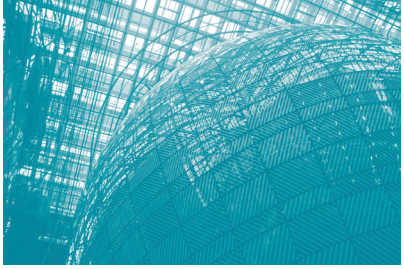

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EDITO

Dear readers,

In this new issue, we propose to focus on the reflexes to adopt to challenge a decision of the administration. We will take a look at the decisions that can be challenged and how to challenge them.

In terms of case law, we will look at an interesting judgment of the General Court which ruled that the European Parliament could require all persons wishing to access the Parliament's buildings to have a Covid certificate.

The Belgian law section will be dedicated to the extension of the legal guarantee for the purchase of digital content and services as of 1 June 2022.

We wish you an excellent reading!

The DALDEWOLF team

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FOCUS

CHALLENGING A DECISION BY THE ADMINISTRATION: THE RIGHT REFLEXES TO ADOPT

What should you do if you want to challenge an administrative decision? Here we look at each of the questions you should consider.

1) What decisions can be contested?

Pursuant to Article 90(2) of the Staff Regulations any official or agent may challenge a decision if it "adversely affects him/her" meaning if it has binding legal effects such as to affect his/her interests directly and immediately by altering his/her legal position (judgement of the General Court of the EU of 15 October 2018, Case T-334/16-P).

The form of the decision is irrelevant. The General Court of the EU has held that the oral, rather than the written, communication of a measure does not prevent it from being considered a decision adversely affecting a party (judgement of the General Court of the EU of 12 March 2019, T-446/17). Examples include:

- a decision to impose a disciplinary sanction;
- a decision to terminate a contract or not renew it;
- a decision rejecting a request for assistance;
- the final decision following an invalidity procedure;
- a pay slip that clearly shows the existence of a decision (*e.g.* by reducing or withdrawing a payment which the official or other staff member had previously received, and which has shown on his/her pay slip);
- an appraisal report;
- a vacancy notice if the conditions it lays down have the effect of excluding a staff member from the possibility of applying;
- a reassignment decision.

Some acts are not considered to be acts adversely affecting a party. These are:

- preparatory acts: acts or decisions which are drawn up in several stages (disciplinary procedure, invalidity procedure, dismissal procedure, procedure for recognition of an occupational disease or accident at work). In principle, only the final decision of the Appointing Authority can be challenged, not the preparatory acts and opinions prior to that decision.
- confirmatory acts: decisions which merely confirm a subsequent position of the Appointing Authority (without adding any new element), and which have not been preceded by a review of the situation of the official or other servant in that subsequent position (judgement of the EU Court of Justice of 20 May 2021, C-63/20 P).
- measures which concern exclusively the internal organisation of the service (such as administrative organisation and work discipline) if they do not affect the legal or material situation of the official concerned by the measure in question (order of the General Court of the EU of 20 September 2018, T-192/17).

2) Introducing a request: asking the administration to adopt a position

If there is not yet a decision adversely affecting the official, he/she must submit a request under Article 90(1) of the Staff Regulations inviting the competent authority to decide on the matter. The administration shall have a period of four months to reply. On the expiry of this period, failure to reply to the request amounts to an implied decision of refusal. The addressee of this decision may then lodge a complaint.

3) Submitting a complaint: challenging the administration's decision

According to Article 90(1) of the Staff Regulations, a complaint must be lodged within three months. In most cases, the time limit runs from the day of notification of the decision to the person concerned or from the date of expiry of the time limit for a reply where the complaint relates to an implied refusal decision. The Staff Regulations provide for other specific cases.

It is essential to respect this 3-months period. Otherwise, the claim will be inadmissible. The only exception to this strict time limit is the exceptional case in which an error can be considered "excusable", namely where the administration has behaved in such a way as to cause admissible confusion in the mind of an individual acting in good faith and exercising due diligence (judgement of the Court of Justice of 3 March 2022, C-172/20 P).

The administration must provide a reasoned opinion within four months from the lodging of the complaint. If it fails to do so, the Staff Regulations provide that, on expiry of the 4-months period, its silence will be deemed to constitute an implicit decision rejecting the complaint. In principle, when the administration adopts an express decision rejecting a complaint after the implied decision of rejection (*i.e.* a period of 4 months has elapsed) but within the time-limit for bringing an action before the General Court, the period for lodging the action shall start to run afresh (Article 91(3) of the Staff Regulations).

4) Bringing an action before the General Court of the EU

Article 91 of the Staff Regulations provides that the official or other servant may bring an action for annulment before the General Court of the EU against the act adversely affecting him/her. It is necessary to have previously lodged an administrative complaint and for the administration to have rejected it (at least in part).

The time limit for lodging an appeal is three months and runs from the day of the notification of the decision taken in response to the complaint or, where the appeal relates to an implied decision, from the date of expiry of the time limit for a reply.

CASE LAW

The General Court has confirmed the lawfulness of a decision of the Parliament which required the presentation of a valid COVID certificate to any person wishing to access the Parliament's premises

On 27 October 2021, the Bureau of the Parliament (hereinafter the "Bureau") adopted a decision concerning exceptional health and safety rules governing access to the Parliament's premises (hereinafter the "contested decision"). This decision requires the presentation of a valid COVID certificate to any person wishing to access the Parliament's three places of work for a period running from 3 November 2021 to 31 January 2022.

A few Members of the European Parliament ("MEPs") challenged the decision and appealed to the General Court to have it annulled. They relied on several pleas, in particular the violation of their privileges and immunities, as well as the violation of their freedom and independence, and the disregard of their right to privacy. In a judgement of 27 April 2022 (T-710/21, T-722/21 et T-723/21), the General Court dismissed their action and confirmed the validity of the contested decision.

First of all, the General Court recalled that the Bureau was competent to adopt its decision as it is within its competence to regulate financial, organisational, and administrative matters concerning the internal organisation of the Parliament, its secretariat, and its bodies (enshrined in Article 25 of the Parliament's Rules of Procedure).

Secondly, the General Court emphasised that the principle of independent mandate of the MEPs is not absolute and may be subject to limitations in so far as they pursue a legitimate aim and respect the principle of proportionality, a general principle of EU law. In this respect, the judges considered that the contested decision pursues a legitimate aim in that it seeks to reconcile two competing interests in the context of the COVID-19 pandemic, namely the continuity of the Parliament's activities and the health of persons present in the Parliament's premises. The General Court also found that the contested decision did not constitute a disproportionate or unreasonable interference with the independent mandate of the Members, pointing out, inter alia, that MEPs had the possibility to get tested on site free of charge, that derogations could be granted on a case-by-case basis and that the measure was temporary.

The judges also upheld the measure with regard to its personal data processing. On the one hand, they considered that the regulation pursues an objective of general public interest of the Union: the protection of public health. In addition, the Court notes, inter alia, that the information displayed when reading the COVID certificates is limited (surname, first name and validity of the certificate), that the purpose of the data processing is limited to authorising access to the buildings, that the data displayed are not stored, recorded or retained and that they are controlled by a security officer trained to ensure the confidentiality of the data processing activity. Consequently, the Court found that the principle of data minimisation has been respected and that the processing of personal data carried out under the contested decision cannot be regarded as unlawful or unfair.

Finally, concerning the proportionality of the measure, the judges considered that the Parliament could reasonably consider that the adoption of reinforced preventive sanitary measures was necessary to protect the health of the persons present on the Parliament's premises in view of the epidemiological situation and the assessment of the Parliament's medical officer. According to the General Court, the Parliament could also legitimately consider that this measure was adequate and proportionate to the aim pursued, considering the Parliament's obligation to ensure the health of its staff and to respect the precautionary principle.

For these reasons, the Court dismissed the actions.

The Belgian Civil Code extends the legal guarantee for the supply of goods and services to consumers

As of 1 June, 2022, the legal guarantee of conformity for the supply of goods or services to consumers will be extended.

Under the amended provisions of the Civil Code (Articles 1694a to 1694quinquies), the burden of proof of the conformity, or non-conformity, of the goods or services in question, will lie with the professional seller. The consumer's obligation will only consist in declaring a possible lack of conformity. The good or service will be declared non-conforming if it does not correspond to what was contractually foreseen or expected by the consumer.

The guarantee may be invoked within two years of delivery, and the consumer must report the lack of conformity within a period not exceeding two months from the date on which he/she noticed it.

If the goods sold are second-hand goods, the guarantee period is reduced to one year (provided that this limitation has been clearly stated by the seller).

No extension has been adopted with regard to these deadlines.

The legal guarantee has been extended to digital content and services, *i.e.*, respectively, softwares, applications, video files, audio files, games, e-books (non-exhaustive list) and data storage in *"clouds"*, film streaming and social media, etc.

For these products and services, however, the burden of proof of non-conformity will lie with the consumer after the expiry of a period of one year from delivery (and not after two years as for other goods and services).

The professional seller will be obliged to repair, replace or bring the goods into conformity. If these operations involve a disproportionate cost, he will agree to a price reduction or refund.

These provisions will apply to sales contracts concluded after 1 June, 2022.