

Spain, Audiencia Nacional, Sala de lo Contencioso (Nacional Cort, Administrative Chamber), appeal number 51/2022, 30 of April of 2024

Member State

 Spain

Topic

accountability, impartiality

Sector

Predictive Justice

Deciding Court Original Language

Audiencia Nacional

Deciding Court English translation

National Court

Registration N

51/2022

Date Decision

30/04/2022

ECLI (if available)

ECLI:ES:AN:2024:2013

National Follow Up Of (when relevant)

N/A

EU legal sources and CJEU jurisprudence

N/A

ECtHR Jurisprudence

N/A

Subject Matter

Right to access to the source of code – the need to preserve personal data – automatized decision

Legal issue(s)

The case addresses the scope of citizens' right to access the source code of the program used by the Public Administration (BOSCO) to determine who is eligible to receive the social electricity subsidy.

Request for expedited/PPU procedures

NO

Interim Relief

N/A

National Law Sources

Article 14.1 of Law 19/2003, on Transparency, Public Information Access, and Good Governance
Article 9.3 of the Spanish Constitution

Facts of the case

BOSCO is an IT system used by the General State Administration to determine which vulnerable families are entitled to receive the social electricity subsidy. The entity "Civico" requested access to the BOSCO program's source code from the Transparency Council ("CTBG"). However, the CTBG denied this request on February 18, 2019, citing reasons related to intellectual property, the protection of affected individuals and personal data, information integrity, and access control.

CIVICO filed an appeal against the CTBG's decision with the Administrative Court No. 8 of Madrid, but on December 30, 2021, the court dismissed the appeal. The ruling noted that Article 14.1 of Law 19/2003, on Transparency, Public Information Access, and Good Governance, outlines certain limitations to accessing source codes: (d) public security; (g) administrative functions of oversight, inspection, and control; (i) economic and monetary policy; (j) professional secrecy and intellectual and industrial property; (k) guarantee of confidentiality.

The judgment referenced a report issued by the Deputy Director General of Information and Communication Technologies of the Ministry of Industry, Commerce, and Tourism.

CIVICO then decided to file an appeal. The appeal first argued that in this case, the protection of intellectual property rights does not justify denying access to the source code. It also claimed that Article 24 of the Spanish Constitution had been violated, as the State Attorney introduced a new issue (national security concerns).

Secondly, the appeal alleged a violation of Article 9.3 of the Spanish Constitution, claiming that the facts were misinterpreted. The appeal emphasized that no human intervention is involved in the decision to grant the social electricity subsidy. Lastly, it referenced the European Union Communication of October 21, 2020, C(2020) 7149.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Supreme Court begins by noting that public administration has the right to protect intellectual property. To justify its decision, it refers to various national laws, such as Article 7.2 of Law 33/2003 on the Assets of Public Administrations and Article 157 of Law 40/2015, on the Legal Regime of the Public Sector.

Additionally, the Supreme Court finds that the appellant has not refuted the assertions made by the Transparency Council. The court states that, for the appeal to be upheld, CIVICO should have first proven that the publication of BOSCO's source code did not pose a serious risk to third-party rights or harm legally protected interests (as outlined in Article 14.1, sections d), g), i), and k) of the Law on Transparency, Access to Public Information, and Good Governance).

In this regard, the Supreme Court acknowledges that the publication of the source code "objectively" increases the vulnerability of the software application, especially if the software handles "classified or sensitive" information. It is specifically noted that BOSCO manages sensitive data related to tax matters and Social Security.

The ruling further contradicts the arguments in the appeal, citing the report from the Deputy Director General of Information and Communication Technologies, who recognizes that publishing the source code could lead to a series of risks.

Relation of the case to the EU Charter

N/A

Relation between the EU Charter and ECHR

N/A

Use of Judicial Interaction technique(s)

consistent interpretation

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

N/A

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

N/A

Strategic use of judicial interaction technique (purpose aimed by the national court)

The national judicial decisions do not make references to EU Law. The appellant was the only actor who during the process refer to the European Commission Communications. Specifically it refers to European Union Communication of October 21, 2020, C(2020) 7149. Even Though, the national court resolved the case solely with internal law.

Impact on Legislation / Policy

N/A

Notes on the national implementation of the preliminary ruling by the referring court

N/A

Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

N/A

Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

N/A

Did the national court take into account national case law on fundamental rights?

N/A

If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

N/A

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

N/A

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

N/A

(Link to) full text

<https://www.poderjudicial.es/search/AN/openDocument/a1da3cb69d61547ea0a8778d75e36f0d/20240513>

Author

David Mier Galera, Pompeu's Fabra University
