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EDITO

Dear readers,

In this last issue of *the OFFICI@L* before summer break, we propose to focus on the immunity from legal proceedings of EU officials and agents.

With regard to recent case law, the Court of Justice confirmed that the new conditions for the reimbursement of travel expenses and the granting of travelling time, arising from the 2014 reform, do not breach the principle of equal treatment. With the 2014 reform, the legislator had limited these benefits to officials and agents entitled to the expatriation or foreign residence allowance.

Under our section "Day-to-day in Belgium", we will discuss the Belgian VAT and customs duties that may apply when consumers order goods from a country outside the European Union, to avoid any unpleasant surprises in this respect.

Finally, under the "Human Rights: an Insight" section, the European Court of Human Rights recently ruled that Italy had breached the right to respect for the private life of a victim of sexual violence. According to the Court in Strasbourg, the national court dealing with the case had conveyed stereotypes about the role of women in society.

We hope you enjoy your reading, have a good holiday and see you in September!

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FOCUS

The immunity from legal proceedings of the EU officials and agents

Protocol No. 7 annexed to the Treaty on the Functioning of the EU deals with the privileges and immunities of the Union. Article 11(a) of this Protocol provides for the protection of officials and agents from legal proceedings by the authorities of the Member States in respect of acts performed by them in their official capacity, including their spoken or written words. They enjoy, in principle, immunity from legal proceedings in criminal, civil and administrative matters.

Protection of acts performed in an official capacity

The protection conferred by Protocol No. 7 is limited to acts performed in an official capacity. These acts are those which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions (Court of justice, 10 July 1969, 9/69). These are acts which, by their nature, represent an involvement of the person claiming immunity in the performance of the tasks of the institution (and, by extension, of the agencies and other bodies of the Union) to which he or she belongs.

In a recent opinion (which does not have the authority of a judgment of the Court of justice), Advocate General Bobek emphasised that the mere fact that acts are carried out in the workplace and involve one's colleagues does not mean that they are automatically carried out in an official capacity (Opinion of 2 February 2021, C-758/19). One example is acts of psychological and sexual harassment which, although they may be committed in the workplace, cannot be considered a necessary extension of the tasks entrusted to the institutions.

As far as private law issues are concerned, EU officials and other servants remain fully bound by the national rules applicable to their legal relationships, like any other citizen. Article 23 of the Staff Regulations thus emphasises that officials and other servants are not exempt from fulfilling their private obligations, nor from observing the laws and police regulations in force (criminal law, real estate, family law, etc.). Consequently, where private law relationships are involved, any institution is obliged to comply with requests for enforcement of a ruling adopted by a national judge by virtue of its duty of loyal cooperation with national judicial bodies. This is the case of an order requiring an official to pay alimony to his or her ex-spouse by means of salary deductions (EU General Court, 14 December 2018, T-464/17).

Waiver of immunity of officials and agents

Acts performed by officials and servants in an official capacity do not necessarily enjoy irrevocable immunity. Article 17 of Protocol No. 7 provides that "each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union".

This decision is only taken in the interests of the service. The EU General Court has thus confirmed that considerations relating to the personal situation of the official concerned by a request for waiver of immunity are irrelevant to the subsequent decision (EU General Court, 14 April 2021, T-29/17 RENV). The administration's duty to have regard for the welfare of officials is therefore limited here. It cannot go so far as to prohibit the institution from waiving the official's immunity, despite the latter's opposition, if the interests of the Union so require.

If the institution finds that a request to waive the immunity of an official or agent is not contrary to the interests of the Union, it has no choice but to comply with the request. This is not an option but an imperative as it is bound by its duty of loyal cooperation with national authorities.

For example, in 2016, the European Commission lifted the immunity from legal proceedings of the former Director-General of OLAF upon request of a Belgian investigating judge, so that he could be heard as a defendant in relation to allegations of possible illegal wiretapping against him. In 2001, the Commission also lifted, at the request of a Belgian investigating judge, the immunity of the Head of Cabinet of a member of the Commission who was suspected of forgery and fraud.

FOCUS

The Court of Justice has also recently recalled that the decision to waive the immunity of an official is an act which adversely affects him or her because it changes significantly the situation of the official who is deprived of the benefit of that immunity (Court of justice, 18 June 2020, C-831/18 P). Consequently, this decision can be challenged by means of a complaint and then before the EU courts.

Finally, the administration shall hear the official or agent before deciding to waive his or her immunity. The Court of Justice recently confirmed this principle (Court of justice, 18 June 2020, C-831/18 P). The absence of a hearing of the official concerned must be exceptional and duly justified. Thus, when a criminal investigation is conducted by national authorities against the official whose immunity is requested to be waived, the secrecy of the investigation cannot be automatically invoked to justify not to hear the official concerned. The administration must take measures to respect the right to be heard of the person concerned, as enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, without jeopardising the interests that the secrecy of the investigation is intended to protect.

CASE LAW

The Court of Justice confirms the lawfulness of the new rules on the reimbursement of travel expenses and the granting of travelling time

The reform of the Staff Regulations, resulting from Regulation 1023/2013, changed the conditions governing the reimbursement of annual travel expenses and the granting of travelling time. Prior to this recast, officials and agents were entitled to these benefits on an annual basis to travel to their place of origin. The reform reduced the number of beneficiaries of these two advantages by excluding the category of officials and agents who do not receive expatriation or foreign residence allowances.

The applicants are officials and agents of the European Commission and the Council who are not entitled to the expatriation allowance or the foreign residence allowance. Although their place of origin was not in Belgium, their country of employment, they did not meet the conditions for receiving these allowances. When the new rules came into force, the administration therefore ended their entitlement to reimbursement of their travel expenses and the granting of travelling time. The applicants lodged complaints and then appealed to the General Court of the European Union, which rejected their applications (T-516/16, T-536/16, T-523/16 and T-542/16). The applicants subsequently appealed against these judgements to the Court of Justice. By a judgment of 25 March 2021 (C-517/19P and C-518/19P), the Court of Justice confirmed the reasoning of the General Court that the new rules on the reimbursement of travel expenses and the granting of travelling time were valid.

Firstly, the Court of Justice recalled that the legal relationship between officials and the administration is governed by the Staff Regulations and is not of a contractual nature. Consequently, the rights and obligations of officials contained in the Staff Regulations may be amended at any time by the legislator provided that the latter respects EU law requirements, including the principle of equal treatment.

Having recalled that the legislator has broad discretion when amending statutory rules, the Court of Justice emphasised that the principle of equal treatment is infringed in that context only where the legislator makes a differentiation which is either arbitrary or manifestly inappropriate in relation to the purpose of these rules. The Court of Justice confirmed that the legislator did not make an arbitrary or manifestly inappropriate differentiation by making the reimbursement of annual travel expenses and the granting of travelling time conditional upon the entitlement to an expatriation or foreign residence allowance.

The judges reiterated that the principle of equal treatment requires that comparable situations should not be treated differently and that different situations should not be treated equally, unless such treatment is objectively justified.

In this respect, the judges pointed out that the purpose of Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations is to provide benefits to enable officials and their dependants to travel at least once a year to their place of origin in order to maintain family, social and cultural ties.

When amending the rules in place, the legislator sought to modernise and rationalise the rules on travel time and the reimbursement of annual travel expenses by linking them to expatriate status, to make the implementation of these rules more simple and transparent. In addition to this specific purpose, the judges also noted the legislator's more general objective of ensuring a good cost-efficiency ratio between the objective of consolidating public finances and the objective of ensuring quality recruitment with the broadest possible geographical basis. Bearing this in mind, the legislator decided to link these benefits to "expatriate" status.

The Court of Justice stated that the purpose of the foreign residence allowance is to compensate for the particular disadvantages resulting from taking up duties with the institutions of the Union for officials who are obliged to transfer their residence from their State of residence to the State of employment. They are thus obliged to integrate into a new environment. As for the expatriation allowance, the judges emphasised that it is intended to compensate for the disadvantages suffered by officials as a result of their status of foreigners, namely a certain number of disadvantages of a civic, family, educational, cultural and political nature which are not faced by nationals of that State. The Court therefore concluded that the benefit of these allowances is limited to officials who are, in principle, not or only slightly integrated into the society of the State of employment. In addition, it held that officials who do not meet the conditions for entitlement to those allowances have a sufficient degree of integration in the Member State of employment which does not expose them to those disadvantages. Thus, according to the Court, even if the place of origin of the officials has not been set in the State of employment, the Court considered that they have closer links with that State. On the contrary, the officials who fulfil the conditions for entitlement to expatriation and foreign residence allowances have a greater need to maintain close links with their place of origin.

Consequently, the Court of Justice confirmed that the principle of equal treatment has not been infringed and this is one of the reasons why the Court of Justice rejected the applicants' appeals.

DAY-TO-DAY IN BELGIUM

From 1 July 2021: beware of unpleasant surprises when buying goods from outside the European Union

Buying goods online has become part of our consumer habits. Widespread access to the internet, the digitalisation of small and large retailers and successive lockdowns have made e-commerce easy and propelled it forward.

Consumers have often been unaware of this, but when they import goods, i.e. when they order items from a country outside the European Union (including the United Kingdom), Belgian VAT and customs duties may apply.

For the time being, VAT does not apply to imports of goods worth up to EUR 22. However, some sellers do not hesitate to split packages in order not to exceed this amount or, even worse, to falsify the value of the imported goods to avoid the application of VAT.

In order to counter this type of fraud, Belgium and other EU countries will abolish this preferential treatment for goods purchased outside the European Union as of 1 July, in accordance with European VAT legislation. The aim is to re-establish some equality in VAT between companies that produce outside the EU and those that produce within the EU.

Consumers will therefore have to pay the VAT on all purchases of goods made online, whether or not the goods originate in the EU, regardless of their value.

Another change is that as of 1 July 2021 websites selling goods from outside the European Union will have to register and use the new import one-stop shop scheme (the IOSS). This registration will allow them to declare and pay VAT directly on the sale of these imported goods in Belgium when their value does not exceed 150 EUR. Consumers who buy products on these registered sites will therefore know, at the time of purchase, the total amount of their order including VAT and any customs charges.

However, if the purchase is made on an unregistered site or if the value of the goods (including taxes paid abroad and transport costs) exceeds EUR 150, the VAT and import costs (including customs duties and administrative costs related to customs clearance) will be calculated upon arrival of the goods in Belgium and payment will be due directly by the purchaser upon delivery of the package. This could lead to unpleasant surprises, given that VAT is in principle 21% and that customs duties can also be significant since they depend on the value, nature and country of origin of the imported goods.

At the moment it is not possible to check whether the site you wish to buy a product from is registered or not. If the price you are charged by the site includes VAT, it is likely that the site is registered, but it is also possible that this is not the case (it may be a non-European VAT that is charged to you, or the site may be claiming VAT fraudulently, without being registered and therefore without intending to pay it to the Belgian Treasury). In case of doubt, it is advisable to ask the site manager and avoid buying goods from the site if the answer does not seem convincing.

It is important to note that VAT and import charges are in principle due on the value of goods imported into Europe, whether they have been purchased or received (as a gift, for example) by the recipient. However, an exemption is applied for non-commercial shipments between private individuals where the value of the goods is less than EUR 45.

HUMAN RIGHTS: AN INSIGHT

The European Court of Human Rights condemns the stigmatisation of victims of sexual violence by the judge

In a judgment JL v. Italy (application No. 5671/16) of 27 May 2021, the European Court of Human Rights ruled that Italy had violated Article 8 of the European Convention on Human Rights (right to respect for private life and personal integrity).

The facts underlying this judgment relate to acts of sexual violence committed by seven men against a female student.

In July 2008, she filed a complaint with the Italian authorities for gang rape. She alleged that she had been forced to have sex with seven men under the influence of alcohol, one of whom had been her consensual partner in the past. At first instance, six of the seven suspects were convicted. They acknowledged the reality of the sexual encounter, but contested the absence of consent.

The six convicted appealed and in 2015 the Florence Court of Appeal acquitted the six defendants, considering that there were multiple inconsistencies in the complainant's version of events which undermined her credibility. The Public Prosecutor's Office did not appeal, so the judgment became final.

The complainant considers that the attitude of the authorities, including the judiciary, towards her has damaged her personal integrity.

In its judgment, the Court of Strasbourg states that the manner in which the victim of such acts is questioned must strike a fair balance between the integrity of the person, his or her dignity and the rights of defence guaranteed to defendants.

After a thorough analysis of the case, the Court found that the investigators could not be reproached. The actions taken were probably difficult for the applicant, but the manner in which the hearings were conducted were not a disproportionate interference with her intimate and private life.

Nor did the Court criticise the manner in which the judicial proceedings were conducted before the Court of Appeal. On the other hand, while stating that it could not substitute itself for the national judicial authorities in assessing the facts of the case, it noted several passages in the judgment of the Florence Court of Appeal that infringed the applicant's right to a personal and private life under Article 8 of the Convention.

For example, the Court considered that the references made by the Court in its judgment to the red lingerie shown by the applicant during the evening, as well as the comments concerning her bisexuality, romantic relationships and occasional sexual relations before the events, were unjustified. The Court also considered inappropriate the comments about the applicant's ambivalent attitude towards sex, which the Court of Appeal deduced from, among other things, her decisions concerning art activities.

The European Court of Human Rights recognises that in this case the question of the applicant's credibility was particularly crucial and that it is prepared to accept that reference to her past relationships with individual defendants or to certain of her behaviours during the evening may be justified. Nevertheless it considers that this is not without limits. The victim's private life could not be stigmatised as it was in the Florence Court of Appeal judgment. Such stigmatisation was not justified by the need to guarantee the defendants' rights of defence. The Court therefore found a violation of Article 8 of the Convention.

This is an important message from the European Court of Human Rights to all Member States. The positive

obligations to protect alleged victims of gender-based or sexual violence also impose a duty to protect the image, dignity and privacy of the victims, including through the non-disclosure of unrelated personal information and data. This obligation is inherent to the judicial function and derives from national law as well as from various international texts.

In this case, the language and arguments used by the Court of Appeal conveyed stereotypes about the role of women in society, particularly in Italy, which may hinder the effective protection of the rights of victims of gender violence despite a satisfactory legislative framework.

This is an interesting judgment in that it does not focus, as often happens in this type of case, on the responsibility of the police force or of the investigations in taking complaints of sexual violence seriously and following them up, but rather on the work of the judges who, through their motivation, contributed to the greater victimisation of the person concerned.