU:C:2013:588

Subject matter

Right of defence - Pecuniary penalty in the event of failure to disclose accounting documents wihin the prescribed period - Company Law

The European Court of Justice was asked to clarify whether Article 47 CFR precludes a national system of sanctions whereby a periodic penalty must be imposed immediately - namely, without any prior notice - on a company that fails to file its annual accounts with the relevant court, in cases where the disclosing obligation is imposed by EU law (in particular, by the Directive)

The ECJ decided on a reference for preliminary ruling issued by the *Oberlandesgericht Innsbruck* (Higher Regional Court of Austria). The Higher Regional Court was asked to state on the request made by a company, contesting the periodic penalties imposed on it by the *Landesgericht Innsbruck* (Regional Court, Innsbruck) for its breach of the obligation to submit its annual accounts to that court, which is responsible for maintaining the commercial register.

Summary Facts Of The Case

By two orders of 5 May 2011, relying on Paragraph 283(2) UGB, the Landesgericht Innsbruck imposed two periodic penalties of EUR 700 each on Texdata, a limited company established in Germany that pursued its activities in Austria through a branch, registered since 4 March 2008 in the Austrian commercial register. According to those orders, Texdata had failed to submit annual accounts for two fiscal years within the prescribed period.

On 23 May 2011, Texdata lodged two objections against the orders before the *Landesgericht Innsbruck*, making two arguments. Firstly, the imposition of a penalty for infringement of the disclosure obligation referred to in Paragraph 283 UGB was unlawful, because no prior notice was given. Secondly, Texdata had filed the contested annual accounts, within the prescribed period, at the Local Court of Karlsruhe (Germany), which had territorial jurisdiction in view of the location of Texdata’s registered office. On the same date, Texdata filed the annual accounts at issue before the *Landesgericht Innsbruck*.

On 25 May 2011, the Landesgeright rendered inoperative, by decisions, the orders previously adopted. Yet, given that the annual accounts at issue had not been filed at that court within the prescribed period, it again imposed two periodic penalties of the same amount, under the ordinary procedure pursuant to Paragraph 283(3) and (7) UGB.

Texdata appealed these orders before the *Oberlandesgericht Innsbruck* (Higher Regional Court), which doubted the compatibility with EU law of the Austrian system of penalties in question, notably the fact that a periodic penalty was to be imposed immediately (ie, without any prior notice) on a company that failed to comply with its disclosure obligation with the competent court. The *Oberlandesgericht* observed that, before the amendment of the BGB in 2011, it had become standard practice for the courts keeping the commercial register in Austria to impose a penalty only when the failure of the company persisted after that two informal notices had been granted, which proved unfruitful. Moreover, according to the same court, the national procedure in force at the time of the facts entailed several shortcomings, amongst which: the lack of any guarantee that a hearing would be held; the reliance on a legal presumption of liability whereby the burden of proof is placed on the company; the breach of the rights of the defence arising from the fact that there was no opportunity to submit observations prior to the imposition of the periodic penalty; the unreasonable rules on time?barring and the lack of prior notice, resulting in a lack of legal certainty for companies established in another Member State.

Against this background, the Oberlandesgericht Innsbruck decided to stay the proceedings and to refer a question for preliminary ruling to the CJEU, asking, *inter alia*, whether a system of sanctions such as that at issue is compatible with the general principle of the right to effective judicial protection and the principle of respect for the rights of the defence, as enshrined in Article 47 CFR.The CJEU had to establish, in essence, whether Article 47 CFR precludes a national system such as that provided for under paragraph 283 UGB, as amended by the BBG, whereby a periodic penalty must be imposed immediately - ie, without any prior notice – on a company that fails to file its annual accounts.

As a preliminary issue, the CJEU verified whether the situation at issue in the main proceedings fell within the scope of EU law, so that the national provisions concerned could be challenged against Article 47 CFR. Quoting Article 51(1) CFR, the CJEU recalled that the Charter’s provisions are addressed to the Member States only when they are implementing EU law. It also reiterated the interpretation of this general clause as provided in Case C?617/10 *Åkerberg Fransson* [2013] paras. 19?22, where it held that the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law; in such situations, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.

The CJEU then affirmed that the case fell within the scope of EU law (and of the Charter), because the main proceedings concerned the penalty imposed for failure to comply with the disclosure obligation as laid down in the Eleventh Directive. Indeed, Article 12 of the latter required the Member States to provide for appropriate penalties in the event of failure to disclose accounting

documents.

In a previous part of its reasoning (paras. 55?61), the CJEU had established that the three general criteria - namely, effectiveness, proportionality and dissuasiveness – that must be fulfilled by national sanctions functional to the enforcement of EU law obligations were satisfied by the system designed by Article 283 UGB. However, the Court then held that that same system should be tested against Article 47 CFR. Since this provision refers to effective judicial protection in relation to the rights and freedoms provided by EU law, the CJEU supported its relevance to the case by relying on the second subparagraph of Article 19(1) TEU, which lays down the obligation of the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. The Court then recalled its case law whereby "*the rights of the defence must be observed in all proceedings in which sanctions, especially fines or penalty payments, may be applied*" (para. 79).

As regards the 14?day period allowed for challenging the penalty for failure to disclose, the CJEU observed that the period prescribed must be sufficient in practical terms to enable an effective objection to be prepared and submitted (para. 80). The CJEU then esteemed that the 14-days period was fit for purpose, in light of a set of qualified circumstances such as the fact that the disclosure obligation was generally known to the interested parties, that Austrian law allowed a period of nine months from the final balance sheet date for making that disclosure and those time-limits may be suspended if an unforeseen and unavoidable event has prevented timely disclosure.

Similarly, the Court did not find problematic the legal presumption of liability of the company, because the latter can activate the ordinary procedure – under which the competent court is free to consider the specific circumstances of the case – simply by submitting a reasoned objection to the penalty.

Concerning the absence of prior notice and the lack of any opportunity for the company to make known its views, the CJEU recalled its case law whereby a person shall be have the chance to effectively make known her views in all proceedings that can culminate into a decision adversely affecting her. However, the Court immediately added that the rights of the defence are not unfettered prerogatives; they can tolerate limitations, provided that these comply with the requirements of the principle of proportionality.

With respect to the case at issue, the Court esteemed that the very substance of the rights of the defence was not impaired by the imposition of an initial penalty of EUR 700 without prior notice or any opportunity for the company concerned to make known its views before the penalty was imposed. Indeed, that company has the possibility to be heard within the ordinary procedure, which it can activate by submitting an objection against the decision concerned.

Similarly, the Court found that also the other conditions of the proportionality test were met. In particular, a procedure such as that designed by Article 283 UGB, as amended by the BBG, insofar as it ensures that the disclosure obligation is met more swiftly and more efficiently, corresponds to an objective of general interest recognized by the European Union. In addition, there was no evidence that such a procedure was disproportionate in relation to the objective pursued.

In light of all these findings, the CJEU concluded that the national system of penalties at issue in the main proceedings was consistent with the principles of effective judicial protection and respect for the rights of the defence, as enshrined in Article 47 CFR.

Relation to the scope of the Charter

Article 47 EU Charter - Right to an effective remedy and to a fair trial

This issue is explicitly addressed by the CJEU at paragraphs 71?75 of the judgment. The case in the main proceedings fell within the scope of EU law (thus, within the scope of the Charter) it concerned a penalty imposed for failure to comply with the disclosure obligation as laid down by Article 12 of the Eleventh Directive. In other words, the national provision at issue - namely, Article 283 UGB, as amended by the BGB – is functional to ensure the enforcement of an obligation laid down by EU law.

Relation between the Charter and EHCR

Article 47 of the EU Charter is based on Article 13 of the ECHR, while the second paragraph corresponds to Article 6 (1) of the ECHR. With regard to the third paragraph, the explanation of Article 52(3) points out that "*Article 47(3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation"*

Charter "corresponding rights" must be granted the same scope and meaning of their homologues under the ECHR, taking into account also the case law of the ECtHR. In addition, based on the explanation of Article 52(3) CFR, the parallel interpretation also extends to limitations, which, therefore, are the same allowed under the ECHR. At the same time, however, "corresponding rights" may be granted a broader protection under Union law.

Impact on Jurisprudence

Since the national provisions concerned were held to be compatible with Article 47 CFR, the CJEU's answer to the preliminary reference raised by the *Oberlandesgericht Innsbruck* had no impact in the main proceedings.

Impact on Legislation / Policy

Impact at the EU level

It is worth paying some attention to the reference made by the CJEU to the second subparagraph of Article 19(1) TEU, which lays down the obligation of the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

Article 47(1) CFR refers to the effective judicial protection of the “rights and freedoms” guaranteed by EU law. In the case at issue, Texdata was the addressee of an obligation ensuing from EU law, rather than the holder of a right conferred on it by that law. Yet, the CJEU found that Texdata should be granted the protection stemming from Article 47 CFR. The reference to Article 19(1) TEU is crucial in this respect, as this provision does not merely restates Article 47(1) CFR, but has a more encompassing scope. Effective protection must be granted “in the fields covered by EU law”; thus, not only to the holders of rights conferred on them by EU law, but to anyone whose subjective legal sphere is “touched” by EU law provisions.

Texdata is an important judgment, insofar as it in made clear that national provisions on sanctions for failure to comply with obligations deriving from EU law must be assessed in the light of Article 47 CFR. Since such provisions fell within the scope of EU law regardless of whether they were specifically introduced by the national legislature to implement an EU law obligation, the scope of application of the *Texdata* judgment is particularly encompassing.

Sources - EU and national law

National Law

- Paragraph 283 of the *Unternehmensgesetzbuch* (Commercial Code “UGB”; dRBl 219/1897), as amended by the *Budgetbegleitgesetz* (Law accompanying the budget of 2011, the “BGB”) Paragraph 283 of the UGB, as amended by the BBG, entered into force on 1 January 2011 and was applicable only to infringements occurring after that date. However, where the disclosure obligation has not been fulfilled from 1 January 2011 until 28 February 2011 inclusive, a periodic penalty procedure may be initiated, at the earliest, on 1 March 2011 and only by means of an order.

EU Law

- Article 6(1) and (3) TEU, Articles 49 TFEU and 54 TFEU;
- Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36; ‘the Eleventh Directive’)

Sources - CJEU Case Law

On the general criteria of national sanctions functional to the enforcement of EU law obligations

- Joined Cases C?387/02, C?391/02 and C?403/02, *Berlusconi and Others*, EU:C:2005:270
- C?81/12*, Asocia?ia Accept*, EU:C:2013:275
- Joined Cases C?379/08 and C?380/08, *ERG and Others*, EU:C:2010:127
- C?234/94, *Tomberger*, EU:C:1996:252
- C?306/99, *BIAO*, EU:C:2003:3
- C?97/96, *Daihatsu Deutschland*, EU:C:1997:581

On the freedom of establishment

- C?337/08, *X Holding*, EU:C:2010:89
- C?64/11, *Commission v Spain*, EU:C:2013:264
- C?371/10*, National Grid Indus*, EU:C:2011:785

On the principles of effective judicial protection and respect for the rights of the defence

- C?617/10, *Åkerberg Fransson*, EU:C:2013:280
- C?194/99 P, *Thyssen Stahl v Commission*, EU:C:2003:527
- C?3/06 P, *Groupe Danone v Commission*, EU:C:2007:88
- C?69/10, *Samba Diouf*, EU:C:2011:524
- C?28/05, *Dokter and Others*, EU:C:2006:408
- C?317/08 to C?320/08, *Alassini and Others*, EU:C:2010:146

Comments

Additional relevant cases on effective judicial protection vis-à-vis sanctions for failure to respect obligations deriving from EU law:

- CJEU, judgment of 25 April 2013, Case C-81/12, *Asocia?ia ACCEPT,* EU:C:2013:275
