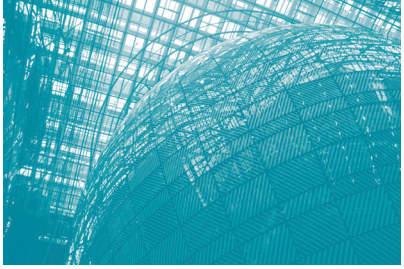

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EDITO

Dear readers,

In this issue of the OFFICI@L, we would like to give you an update on the sharing of costs before the General Court of the European Union at the end of proceedings.

As regards the case law, the General Court of the European Union recently handed down an interesting judgment on the conditions for granting an expatriation allowance (T-466/20), of which we offer a brief commentary.

In the "Human Rights – An insight" section, we look at a recent ECHR judgement involving Italy on the interpretation of the right to be forgotten.

Finally, in the day to day in Belgium section, we will discuss the protection of your personal data within the Covid Safe Ticket scheme.

We wish you an excellent reading!

The DALDEWOLF team

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FOCUS

THE COSTS TO BE BORNE BY THE PARTIES BEFORE THE GENERAL COURT OF THE EUROPEAN UNION

Bringing an action before the General Court represents a significant financial challenge for officials and other staff who wish to defend their rights and may act as a deterrent for those of them who cannot expose themselves to an excessive financial risk.

That is why our focus this month is on the rules relating to costs, and their sharing, before the General Court of the European Union.

Costs are in principle borne by the unsuccessful party

In general, costs are the sums made necessary by the conduct of the proceedings, the most important of which are lawyers' fees. The provisions applicable in this respect are to be found in Title 3, Chapter 13 of the Rules of Procedure of the General Court (hereinafter the Rules).

A distinction is made bythe EU Courts between costs that are recoverable and those that are not. Thus, only the essential costs incurred by the parties for the purposes of the proceedings are considered to be recoverable costs. Travel and subsistence costs for the hearing in Luxembourg also constitute recoverable costs.

For example, regarding lawyers' fees, the case law identifies recoverable costs as objectively indispensable fees. In the absence of fee scales, the EU judge is free to assess the facts of the case, taking into account the subject matter and nature of the dispute, its importance from the point of view of EU law, the difficulties of the case, the amount of work involved in the litigation and the economic interests of the parties (CJEU, 28 February 2013, Commission v. Marcuccio, C-432/08 P-DEP, pts 20-23).

Article 134(1) of the Rules provides that any unsuccessful party, i.e. one who loses the case, shall be ordered to pay the costs, if so found. This means that the unsuccessful party must in principle bear the costs of the opposing party in addition to its own costs.

This is a very widespread principle, which can be found in most national legal proceedings. The fear of exposing oneself to an excessive financial risk when bringing an action is obviously rooted in this principle.

However, this principle is subject to a number of adjustments before the General Court, which should be taken into account at the stage of filing an application.

The Court may decide on a modified division of costs depending on the circumstances of the case

First of all, where the parties are unsuccessful in one or more of their claims, the General Court may decide, pursuant to Article 134(3) of the Rules, that the circumstances of the case justify one party bearing a proportion of the costs of the other party.

This is the case, for instance, when the Institution is unsuccessful in the main part of its claims and has, by its conduct, obstructed the proper conduct of the judicial procedure (in this case the ECB had taken a decision vitiated by illegalities and destroyed an investigation file; GC, 28 May 2020, Maria Concetta Carafogli v. ECB, T-483/16 RENV, pts 453-456).

Furthermore, where equity so requires, the General Court may decide that an unsuccessful party shall bear, only a fraction of the costs of the successful party, or that it shall not be ordered to bear them.

The Commission has already been ordered to pay the applicant's costs even though the application was rejected, because the General Court found that the contested decision was the outcome of a long and complex procedure because the Commission had failed to examine the complaint, and this for of the sake of expediency (GC, 23 November 2011, Daphne Jones and Others v. European Commission, T-320/07, pts 154-159).

This practice applies the other way around. For example, the Civil Service Tribunal ordered an applicant to pay, in addition to his own costs, three quarters of the costs of the Institution against which he had brought an action, on account of the unjustified delay he had taken in presenting his arguments, which had affected the case in a fundamental way (CST, 16 January 2014, Philippe Guinet v. EIB, F-107/12, pts 94-96).

Similarly, Article 135(2) of the Rules provides that the General Court may condemn a party, even if successful, in part or in full, if it appears justified by reason of its attitude, including before the institution of proceedings, in particular if it has caused the other party to incur costs which the General Court recognises as frustrating or vexatious (those unnecessarily incurred by the parties, resulting in lengthening and evading the proceedings before the General Court).

The idea here is not to make the applicant, even the one whose claims have been rejected, bear the cost of failures to communicate, omissions in the transmission of relevant documents, or errors made by the Institution during the pre-litigation and litigation procedures.

The principle applies even in the case of an application declared inadmissible, where the Institution has failed to act with due diligence during the pre-litigation procedure (GC, 18 November 2019, Sigrid Dickmanns v. EUIPO, T-181/19, pts 60-63).

Consequently, it appears that the mere fact of having one's claims admitted or rejected does not entirely prejudge the sums that the applicant will have to bear at the end of the proceedings before the General Court.

Nevertheless, one must recall that the assessment of the various elements relevant to the sharing of costs is made on a case-by-case basis, and it is therefore difficult to draw general lessons from it. The Court of Justice will soon have to rule on an appeal against a judgment of the General Court on a question of the division of costs, and will perhaps allow greater predictability on the topic (appeal C-299/21 P).

An update on the expatriation allowance and the conditions for granting it

In its judgment of 15 September 2021 in the case T-466/20 LF v Commission, the General Court reviewed the conditions for granting the expatriation allowance to European officials and other servants.

The applicant, a Belgian national,had lived and worked in France before entering the service with the Commission as a contract staff member. Hereceived the expatriation allowance between 2013 and 2019 on the basis of Article 4(1)(b) of Annex VII to the Staff Regulations, given his Belgian nationality and his absence from Belgian territory for the ten-year period prior to his engagement with the Commission.

Shortly after the end of his contract in April 2019, he received an offer of employment from the European Research Executive Agency (REA) for a job as a contract agent from 1 September 2019. In the meantime, he was registered as a jobseeker in Belgium, with his allowances paid by the EU, and continued to benefit from the EU's health insurance scheme.

When he joined REA, the Administration considered that he was not entitled to the expatriation allowance. Indeed, the PMO considered, on the basis of the judgment of 13 July 2018, Quadri di Cardano v Commission (T-273/17,) that the period between 2013 and 2019 should be taken into account for the purposes of determining the staff member's habitual residence, since it was presumed to prevent the creation of lasting links between him and the country of employment (France in this case). It considered that the applicant's claimed ties with France (in particular the fact that he grew up in France, that he studied there and that his wife was a French citizen) did not call into question the reality of his habitual residence in Belgium.

The applicant therefore brought the case before the General Court of the European Union, arguing that, by refusing him the expatriation allowance, the PMO had infringed Article 4(1)(b) of Annex VII to the Staff Regulations, which provides, in substance, that the expatriation allowance is to be paid to *"an official who having or having had the nationality of the State in whose territory the place of employment is situated, has habitually resided outside the European territory of that State for a period of ten years ending on the date of his taking up his duties for a reason other than the performance of duties in the service of a State or in an international organization."*

In its judgment, the General Court first recalled that the Staff Regulations draws a distinction between officials who do not have and have never had the nationality of the State in whose territory their place of employment is situated and officials who have or have had the nationality of the State in whose territory their place of employment is situated. In the first case, the reference period is five years. In the second case, the conditions are stricter since it is ten years. Moreover, it is settled case law that maintaining residence in the country of employment for a very short period during the ten-year reference period is sufficient to entail the loss or refusal of the benefit of this allowance.

It then defined the reference period for determining entitlement to the expatriation allowance

Delimitation of the reference period

In principle, this period expires when the official enters into service with the Institution. However, the Staff Regulations provide that periods during which the official has habitually lived outside the State of employment in order to perform duties in the service of a State or an international organization are not taken into account. In this respect, these periods shall be "neutralized" by lengthening the period of service by the same amount (Grazyte v Commission, T-86/13 P, EU:T:2014:815)

In this case, the General Court noted that before joining the EU institutions, the applicant had worked in France for the French Ministry of Ecology for a period of three years and seven months (from 2009 to 2013). As this activity was carried out Belgium, the reference period should therefore be extended to 2006.

However, it considered that the years spent by the applicant in Belgium, in the service of the European Commission, should be taken into account, since no "neutralisation" is provided for by the Staff Regulations for periods during which the staff member worked for an international organisation in the State of employment.

CASE LAW

Determination of the applicant's habitual residence during the period of service with the European institutions

In view of the arguments submitted to it by the parties, the General Court considered that it was necessary first to determine the extent to which services performed for an international organisation in the State of employment could be taken into account, for a person engaged by an institution or agency situated in the State of which he is a national, in order to determine his place of habitual residence during the reference period.

In this respect, it considered that the "neutralisation" provided for in Article 4(1)(b) of Annex VII to the Staff Regulations does not apply to the exercise of functions in an international organisation in the State of employment, as in the present instance. The General Court recognised that the exercise of activities in an international organization does not facilitate, and in some cases does not allow, the establishment of lasting links.

With regard to the determination of habitual residence, the applicant provided a series of elements to demonstrate that he had maintained his residence in France, based on his personal history, his links with his family, his real estate and professional projects, and the possession of a French telephone number and bank account. However, the Court found that over the period in question (2013-2019), the applicant resided in Belgium continuously, he was joined there by his wife in 2014, they were married there, his wife worked there on a permanent contract, and they had two children who went to school there. Furthermore, the fact that the applicant had remained in Belgium with his wife and children after the expiry of the contract with that Institution and had registered as a jobseeker there, even for a very brief period, was sufficient to show that his habitual residence was established in that State.

Finally, the General Court rejected the applicant's allegations concerning the possibility for the institutions to defer, at its discretion, the entry into service of a member of staff who was legally entitled to the expatriation allowance under a previous contract in order to deprive him of that allowance and dismissed the action in its entirety and ordered the applicant to pay the costs.

HUMAN RIGHTS: AN INSIGHT

ECHR GIVES A BROAD INTERPRETATION OF THE RIGHT TO BE FORGOTTEN

In its Biancardi v. Italy judgement of 25 November 2021 (application no. 77419/16), the European Court of Human Rights took a particularly broad view of the right to be forgotten and, in particular, of the responsibility for implementing it.

In this case, the applicant is the former editor-in-chief of an online newspaper who was convicted in a civil action by the Italian courts for having kept an article on his newspaper's website about a fight in a restaurant, giving full details of the proceedings initiated in this respect.

The restaurant's owner had expressly requested the removal of the article in which he was unnecessarily implicated, but it appeared that the article could be easily found by typing the name of the restaurant or its owner into a search engine, including access to sensitive information about the criminal proceedings.

The European Court of Human Rights refused to condemn Italy on the basis of Article 10 of the Convention (freedom of expression) as it considered that the national courts have correctly applied the law in respect of freedom of expression by considering that not only providers of internet search engines, but also administrators of online journalistic archives may be required to de-index documents. The Court also agreed with the decisions of the domestic courts that the prolonged and easy access to information on the criminal proceedings concerning the restaurant owner had infringed his right to reputation. The applicant's right to disseminate the information, guaranteed by the Convention, had therefore not been violated, especially as he had not been under any actual obligation to remove the article from the website. The Court noted that the article had remained online and easily accessible for eight months, even though the restaurant owner had requested its removal.

It considered that the editor-in-chief of the daily newspaper that had published the sensitive information was also responsible for de-indexing it from the time of the restaurant owner's request. It therefore considered that the interference with freedom of expression was justifiable in this case, given the damage to the restaurant owner's rights and reputation.

Covid Safe Ticket and the protection of your personal data

The Covid Safe Ticket (CST) has already been required for more than a month throughout Belgium in order to gain access to many places of daily life, and the recent announcement of new health measures by the authorities suggests that the scheme will continue for several months. We have therefore examined the issue of the processing of your personal data in this area. .

In July, the Belgian Data Protection Authority (APD) underlined in an opinion on the issue the *"particularly sensitive and unprecedented nature of the Covid Safe Ticket"* and recalled in this regard that *"any interference with the right to respect for the protection of personal data, in particular when the interference proves to be significant, as is the case for the introduction of the Covid Safe Ticket, is only admissible if its necessary and proportionate to the objectives it pursues"*.

In essence, the aim was to compare the draft legislation providing for the CST with the guiding principles of data protection law since the General Data Protection Regulation (GDPR) came into force in 2018.

These cooperation agreements between the federal State, the communities, and the regions, adopted since 14 July 2021, allow Belgium to comply with the obligation to provide for such interference with the right to data protection. Of course, the current health situation, unprecedented in its scope, justifies the need for this. Various provisions are intended to guarantee the proportionality of the interference..

On the question of the data itself, they can only be data necessary for the public health objective pursued. Thus, the CST contains only the so-called identification data (your surname, first name and birthdate) and data relating to your examination or vaccine (the date of the examination, the State in which the procedure was carried out, the type of examination or vaccine, the manufacturer of the examination or vaccine, the injection rank of the vaccine or the result of the examination, the body that issued the certificate and the unique identifier of the certificate).

Only the Member State that issued the certificate is entitled to hold these data, it cannot pass them to another Member State, and can only keep them for as long as is necessary to control the epidemic. The cooperation agreements provide that their retention and processing for the purpose of generating and using the CST is limited in time, so as to ensure the proportionality of the interference.

Event organisers and operators of venues accessible on presentation of the CST are prohibited from recording and storing your data and must draw up a list of staff authorised to cross-check your CST with your identity data during the checks. They only have access to your identity (surname, first name and birthdate) and the result, positive or negative, of your certificate.

However, there are still major reservations about the level of guarantees provided. In this respect, the Human Rights League (Ligue des Droits Humains) has expressed concerns over the lack of transparency regarding data protection and the privatisation of their control and has called on the Belgian authorities to provide better guarantees on this issue.

The Court of First Instance of Namur has just judged the CST illegal with regard to the principle of proportionality and imposed on the Walloon Region to suspend or modify it. The Region has already appealed the decision. The Brussels' Court will issue a judgement within the coming days, regarding a similar case.