

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
6 May 2003 \*

In Case T-321/02,

Paul Vannieuwenhuyze-Morin, residing in Grigny (France), represented by  
G. Dupaigne, avocat,

applicant,

v

European Parliament, represented by H. Duintjer Tebbens and A. Caiola, acting  
as Agents, with an address for service in Luxembourg,

and

Council of the European Union, represented by M.-C. Giorgi Fort, acting as  
Agent,

defendants,

\* Language of the case: French.

APPLICATION for partial annulment of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), .

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,  
Registrar: H. Jung,

makes the following

**Order**

**Legal framework**

- <sup>1</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37; ‘the contested directive’ or ‘Directive 2002/58’) harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in

particular the right to privacy, with respect to the processing of personal data in the electronic communications sector and to ensure the free movement of such data and of electronic communications equipment and services in the Community.

- 2 For this purpose, Directive 2002/58 particularises and complements Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and also provides for protection of the legitimate interests of subscribers who are legal persons.

- 3 Recital 40 in the preamble to Directive 2002/58 states as follows:

‘Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes, in particular by means of automated calling machines, telefaxes, and e-mails, including SMS messages. These forms of unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For such forms of unsolicited communications for direct marketing, it is justified to require that prior explicit consent of the recipients is obtained before such communications are addressed to them. The single market requires a harmonised approach to ensure simple, Community-wide rules for businesses and users.’

- 4 Accordingly the first three paragraphs of Article 13, headed ‘Unsolicited communications’, of Directive 2002/58 provide as follows:

‘1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

2. Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.

3. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.’

## Facts and procedure

- 5 The applicant is an internet user and founder of the site Internet-libre.net. He uses the internet to send unsolicited applications to potential employers when he is seeking employment and also to carry out direct mailing over the internet to make himself known and to spread his ideas. These messages are displayed as a mailing by Internet-libre in the 'subject' part of the e-mail and are accompanied by a notice permitting easy removal of the recipient's name from the list of recipients, free of charge.
- 6 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 22 October 2002.
- 7 By separate documents lodged at the Registry on 3 and 5 December 2002 respectively, the Parliament and the Council raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged his observations on those objections on 17 February 2003.
- 8 By documents lodged at the Registry on 13 and 20 February 2003 respectively, the Kingdom of Spain and the Commission applied for leave to intervene in the present proceedings in support of the form of order sought by the defendants. The parties submitted no observations on those applications.

## Forms of order sought by the parties

9 In the application the applicant claims that the Court should:

- declare the action admissible;
- annul Article 13(1) and (2) of Directive 2002/58 and Article 13(3) in so far as it contains the words ‘either without the consent of the subscribers concerned or’ and ‘the choice between these options to be determined by national legislation’;
- make an appropriate order as to costs.

10 In its objection of inadmissibility, the Parliament contends that the Court should:

- declare the action manifestly inadmissible;
- order the applicant to pay the costs.

11 In its objection of inadmissibility, the Council contends that the Court should:

- by way of order, dismiss the action as manifestly inadmissible;
- order the applicant to pay the costs.

12 In his observations on the objections of inadmissibility, the applicant claims that the Court should:

- dismiss the objections on inadmissibility raised by the Council and the Parliament;
- order the proceedings to be continued.

## Law

13 Under Article 114(1) of the Rules of Procedure, the Court may, on application by a party, give a decision on inadmissibility without examining the substance of the case. Article 114(3) provides that the remainder of the proceedings is to be oral unless the Court otherwise decides. In the present case, the Court considers that the documents in the file provide sufficient information to enable the Court to rule upon the defendants' applications without opening the oral procedure.

*Arguments of the parties*

- 14 The Parliament and the Council contend that the action must be ruled manifestly inadmissible because of the nature of the contested measure. They consider that Article 230 EC does not confer a right upon natural and legal persons to challenge the validity of a directive before the Community Courts (Opinion of Advocate General Geelhoed in Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, points 49 and 50).
- 15 The Parliament and the Council add that although, according to Community case-law, a measure can be the subject of an action for annulment only after examination of its content in order to establish its legal nature, nevertheless, in the present case, the contested provisions of Article 13 of the directive at issue are provisions which, because of their content, constitute general rules and do not have the characteristics of decisions addressed to natural or legal persons. Consequently the present action should be declared inadmissible by reason alone of the fact that the form of Directive 2002/58 matches its content and it would be unnecessary to determine whether the directive is of direct and individual concern to the applicant.
- 16 In the alternative, the Parliament and the Council consider that the contested provisions of Directive 2002/58 are of neither direct nor individual concern to the applicant. First, the contested directive cannot, as such, directly affect the applicant's legal situation for the purposes of the fourth paragraph of Article 230 EC. Furthermore, it can produce a direct effect only at the end of the period laid down for its transposition into the domestic legal systems of the Member States, namely by 31 October 2003, and in the event of the Member States' failure to effect such transposition. Second, it is obvious that the contested directive is not of individual concern to the applicant because he is in the same situation as that of all other business users of the internet.



- 17 The applicant considers, first, that the fact that Directive 2002/58 is indeed a measure of general application and not an individual decision taken in the form of a directive should not preclude the admissibility of the present action. According to the applicant, the fourth paragraph of Article 230 EC must be interpreted in the light of the general principles of law common to the Member States of the European Union and of Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which guarantee every citizen's access to the courts. In the present case the applicant has no other means of challenging the contested provisions of the directive in question before the national courts, since those measures do not, according to him, require national implementing measures or, in any case, require implementing measures not open to challenge before the national courts.
- 18 Having regard to those considerations, the applicant, referring to the judgment in Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, paragraph 51, claims next that a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. That is the case here in so far as, as of 31 October 2003, the applicant will be obliged to send a registered letter to each of his correspondents before carrying out any internet mailing at all and consequently will have the greatest difficulty in developing his business. The number and position of other persons who are likewise affected by the contested measures, or who may be so, are of no relevance in that regard.
- 19 Finally, the applicant adds that he is also directly concerned by the contested provisions which do not call for the adoption of any additional measure, whether Community or national, to produce effects in relation to him. Moreover, there is no provision which prevents adjudication on the legality of the contested directive before the period for transposing it expires.

*The findings of the Court*

- 20 Under the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.
- 21 Although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by private persons for the annulment of a directive, it is none the less clear from the case-law that that fact in itself is not sufficient for such actions to be declared inadmissible (Case T-135/96 *UEAPME v Council* [1998] ECR II-2335, paragraph 63; order of 10 September 2002 in Case T-223/01 *Japan Tobacco and JT International v Parliament and Council* [2002] ECR II-3259, paragraph 28). In addition, the Community institutions cannot, merely by their choice of the form of the measure at issue, deprive individuals of the judicial protection which is afforded them by that provision of the Treaty (orders of 14 January 2002 in Case T-84/01 *Association contre l'heure d'été v Parliament and Council* [2002] ECR II-99, paragraph 23, and *Japan Tobacco and JT International*, cited above, paragraph 28). Therefore it is necessary to ascertain whether the contested directive is a decision of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC.
- 22 In the present case, it is common ground that Directive 2002/58 is indeed a legislative measure. The rules which it contains, in particular the first three paragraphs of Article 13, laying down provisions intended to regulate unsolicited electronic communications, are set out in general terms, apply to objectively determined situations and produce legal effects in relation to categories of persons considered generally and objectively, namely any natural or legal person providing electronic communications services and any user of or subscriber to those services.

- 23 However, the fact that the contested measure is, by nature, legislative and is not a decision within the meaning of Article 249 EC is not in itself sufficient to make it impossible for the applicant to bring an action for its annulment.
- 24 In certain circumstances, even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them (Case C-358/89 *Exramet Industrie v Council* [1991] ECR I-2501, paragraph 13; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 19, and order in *Japan Tobacco and JT International*, cited above, paragraph 29).
- 25 It follows that the plea of inadmissibility based on the legislative nature of the contested measure must be dismissed and therefore it is necessary to determine whether the contested directive is of individual and direct concern to the applicant.
- 26 On this point it must be observed that, in accordance with settled case-law, persons other than those to whom a measure is addressed may claim to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, only if that measure affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann v Commission* [1962] ECR 95, 107; *UEAPME v Council*, cited above, paragraph 69, and the order in *Association contre l'heure d'été v Parliament and Council*, cited above, paragraph 24).
- 27 This condition of admissibility of an action brought by a natural or legal person was recently called to mind by the Court of Justice in terms identical to those given in paragraph 26 above in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 36.

- 28 In the present case, as already mentioned, the rules in the contested directive, in particular those in Article 13(1) to (3), regulating unsolicited electronic communications, are set out in general terms, apply to objectively determined situations and produce legal effects in relation to categories of persons considered generally and objectively, namely providers of electronic communications services and any users of or subscribers to those services.
- 29 It follows that Directive 2002/58 concerns the applicant only in his objective capacity as an internet user, in the same way as all other business users of the internet.
- 30 This conclusion is not affected by the applicant's argument (see paragraphs 17 and 18 above) that, as there is allegedly no remedy before the national courts and in order to safeguard his right to effective judicial protection, the contested provisions of Directive 2002/58 must be considered to be of individual concern to him in so far as they affect his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him, for the purposes of the fourth paragraph of Article 230 EC, as interpreted by the judgment in *Jégo-Quéré v Commission*, cited above. In the light of the judgment in *Unión de Pequeños Agricultores v Council*, cited above (paragraphs 43 and 44), this argument is unfounded and must be dismissed.
- 31 It is also necessary to dismiss the applicant's argument that, in accordance with paragraph 51 of the judgment in *Jégo-Quéré v Commission*, cited above, the number and position of other persons who are likewise affected by the contested provisions of Article 13 of Directive 2002/58, or who may be so, are of no relevance in determining whether the present action is admissible. It must be observed that, in claiming that those factors are not relevant for distinguishing him individually, the applicant neither alleges nor proves, in accordance with the

case-law cited in paragraphs 26 and 27 above, that Article 13 of Directive 2002/58 affects him by reason of certain attributes which are peculiar to him or by reason of circumstances in which he is differentiated from all other persons and by virtue of these factors distinguishes him individually just as in the case of the person addressed.

32 It follows from the foregoing that the contested provisions of Directive 2002/58 cannot be regarded as of individual concern to the applicant. In so far as he fulfils none of the conditions of admissibility laid down by the fourth paragraph of Article 230 EC, it is unnecessary to examine the defendants' submission that those same provisions are not of direct concern to the applicant.

33 It follows that the action must be dismissed as inadmissible.

34 In those circumstances, it is unnecessary to give a ruling on the applications for leave to intervene by the Kingdom of Spain and the Commission.

## Costs

35 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has failed in his submissions, he must be ordered to pay the costs, in accordance with the applications of the Parliament and the Council.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The application is dismissed as inadmissible.
2. It is not necessary to adjudicate on the applications for leave to intervene by the Kingdom of Spain and the Commission.
3. The applicant shall bear his own costs and pay those of the Parliament and the Council.

Luxembourg, 6 May 2003.

H. Jung

Registrar

V. Tiili

President