Reports of Cases

ORDER OF THE COURT (Ninth Chamber)

15 November 2022*

(Reference for a preliminary ruling – Article 53(2) and Articles 94 and 99 of the Rules of Procedure of the Court of Justice – Insolvency proceedings – Mutual set-offs with an insolvent credit institution – Retroactive amendment to the conditions for the enforcement of those set-offs – National legislation declared unconstitutional – Purely internal situation – Manifest inadmissibility)

In Case C-260/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Okrazhen sad Vidin (Regional Court, Vidin, Bulgaria), made by decision of 21 April 2021, received at the Court on 23 April 2021, in the proceedings

Corporate Commercial Bank, in liquidation

v

Elit Petrol AD,

THE COURT (Ninth Chamber),

composed of L.S. Rossi, President of the Chamber, J.-C. Bonichot (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Corporate Commercial Bank, in liquidation, by A.N. Donov, K.H. Marinova, representatives, and V. Matev, advokat,

– Elit Petrol AD, by A. Kolarov and G. Stoychev, advokati,

– the European Commission, by M. Mataija, G. von Rintelen and I. Zaloguin, acting as Agents,

* Language of the case: Bulgarian.

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 53(2) and Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 2 TEU, read in conjunction with Article 19(1) TEU and the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Article 4(2)(a) and Articles 26, 27, 63, 114 and 115 TFEU, and of the principle of legal certainty.

2 The request has been made in proceedings between Corporate Commercial Bank, in liquidation ('KTB'), and Elit Petrol AD concerning the payment by way of set-off of debts owed by Elit Petrol AD to KTB.

Legal context

3 Article 59 of the zakon za bankovata nesastoyatelnost (Law on the insolvency of banks, DV No 92 of 27 September 2002; 'the ZBN'), which lays down the conditions for the set-off of the debts and claims of a bank in the event of insolvency, was amended by the zakon za izmenenie i dopalnenie na zakona za bankovata nesastoyatelnost (Law amending and supplementing the Law on the insolvency of banks, DV No 98 of 28 November 2014).

4 Paragraphs 5, 7 and 8 of the transitional and final provisions of the zakon za izmenenie i dopalnenie na zakona za bankovata nesastoyatelnost (Law amending and supplementing the Law on the insolvency of banks, DV No 22 of 13 March 2018; 'the ZIDZBN') provide:

'5. (1) The cancellation of security interests issued by debtors or third parties to [KTB], in insolvency, by financial controllers and by the bank's interim and permanent insolvency administrators between the date on which that bank was placed under special supervision and the date of opening of the procedure for the realisation of the bank's assets, shall be null and void. The issued security interests shall be deemed valid and shall retain their rank.

…

7. This Law shall also apply to insolvency proceedings opened before its entry into force.

8. Paragraphs 5, 6 and 7 of Article 59 shall apply from 20 June 2014.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 KTB, the applicant in the main proceedings, is a Bulgarian bank which is the subject of insolvency proceedings under the ZBN.

6 Elit Petrol, the defendant in the main proceedings, is a Bulgarian undertaking which is the subject of insolvency proceedings pursuant to the rules of the Targovski zakon (Bulgarian Commercial Code), before the Okrazhen sad Vidin (Regional Court, Vidin, Bulgaria).

7 In October and November 2014, Elit Petrol set off part of the liabilities it had towards KTB under two loan agreements, in accordance with the provisions of the ZBN in force on those dates ('the set-offs at issue').

8 In November 2014, the Bulgarian legislature amended the conditions laid down by the ZBN for declaring such transactions enforceable.

9 In March 2018, by the transitional and final provisions of the ZIDZBN, the Bulgarian legislature accorded those amendments retroactive effect.

10 On 8 June 2018, KTB's insolvency administrators asserted claims held against Elit Petrol under the two loan agreements that Elit Petrol had taken out with that bank.

11 In the insolvency proceedings in respect of Elit Petrol, KTB's insolvency administrators relied on the transitional and final provisions of the ZIDZBN in order to argue that those claims, which had been the subject of the set-offs at issue, were 'restored' by operation of those provisions.

12 Elit Petrol's insolvency administrator takes the view, on the other hand, that those claims were definitively settled by the set-offs at issue and that the legislation relied on by KTB in support of its application is contrary to EU law.

13 The referring court expresses doubts as to whether that legislation is in compliance with EU law.

14 In those circumstances, the Okrazhen sad Vidin (Regional Court, Vidin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 63 TFEU, which governs the free movement of capital and payments, to be interpreted as covering the declaration of a set-off in a relationship with a banking institution where a commercial company which is a debtor of the bank discharges its liabilities by way of set-off against reciprocal claims against the same bank which are certain, of a fixed amount and due?

(2) Is Article 63 TFEU to be interpreted as meaning that an amendment of the conditions for the validity of set-offs already lawfully declared in a relationship between a commercial company and a banking institution, by which the set-offs declared are declared to be invalid on the basis of new conditions which apply retroactively to the set-offs already declared, constitutes a restriction within the meaning of Article 63(1) TFEU if it has the effect of restricting the possibility to discharge liabilities towards other companies in which persons from other Member States of the European Union hold share capital or stock or from which such persons hold bonds?

(3) Is Article 63 TFEU to be interpreted as permitting national legislation which retroactively amends the conditions for the validity of set-offs already lawfully declared in a relationship between a commercial company and a banking institution and which declares the declared set-offs to be invalid on the basis of new conditions applied retroactively to the set-offs already invoked?

(4) Are Article 4(2)(a) and Articles 26, 27, 114 and 115 TFEU, which govern the internal market of the European Union, to be interpreted as meaning that, also in cases in which the legal relationships exist only between legal entities of the same nationality and can therefore be categorised as domestic legal relationships without a direct cross-border link to the internal market of the European Union, those provisions permit national legislation which retroactively amends the conditions for the validity of set-offs already lawfully declared in a relationship between a commercial company and a banking institution in a Member State by declaring the declared set-offs to be invalid on the basis of new conditions applied retroactively to the set-offs already invoked?

(5) Is Article 2 TEU, read in conjunction with Article 19(1) thereof and the first and second paragraphs of Article 47 of the Charter, to be interpreted as permitting the adoption of national legislation which amends the conditions under which set-offs can be validly declared in a relationship with a banking institution by expressly giving retroactive effect to the new conditions and declaring set-offs lawfully invoked in an earlier period to be invalid, while, in the Member State concerned, insolvency proceedings concerning the banking institution have been opened and court proceedings for a declaration of invalidity of set-offs invoked against the bank which were subject to different legal conditions at the time they were invoked are pending?

(6) Is the principle of legal certainty, as a general principle of EU law, to be interpreted as permitting national legislation which amends the conditions under which set-offs can be validly declared in a relationship with a banking institution by expressly giving retroactive effect to the new conditions and declaring set-offs lawfully invoked in an earlier period to be invalid, while, in the Member State concerned, insolvency proceedings concerning the banking institution have been opened and court proceedings for a declaration of invalidity of set-offs invoked against the bank which were subject to different legal conditions at the time they were invoked are pending?'

Admissibility of the request for a preliminary ruling

15 By its questions, the referring court asks, in essence, first, whether the legislation of a Member State governing set-off, by which an undertaking discharges its liabilities towards a bank by offsetting those liabilities against the value of the claims that the undertaking has against that bank, falls within the scope of Article 63 TFEU and, secondly, whether Article 63 TFEU, Article 2 TEU, read in conjunction with Article 19(1) TEU and the first and second paragraphs of Article 47 of the Charter, Article 4(2)(a) and Articles 26, 27, 114 and 115 TFEU, and the principle of legal certainty, preclude a retroactive amendment of the conditions for effecting such a set-off transaction.

16 Under the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (see, inter alia, order of 26 March 2021, *Fedasil*, C-92/21, EU:C:2021:258, paragraph 47 and the case-law cited).

17 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, order of 26 March 2021, *Fedasil*, C-92/21, EU:C:2021:258, paragraph 48 and the case-law cited).

18 In the present case, it is apparent from the material submitted to the Court that the provisions of Bulgarian law applicable to the dispute in the main proceedings, namely paragraphs 5 to 8 of the transitional and final provisions of the ZIDZBN, were declared unconstitutional, at least in part, by a decision of the Konstitutsionen sad (Constitutional Court, Bulgaria) of 27 May 2021.

19 In its reply to the request for clarification sent to it by the Court pursuant to Article 101 of the Rules of Procedure of the Court of Justice, the referring court states that its questions nevertheless remain relevant to the resolution of the dispute in the main proceedings, in particular because the decision referred to in the preceding paragraph has only prospective effect.

20 In those circumstances, the information available to the Court does not enable it to find that the request for a preliminary ruling is manifestly inadmissible on the ground that it is irrelevant.

Consideration of the questions referred

21 Under Article 53(2) of the Rules of Procedure, where a request is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

22 Furthermore, pursuant to Article 99 of those rules, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

23 It is appropriate to apply those provisions in the present case.

The first, second and third questions

24 As regards the first to third questions, relating to Article 63 TFEU, it should be borne in mind that the provisions of the FEU Treaty on the free movement of capital do not apply to a situation which is confined in all respects within a single Member State (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited). It is, therefore, for the referring court to determine, before any application of Article 63 TFEU, whether there is, in the case before it, a cross-border situation involving the exercise of the free movement of capital between Member States or between Member States and third countries (see, to that effect, judgment of 16 September 2020, *Romenergo and Aris Capital*, C-339/19, EU:C:2020:709, paragraph 27 and the case-law cited).

25 In the present case, it is apparent from the order for reference that the dispute in the main proceedings is confined in all respects within the Member State concerned.

26 KTB and Elit Petrol are established in Bulgaria and the set-offs at issue concern liabilities and claims which they had directly against each other; the mere fact that their assets may be comprised of securities issued by companies established in other Member States cannot alter the analysis in that regard.

27 As to the arguments raised by Elit Petrol that the retroactive amendment by law of the effects of the set-offs at issue would lead to the restoration of its liabilities, which would have an impact on its financial relations, and those of its parent company, with creditors established in other Member States or in third countries or in which the capital is held by persons residing in other Member States, it must be stated that such an impact, even if proved, would be too uncertain and too indirect to demonstrate a connection with the free movement of capital established in Article 63 TFEU.

28 Furthermore, while it is true that, in the instances set out in paragraphs 50 to 53 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874), the Court held that requests for a preliminary ruling on the interpretation of the provisions of the FEU Treaty relating to fundamental freedoms were admissible, even though the disputes in the main proceedings were confined in all respects within a single Member State, the referring court has not provided the Court with any information to enable it to find that the questions concerning the interpretation of Article 63 TFEU fall within one of those situations.

29 It follows that the first to third questions are manifestly inadmissible.

The fourth question

30 As regards the fourth question, relating to Article 4(2)(a) and Articles 26, 27, 114 and 115 TFEU, it must be borne in mind that the national court is required, in the order for reference, to set out the factual and legislative context of the dispute in the main proceedings and to provide the necessary explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link it establishes between those provisions and the national law applicable to the proceedings pending before it (see, to that effect, inter alia, judgment of 4 June 2020, *C.F. (Tax inspection)*, C-430/19, EU:C:2020:429, paragraph 23 and the case-law cited).

31 Those requirements relating to the content of an order for reference are expressly set out in Article 94 of the Rules of Procedure, of which the national court should, in the context of the cooperation established by Article 267 TFEU, be aware and which it is bound to observe scrupulously (see, to that effect, order of 3 July 2014, *Talasca*, C-19/14, EU:C:2014:2049, paragraph 21). They are, moreover, reiterated in paragraphs 13, 15 and 16 of the Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1).

32 In the present case, the order for reference clearly fails to meet the requirements set out in Article 94(c) of the Rules of Procedure.

33 The order for reference does not set out the reasons which prompted the national court to inquire about the interpretation of Article 4(2)(a) and Articles 26, 27, 114 and 115 TFEU, nor does it set out the relationship between those provisions and the national legislation applicable to the main proceedings, with the result that the Court is unable to assess to what extent an answer to the fourth question is necessary for the resolution of the dispute in the main proceedings.

34 Consequently, the fourth question is manifestly inadmissible.

The fifth question

35 As regards the fifth question, relating to the interpretation of Article 2 TEU, read in conjunction with Article 19(1) TEU and the first and second paragraphs of Article 47 of the Charter, the order for reference states in particular that the retroactive amendment resulting from the transitional and final provisions of the ZIDZBN would prejudge the outcome of several pending disputes, which would, inter alia, undermine the constitutional principle of the separation of powers enshrined in the Bulgarian Constitution and, consequently, affect the independence from the legislature of the national courts before which such disputes are brought.

36 It should be borne in mind that the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law (see, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 37 and the case-law cited). That provision refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 36 and the case-law cited).

37 Thus, every Member State must, in accordance with the second subparagraph of Article 19(1) TEU, ensure that the bodies which may be called upon to rule, as 'courts or tribunals' within the meaning of EU law, on questions related to the application or interpretation of EU law and therefore come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection, including, in particular, that of independence (see, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraphs 40 and 81).

38 In that regard, the requirement that courts of the Member States be independent, which follows from the second subparagraph of Article 19(1) TEU and which must, inter alia, be guaranteed in relation to the legislature and the executive, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, has two aspects to it (see, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraphs 41 and 42 and the case-law cited).

39 The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 41).

40 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72, and of 22 February 2022, *RS (Effect of the judgments of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 41).

41 In the present case, it is clear that the adoption by a Member State of general provisions of civil or commercial law relating to the regime for set-off in the context of the insolvency of a bank, even if they are retroactive, is not in itself of such a nature as to undermine the requirements set out in paragraphs 39 and 40 above, subject always to their compliance with national law, which is a matter for the national courts alone to determine.

42 Consequently, the answer to the fifth question is that the second subparagraph of Article 19(1) TEU must be interpreted as not precluding the adoption by a Member State of general rules on set-off in the context of the insolvency of a bank, even if they are retroactive.

The sixth question

43 As regards, lastly, the sixth question, relating to the principle of legal certainty, it should be borne in mind that, where Member States adopt measures by which they implement EU law, they are required to observe the general principles of EU law, which include, inter alia, the principle of legal certainty (see, to that effect, judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 29 and the case-law cited).

44 As stated in paragraph 25 above, the dispute in the main proceedings concerns a situation which is confined in all respects within a single Member State. Furthermore, there is nothing in the order for reference to enable the finding that the dispute concerns national legislation which is implementing EU law.

45 It follows that the sixth question is manifestly inadmissible.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **The second subparagraph of Article 19(1) TEU must be interpreted as not precluding the adoption by a Member State of general rules on set-off in the context of the insolvency of a bank, even if they are retroactive.**

2. **The first to fourth and sixth questions submitted by the Okrazhen sad Vidin (Regional Court, Vidin, Bulgaria) are manifestly inadmissible.**

[Signatures]