Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 13 January 2016[1]

Case C-161/15

Abdelhafid Bensada Benallal
v
État belge

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Reference for a preliminary ruling — General principle of EU law — Rights of the defence — Right to be heard — Plea based on public policy — Plea raised of a court's own motion — Principle of equivalence — Role of the national courts and the EU Courts — Union citizen — Order to leave the territory — Abuse of rights)

I – **Introduction**

1. Does respect for the rights of the defence, including respect for the right to be heard before any decision is taken by an administrative authority, have a ranking similar to that of rules of public policy under national law with the result that, pursuant to the principle of equivalence, an administrative court of last instance is required to rule on a plea alleging infringement of the right to be heard raised for the first time before it, as is permitted under national law for pleas based on public policy?

2. That is, in essence, the question referred by the Belgian Conseil d'État (Council of State) in the context of a dispute between Mr Bensada Benallal, a Spanish national, and the Belgian Immigration Office (Office des étrangers), concerning a decision taken by the latter on 26 September 2013 withdrawing the residence authorisation of the applicant in the main proceedings and ordering him to leave Belgium.

3. Specifically, one year after issuing a residence authorisation to him as a salaried worker, the Belgian Immigration Office adopted that decision because it appeared that 'the interested party [had] used misleading information which was determinative in the recognition of his right to reside by the local council of Berchem-Sainte-Agathe [Belgium]. In its report of 4 September 2013, the [National Social Security Office (Office national de sécurité sociale)] found that all the individuals declared by the company … were not subject to the general social security regime for salaried workers: "Considerable detailed and consistent evidence establishes to the required legal standard the absence of genuine activity by the salaried workers of [that] company … and consequently the absence of an employment contract between the individuals notified ... and that company"'.

1 — Original language: French.

4. On 2 January 2014, the applicant in the main proceedings submitted an application to the Belgian Conseil du contentieux des étrangers (Asylum and Immigration Board) for annulment of that decision. In support of his application, the applicant in the main proceedings put forward a single plea alleging infringement of a legislative provision concerning the giving of formal reasons for administrative measures, infringement of the principles of good administration, of legal certainty, of proportionality, of care and of detailed and exhaustive examination, of sound management and of the principle that the authorities are required to take decisions on the basis of all the circumstances of the case, and breach of Article 35 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. [2]

5. In his submissions intended to clarify that single plea, the applicant in the main proceedings argued, inter alia, that the contested decision was vitiated by a deficient statement of reasons. He submitted that the report of the National Social Security Office on which that decision was based had neither been attached to that decision nor substantially reproduced therein and also had not been sent to him prior to notification of that decision, with the result that the applicant in the main proceedings had been unable to understand the reasons for the decision taken against him.

6. The application for annulment was rejected by judgment of the Conseil du contentieux des étrangers (Asylum and Immigration Board) of 30 April 2014, in which it made the following findings, among others:

'In any event, the Conseil [du contentieux des étrangers (Asylum and Immigration Board)] finds that over a year passed between the applicant producing his employment contract with the company … and the report by the inspector of the [National Social Security Office] which led to the contested decision, a period during which the applicant did not send or communicate any information to the defendant concerning the issues raised in terms of the application and which the applicant would have encountered in the contract of employment with that company.

If the applicant was of the opinion that he could advance evidence that might prevent the withdrawal of his residence permit, it was for him to bring that evidence to the attention of the defendant and not for the latter to invite the applicant to make his observations in that regard. The Conseil [du contentieux des étrangers (Asylum and Immigration Board)] reiterates that it is for the applicant to demonstrate that he fulfils the necessary conditions for the right that he claims and in order to maintain that right. In so far as the applicant made an application for a registration certificate in Belgium as a "salaried worker", he could/should reasonably expect that the non-fulfilment of his employment contract (even if that is nothing to do with him) would have consequences for his residence and would be aware that it was necessary to volunteer this information to the defendant, which was not the case here, as is apparent from the administrative file.

As to the fact that the applicant "did not receive a registered letter as confirmed in the investigation and, therefore, did not have the opportunity to be heard", he may not challenge that fact since the applicant's complaint relates to the hearing by the inspector in charge of the report of the [National Social Security Office] of 4 September 2013 (that hearing, moreover, was not only based on statements but also on objective findings none of which have been contested by the applicant) and does not relate directly to the contested decision.'

2 — OJ 2004 L 158, p. 77.

7. On 10 May 2014, the applicant in the main proceedings brought an appeal on a point of law before the Conseil d'État (Council of State) which includes, inter alia, a plea in which the applicant in the main proceedings maintains that the Belgian Immigration Office ought to have given him an opportunity to be heard before adopting the contested decision. In that connection, the applicant in the main proceedings alleges infringement of Article 41 and Article 51 of the Charter of Fundamental Rights of the European Union ('the Charter'), of the rights of the defence, of the right to an adversarial process and of the principle of *audi alteram partem*.

8. The Belgian Immigration Office submits in reply, inter alia, that the plea is inadmissible since it was raised for the first time at the stage of the appeal on a point of law and is not based on public policy.

9. The Conseil d'État (Council of State) observes that the applicant in the main proceedings submits a plea on which he did not rely before the Conseil du contentieux des étrangers (Asylum and Immigration Board). Under Belgian law, the Conseil d'État (Council of State) can admit such a plea as admissible only if it is based on public policy. It explains that, under domestic law, the rules of public policy are those which are of fundamental importance in the Belgian legal system, such as the rules relating to the powers of the administrative authorities, the jurisdiction of the courts, respect for the rights of the defence or those concerning certain fundamental rights.

10. Referring in particular to the judgments in *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318) and *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615), the Conseil d'État (Council of State) expresses uncertainty as to whether the general EU — law principle of respect for the rights of the defence, including the right to be heard, occupies a similar position in the EU legal order and whether the principle of equivalence requires it to examine a plea, raised for the first time in an appeal on a point of law, alleging infringement of the rights of the defence, as is permitted under national law for pleas based on public policy.

11. It was on that basis that the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the general principle of EU law upholding the rights of the defence, including the right of an individual to be heard by a national authority before any decision is taken by that authority likely adversely to affect that individual's interests, such as a decision ending that individual's residence authorisation, carry in the legal system of the European Union an equivalent importance to that held by the rules of public policy in the Belgian legal system, and does the principle of equivalence require that a plea can be raised for the first time before the Conseil d'État (Council of State) hearing an appeal on a point of law based on breach of the general principle of EU law of the right to be heard as is permitted in the national law for pleas based on public policy?'

12. That question was the subject of written observations from the applicant in the main proceedings, the Belgian and French Governments, and the European Commission. Those parties, except for the applicant in the main proceedings, who was not represented, also presented oral argument at the hearing held on 19 November 2015.

II – **Assessment**

A – *Preliminary observations*

13. This case affords the Court the opportunity to clarify a number of issues relating to the role of the courts in administrative proceedings, particularly as regards the possibility for those courts to declare admissible a plea alleging infringement of the right to be heard raised for the first time on appeal or to raise such a plea of their own motion.

14. Before examining the two parts of the question referred for a preliminary ruling by the national court, I would like to make four preliminary observations.

15. The first concerns the interpretation of the legal and factual context giving rise to the main proceedings and, specifically, the finding of the Conseil d'État (Council of State) that the plea alleging infringement of the right to be heard was raised for the first time at the stage of the appeal on a point of law. It is apparent from the judgment of 30 April 2014 delivered by the Conseil du contentieux des étrangers (Asylum and Immigration Board), the relevant sections of which are reproduced in point 6 above, that the Board interpreted the single plea in law raised before it as covering, at least by implication, an infringement by the Belgian Immigration Office of the right of the applicant in the main proceedings to be heard prior to the adoption of the contested decision. Indeed, the Conseil du contentieux des étrangers (Asylum and Immigration Board) stated that if the applicant in the main proceedings 'was of the opinion that he could advance evidence that might prevent the withdrawal of his residence permit, it was for him to bring that evidence to the attention of the defendant and not for the defendant to invite the applicant to make his observations in that regard'. At first sight, therefore, this is a position statement that the complaint is well founded which, in the context of the appeal, could have resulted in the Conseil d'État (Council of State) simply reviewing the substance of the assessment of the Conseil du contentieux des étrangers (Asylum and Immigration Board) and, depending on the circumstances, declaring that assessment to be unlawful. [3]

16. That being the case, it is obvious that, in the context of the allocation of powers between the Court of Justice and the national courts under Article 267 TFEU, the interpretation given by the Conseil d'État (Council of State) of the scope of the action at first instance raised by the applicant in the main proceedings falls exclusively within the remit of the assessment of the referring court and it is not for the Court of Justice to interfere in that respect. Accordingly, the latter must consider as categorically established the finding that the plea alleging infringement of the right to be heard, based on EU law, was raised only at the appeal stage before the referring court.

17. The same holds (and this is my second observation) for the classification of that plea under national law, even though such classification is disputed by the Belgian Government in its written observations. In the reference for a preliminary ruling, it is not for the Court to decide on the difference that the Belgian Government claims to exist under national law between, on the one hand, an infringement of the rights of defence in the disciplinary and criminal field which falls within the category of pleas based on public policy capable of being raised of a court's own motion and, on the other hand, an infringement of the right to be heard by an administrative authority before it adopts an adverse decision which is not of a public policy nature and cannot therefore be raised of a court's own motion. [4]

18. It is sufficient to note that, in its request for a preliminary ruling, the Conseil d'État (Council of State) includes respect for the right to be heard within respect for the rights of the defence and starts from the premiss that that right may be examined of a court's own motion under national law which, moreover, is the very reason for the question referred for a preliminary ruling, centring round the requirements flowing from observance of the principle of equivalence.

19. My third observation concerns the scope of EU law and the assessment of the Belgian Immigration Office, upheld by the Conseil du contentieux des étrangers (Asylum and Immigration Board), according to which, in essence, the withdrawal of the residence authorisation of the applicant in the main proceedings was motivated by an abuse or fraudulent use of the provisions of EU law.

3 — So far as is relevant, I would pause over that, when ruling on an appeal, the Court of Justice admits pleas which have their origins in an assessment in the judgment of the General Court under appeal before it. See, inter alia, judgment in *Areva and Others* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 118 and 170 and the case-law cited).

4 — Need it be recalled that the Court has repeatedly held that it is not for it to rule on the interpretation of national law, a task which lies exclusively with the referring court? See, inter alia, judgment in *Târșia* (C-69/14, EU:C:2015:662, paragraph 13 and the case-law cited).

20. The applicant in the main proceedings disputes that classification by the Belgian Immigration Office and argues that the latter infringed Article 35 of Directive 2004/38, entitled 'abuse of rights', under which, in particular, Member States are entitled to 'adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud', in keeping with the principle of proportionality.

21. It is unclear whether, if proven, such abuse or fraudulent use would have the effect of removing from the scope of EU law the situation of a national of a Member State who has exercised one of the freedoms of movement guaranteed by the TFEU, so that the question raised would become irrelevant.

22. As previously stated in my Opinion in *Fonnship and Svenska Transportarbetareförbundet* (C-83/13, EU:C:2014:201, points 62 and 66), the case-law of the Court does not provide an unambiguous answer to whether the notion of abuse of rights constitutes a rule capable of defining the scope of the provisions of EU law (in which case the Court would lack jurisdiction to reply to the question referred for a preliminary ruling by the national court) or whether, on the contrary, it can be viewed as a rule or principle permitting the restriction of the exercise of a (subjective) right conferred by those provisions (so that the situation in the main proceedings could be regarded as falling within the scope of EU law and a reply should be provided to the question referred to the Court). [5]

23. Without it being necessary to repeat the arguments in favour of the second proposition here, I am inclined to the view that to consider the prohibition on the abuse of rights to be a principle defining the scope of provisions of EU law is tantamount to conferring on it — in relation to the fundamental freedoms of movement — a status similar to that of a rule of reason, which I think is incorrect and inappropriate. An acknowledgement of that kind would mean establishing, in all cases, that a given situation does not involve an abuse of rights before that situation could be considered to fall within the scope of EU law. Such a relationship between the abuse and the right, favouring the examination of the abuse over that of the right, would, to my mind, significantly undermine the effectiveness of the freedoms of movement guaranteed by the TFEU. [6]

24. Moreover, Article 35 of Directive 2004/38 confirms, in my view, that the prohibition on abuse of rights is a principle which restricts the subjective rights granted by EU law to individuals. That provision simply permits Member States to take measures to penalise the abuse of a right previously conferred by the directive on Union citizens and their family members.

25. Consequently, I consider that a situation such as that in the main proceedings clearly falls within the scope of EU law. The Court should therefore provide an answer on the substance of the question referred for a preliminary ruling by the national court.

26. Lastly, my fourth observation concerns the scope of the question referred by the national court.

5 — Thus, the Court has stated that 'it is settled case-law that *the scope* of European Union regulations *must not be extended to cover* abuses on the part of a trader' (see judgment in *Slancheva sila* (C-434/12, EU:C:2013:546 and the case-law cited)) (emphasis added), thereby suggesting that the notion of abuse (of rights) is a rule that defines the scope of the provisions of EU law (Advocate General Poiares Maduro also argued in favour of that classification in his Opinion in *Halifax and Others* (C-255/02, EU:C:2005:200, point 69)). On the other hand, the Court has found that 'any abusive use of the rights granted by the [EU] legal order under the provisions relating to the freedom of movement for workers *presupposes that the person concerned falls within the scope ratione personae of that Treaty* because he satisfies the conditions for classification as a worker' (judgment in *Ninni-Orasche* (C-413/01, EU:C:2003:600, paragraph 31)) (emphasis added) and has also examined action to counteract abusive practices under public interest grounds capable of justifying restrictions on the freedoms of movement (see, inter alia, judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 55) and *SIAT* (C-318/10, EU:C:2012:415, paragraph 50)).

6 — See my Opinion in *Fonnship and Svenska Transportarbetareförbundet* (C-83/13, EU:C:2014:201, point 70).

27. The national court asks the Court about respect for the rights of the defence, including respect for the interested person's right to be heard by the authorities before they take a decision which will adversely affect him, as a general principle of EU law and not as enshrined in Article 41 and Article 47 of the Charter, the first of which was pleaded by the applicant in the main proceedings in his appeal on a point of law before the Conseil d'État (Council of State).

28. The applicability of Article 41 of the Charter to Member States when they implement EU law, namely when national measures they adopt fall within the scope of EU law,[7] remains a matter of dispute.

29. Although the 'right to good administration' referred to in that article includes, pursuant to paragraph 2(a) thereof, 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken', its provisions are addressed only to 'the institutions, bodies, offices and agencies of the Union', according to paragraph 1.

30. In a series of judgments, the Court inferred from that wording that Article 41(2) of the Charter does not apply to the Member States,[8] which resulted in it examining the questions raised in some of those judgments in the light of the general principle of EU law of respect for the rights of the defence, of which the right to be heard forms an integral part.[9]

31. However, in another line of case-law, the Court has held that Article 41 of the Charter may apply to measures of the Member States when the latter implement EU law[10] and is a provision 'of general application'.[11]

32. As I recalled in my Opinion in *CO Sociedad de Gestion y Participación and Others* (C-18/14, EU:C:2015:95, footnote 48), Article 51(1) of the Charter obliges the Member States to apply the provisions of the Charter 'when they are implementing Union law'. Accordingly, the Member States are required to comply with the provisions of the Charter, including the right of persons subject to administration to be heard, as laid down in Article 41(2)(a) thereof. A literal interpretation of Article 41 of the Charter that consists in ruling out its applicability to the Member States would lead to an acceptance that the right to be heard provided for in Article 41 is an exception to Article 51 of the Charter, which provides for the applicability of all the 'provisions of this Charter' to the Member States when they are implementing EU law. As Advocate General Wathelet pointed out in his Opinion in *Mukarubega* (C-166/13, EU:C:2014:2031, point 56), it is not 'consistent … that the wording of Article 41 of the Charter can allow the introduction of an exception to the rule laid down in Article 51 thereof enabling the Member States not to apply an article of the Charter, even when they are implementing EU law'.

33. In the main proceedings, the contested decision by which the Belgian Immigration Office withdrew the residence authorisation of a Union citizen and ordered him to leave the Kingdom of Belgium is undeniably a measure falling within the scope of EU law the aim of which, specifically, is to implement the permission granted by Article 35 of Directive 2004/38.

7 — Judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 18 to 21).

8 — See judgments in *Cicala* (C-482/10, EU:C:2011:868, paragraph 28); *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67); *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 44); and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraphs 32 and 33).

9 — See judgments in *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 45) and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 34).

10 — See judgment in *N.* (C-604/12, EU:C:2014:302, paragraphs 49 and 50). Also see, by implication, judgment in *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 29), in which the Court simply ruled out the applicability *ratione temporis* of Article 41(2) of the Charter to the situation giving rise to the main proceedings.

11 — Judgment in *M.* (C-277/11, EU:C:2012:744, paragraph 84).

34. The Court could therefore reformulate the question raised so as to answer it in terms of Article 41(2)(a) of the Charter rather than in terms of the application of the general principle of EU law of respect for the rights of the defence, including the right to be heard, which seems to me to be the most appropriate approach, in view of the foregoing considerations.

35. Having set out my preliminary observations, I think that the reply to the question referred for a preliminary ruling can be split into two parts. In the first place, it is necessary to examine whether, as the national court presupposes, the application of the principle of equivalence is subject to the requirement that respect for the right to be heard must have a ranking in the EU legal order similar to that under domestic law in order to be raised of a court's own motion. If so, it will be necessary to ascertain, in the second place, whether the right to be heard constitutes a rule of public policy that the EU Courts may examine of their own motion, which gives rise to the controversial question whether infringement of that right must be regarded as an infringement of essential procedural requirements.

B – *Application of the principle of equivalence subject to the requirement that the rule of EU law must have a similar ranking to rules of domestic law that may be raised of a court's own motion*

36. The Court has repeatedly held that the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. [12]

37. In accordance with the Court's case-law, the obligation to respect the right to be heard is triggered even where the applicable legislation does not expressly provide for such a procedural requirement [13] and applies, as a rule, to the authorities of the Member States when they take measures which come within the scope of EU law. [14]

38. Where neither the conditions under which respect for the right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by EU law, those conditions and consequences are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the EU legal order (principle of effectiveness). [15]

39. In the present case, as the Commission correctly pointed out, even though Directive 2004/38 — in accordance with Article 31 thereof — provides that the Member States must ensure that the persons concerned have access to judicial redress procedures against expulsion decisions, [16] it does not provide for the right of those persons to be heard by the competent authority of the host Member State before such a decision is taken.

40. Consequently, as the referring court correctly pointed out, the conditions under which the right to be heard is to be exercised are governed by national law, pursuant to the procedural autonomy of the Member States, but subject to observance of the principles of equivalence and effectiveness.

12 — Judgments in *M.* (C-277/11, EU:C:2012:744, paragraph 87); *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 46); and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 36).

13 — See, inter alia, judgments in *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 49) and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 39 and the case-law cited).

14 — See, to that effect, judgments in *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 50) and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 40).

15 — See, to that effect, judgments in *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 35); *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 51); and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 41).

16 — See Article 31 of Directive 2004/38. Article 30 of the directive also provides that decisions restricting the right to remain or reside must be notified in writing to the person concerned and must contain a statement of reasons.

41. It is easy to see why the referring court does not ask the Court anything about the scope of the principle of effectiveness.

42. The fact that the administrative courts of last instance cannot examine of their own motion or are required to dismiss as inadmissible a plea alleging infringement of the right to be heard raised for the first time before them does not in any way mean that domestic rules of procedure make it impossible or excessively difficult to plead the infringement of such a right before the national courts. In the light of the principle of effectiveness, what matters — in accordance with the case-law of the Court — is that the parties have had a genuine opportunity to raise pleas based on EU law before a national court.[17] In other words, that principle does not require the national courts to remedy the deficiency or omission of the parties where they have had a genuine opportunity, under domestic rules of procedure, to raise a plea alleging infringement of EU law. Since that is undoubtedly the case here, the applicant in the main proceedings having moreover been represented by a lawyer from the moment he lodged his action at first instance, the application of the principle of effectiveness does not require the referring court to raise of its own motion a plea alleging infringement of the right to be heard, irrespective of the significance of that right in the EU legal order.[18]

43. Considerably more delicate is the question whether the principle of equivalence entails such a consequence vis-à-vis the referring court.

44. This principle implies that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions.[19]

45. It could thus be logically inferred that, where domestic rules of procedure empower or oblige a national court to raise a plea based on national law of its own motion, the principle of equivalence automatically, in a way, requires that power or obligation to cover pleas based on EU law, too.

46. In the present case, the French Government argues in favour of that approach. In essence, it submits that since the national court identifies the plea alleging non-observance of the right to be heard as a plea based on public policy which may be raised for the first time in an appeal on a point of law before it in the context of the application of domestic law, the principle of equivalence demands that the plea alleging infringement of the general principle of EU law of respect for the right to be heard be subject to the same rules before that same court. At the hearing, the French Government stated that, pursuant to the procedural autonomy of the Member States, there is no need whatsoever — in contrast to the referring court's submissions — to determine whether non-observance of the right to be heard is of a public policy nature under EU law.

47. Acceptance of that proposition, which is moreover appealing, would mean that the reply to the question referred by the national court would ultimately be quite straightforward.

48. That proposition — and the resulting reformulation of the question referred for a preliminary ruling suggested by the French Government at the hearing — nevertheless disregards the case-law of the Court,[20] case-law which renders the answer to be given to the national court considerably more complex.

17 — See, to that effect, judgment in *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 41).

18 — Idem.

19 — See, to that effect, inter alia, judgments in *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 28); *Kempter* (C-2/06, EU:C:2008:78, paragraph 57); and *Târşia* (C-69/14, EU:C:2015:662, paragraph 27).

20 — At the hearing, the French Government did not conceal its unease as regards that case-law or at least as regards the terminology used by the Court.

49. The case-law requires a determination to be made as to whether the rule at issue occupies, within the EU legal order, a 'position' which is at least equivalent to the position enjoyed by the rules which may or must be raised by the national courts of their own motion under domestic law.

50. Thus, in its judgment in *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraphs 29 to 31), the Court held that the provisions of a directive establishing measures to control foot-and-mouth disease could not occupy a 'similar position within the [EU] legal order' to the position occupied by pleas alleging infringement of public policy rules under Netherlands law which were construed, in essence, as meaning issues concerning the powers of administrative bodies and the admissibility of actions. The Court therefore found that the application of the principle of equivalence did not mean, as regards that case, that the national court was obliged to conduct of its own motion an examination of the validity of the administrative measures in dispute before it by having regard to criteria based on the directive in question. In paragraph 32 of the judgment, the Court also stated that, even if the provisions of the directive were to form part of public health policy, they would have been put forward 'essentially in order to take account of the private interests of individuals' who had been the object of measures to control foot-and-mouth disease.

51. More recently, the Court summarised that case-law as meaning that 'in accordance with the principle of equivalence, the conditions imposed by domestic law under which the courts and tribunals may apply a rule of [EU] law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law *of the same ranking*'.[21]

52. Therefore, according to that case-law, the scope of an examination by a court of its own motion of a plea alleging infringement of a rule of EU law depends on whether the ranking occupied by that rule under EU law is equivalent to or the same as the ranking occupied by the rules which the national courts are entitled to raise of their own motion within the domestic legal system.

53. In other words, although domestic rules of procedure empower national courts to raise of their own motion 'binding' domestic rules, as in the cases giving rise to the judgments in *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraphs 13, 14 and 22) and *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraphs 57, 58 and 60), they are required to raise of their own motion rules of EU law of an equally binding nature, as that concept has been developed by the Court.

54. Although domestic rules of procedure are more stringent and make the examination of a plea of a court's own motion conditional on the rule of domestic law which was infringed being classified as a public policy rule, a plea alleging infringement of EU law must also, if it is to be treated in an equivalent manner by national courts, allege infringement of a rule which occupies a 'similar position' or is of the 'same ranking' under EU law.

55. By contrast, the French Government's preferred proposition seems to give too much latitude to the procedural autonomy of the Member States, even though in issue is the interpretation of the principle of equivalence, a principle which seeks to moderate that autonomy and the scope of which must be defined by EU law.

56. The very merit of the case-law of the Court is to lay the foundations for the definition of 'plea based on public policy' under EU law so as to avoid the situation whereby the application of the relevant EU rule varies solely depending on its classification under domestic law.

21 — Judgment in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 49) and order in *Pohotovosť* (C-76/10, EU:C:2010:685, paragraph 48) (emphasis added).

57. With all due respect to the French Government, that guidance is, in my view, consistent with the approach taken in the judgment in *Eco Swiss* (C-126/97, EU:C:1999:269, paragraphs 24, 31, 37 and 41). In that judgment, the Court considered that Article 81 EC (now Article 101 TFEU) had the same value as the domestic public policy rules of law of the Member State in question and, therefore, that the principle of equivalence required a national court to grant an application for annulment of an arbitration award which it found to be contrary to that article, where its domestic rules of procedure required it to grant an application for annulment founded on failure to observe national rules of public policy, even though, under domestic law, the fact that an arbitration award is contrary to domestic competition law rules was not generally regarded as falling within the scope of public policy.

58. In other words, although there is acceptance of the procedural autonomy of the Member States, that autonomy may not be extended to cover the definition or classification of rules of EU law falling within the category of public policy rules.

59. I therefore take the view, as the applicant in the main proceedings and the Belgian Government submitted and examined in their written observations in this case, that the case-law of the Court raises the issue whether respect for the right to be heard occupies, under EU law, a ranking which is identical or similar to that of public policy rules under domestic law.

C – *Public policy nature of respect for the right to be heard under EU law*

60. Before the EU Courts, no new pleas may be introduced in the course of proceedings, except in the following situations: where the pleas are based on matters of law or of fact which came to light during the procedure;[22] where the pleas in fact merely amplify a plea put forward previously; or where the pleas allege infringement of a rule of public policy.[23]

61. As regards that last point, Article 150 of the Rules of Procedure states that the Court of Justice may at any time, of its own motion, decide whether there exists any absolute bar to proceeding with a case. In addition, according to well-established case-law, the Court has held that it is for the EU judicature to raise of its own motion pleas based on public policy.[24]

62. Without in any way claiming to be exhaustive, the Court has thus examined of its own motion, including at the appeal stage, grounds of inadmissibility of proceedings for judicial review[25] and the disappearance of their purpose;[26] the competence of the author of an EU measure;[27] the jurisdiction of the court before which a case is brought;[28] irregularities in the composition of the General Court;[29] as well as the absence of or an inadequate statement of reasons for an EU measure.[30] These are therefore pleas which concern the formal legality of measures.

22 — See Article 127(1) of the Rules of Procedure of the Court of Justice; Article 84(1) of the Rules of Procedure of the General Court; and Article 56(1) of the Rules of Procedure of the Civil Service Tribunal.

23 — Also see, to that effect, Opinions of Advocate General Poiares Maduro in *Spain* v *Commission* (C-276/02, EU:C:2004:211, point 10 and the case-law cited) and of Advocate General Jääskinen in Joined Cases *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:215, point 36 and the case-law cited).

24 — See, inter alia, judgments in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 67); *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 104); and *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 321).

25 — See, inter alia, judgments in *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 35) and *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105, paragraph 32 and the case-law cited).

26 — See judgment in *Hassan and Ayadi* v *Council and Commission* (C-399/06 P and C-403/06 P, EU:C:2009:748 and the case-law cited).

27 — See, inter alia, judgment in *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:397, paragraph 56).

28 — See judgments in *Planet* v *Commission* (C-564/13 P, EU:C:2015:124, paragraph 20 and the case-law cited) and *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 37).

29 — Judgment in *Chronopost and La Poste* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 48 and 49).

30 — See, inter alia, judgments in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraphs 34 and 35) and *Mindo* v *Commission* (C-652/11 P, EU:C:2013:229, paragraph 30 and the case-law cited).

63. By contrast, as an appeal court, the Court of Justice has refused to examine of its own motion substantive pleas, alleging infringement of material provisions of the Treaty or of EU measures,[31] raised for the first time before it. The Court therefore seems to be somewhat reluctant to examine of its own motion pleas based on the substantive legality of measures.[32]

64. The fact remains that the Court has never identified in a general way the criteria for determining whether or not a plea is based on public policy.

65. It is true that it is not easy to define such a plea since it ultimately depends on the fundamental values of the legal order concerned, the respective roles of the parties, the applicable rules of procedure, as well as the branch of the judiciary before which the proceedings take place (in particular, civil or administrative) and its level (court ruling on the merits or on an appeal on a point of law).[33]

66. However, in the case of the EU legal order and court system, the case-law provides sufficient material enabling those criteria to be identified with reasonable precision.

67. As I have already had the opportunity of pointing out in previous Opinions,[34] I endorse, in that connection, the two criteria identified by Advocate General Jacobs in points 141 and 142 of his Opinion in *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:172).

68. Therefore, it must be determined, first, whether the rule infringed is designed to serve a fundamental objective or value of the EU legal order and whether it plays a significant role in the achievement of that objective or value and, secondly, whether that rule was laid down in the interest of third parties or the public in general and not merely in the interest of the persons directly concerned.[35]

69. Clearly, the first criterion must be regarded as satisfied. Respect for the right to be heard in all administrative proceedings is inherent in respect for the rights of the defence, which is a general (and fundamental) principle of EU law.[36] Under Article 2 TEU, the European Union is founded in particular on the values of respect for the rule of law and for human rights, respect for the latter being, according to the Court, a condition for the lawfulness of EU acts[37] and a 'constitutional principle' of the

31 — See judgment in *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraphs 28 and 29 and the case-law cited). In that case, the Court thus refused to examine of its own motion a plea alleging infringement of Article 87(1) EC on account of the non-attributability of the aid measure in question to the State. Also see judgment in *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213, paragraph 97).

32 — By contrast, the Civil Service Tribunal has examined of its own motion a plea, well known in French administrative law, based on the scope of the law. See, inter alia, judgments in *Valero Jordana* v *Commission* (F-104/05, EU:F:2008:13, paragraphs 53 and 54); *Putterie-De-Beukelaer* v *Commission* (F-31/07, EU:F:2008:23, paragraphs 50 to 62); and *Vakalis* v *Commission* (F-38/10, EU:F:2011:43, paragraphs 28, 29 and 38). In that last judgment, the Civil Service Tribunal made the scope of that examination clear, stating that it 'would be neglecting its function as the arbiter of legality if, even in the absence of a challenge by the parties in that regard, it failed to make a finding that the contested decision before it had been adopted on the basis of a rule that was not applicable to the circumstances of the case and if, as a consequence, it was led to adjudicate on the dispute before it by itself applying such a rule'. In its judgment in *Wurster* v *EIGE* (F-20/12 and F-43/12, EU:F:2013:129, paragraph 90), the Civil Service Tribunal considered that raising of its own motion a plea based on the scope of the law was an exception to the prohibition on it raising of its own motion pleas based on substantive legality. As regards relations with national courts, the Court also seems to accept, as demonstrated by its judgment in *Eco Swiss* (C-126/97, EU:C:1999:269) and its case-law on unfair terms in consumer contracts, that those courts are required in some cases, in the name of the principle of effectiveness of the rules of EU law, to raise of their own motion pleas based on the substantive legality of measures.

33 — See, to that effect, Opinion of Advocate General Jacobs in *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:172, point 134).

34 — See my Opinions in *Common Market Fertilizers* v *Commission* (C-443/05 P, EU:C:2007:127, points 102 and 103) and *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2009:553, points 78 and 79).

35 — By contrast, I do not think that the criterion of the manifest nature of the infringement of EU law, set out in point 143 of the abovementioned Opinion of Advocate General Jacobs, deals with, in the proper sense, the classification of a plea as a plea based on public policy. Rather, it is a precondition for the existence of an obligation on the courts to raise a plea based on public policy of their own motion. See, to that effect, Vesterdorf, B., 'Le relevé d'office par le juge communautaire', in *Une Communauté de droit: Festschrift für G. C. Rodríguez Iglesias*, Nomos, 2003, p. 551, particularly pp. 560 and 561.

36 — See judgments in *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 45) and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 34).

37 — Judgments in *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 284) and *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 41).

Treaty.[38] Furthermore, whilst Article 6(1) TEU states that the European Union recognises the rights and principles set out in the Charter, which includes those set out in Article 41 of the Charter, Article 6(3) TEU also provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, form part of EU law as general principles.

70. Respect for the right to be heard therefore serves an essential value of the EU legal order, namely the latter's constitutional attachment to respect for the rights and freedoms recognised in favour of individuals, enshrined, in particular, in the Charter.

71. By contrast, determining whether respect for the right to be heard satisfies the second criterion, namely whether it was laid down in the public interest rather than merely in the interest of the persons directly concerned, is more problematic.

72. In the light of the dividing line drawn in the case-law of the Court between pleas relating to formal legality, which may be raised by a court of its own motion, and those based on substantive legality, which may not, the determination to be made is whether the infringement of the right to be heard is capable of falling within the scope of an infringement of an essential procedural requirement, within the meaning of Article 263 TFEU, that is to say, in my view, an infringement of an essential procedural requirement which is intrinsically linked to the formation and expression of the intention of the authority adopting the act in question, so as to alter *ipso jure* the essence of the act.[39]

73. That classification of a failure to respect the right to be heard, entailing the examination by a court of its own motion of such a complaint, has been upheld on a few occasions by the General Court and by the Civil Service Tribunal.

74. The General Court has therefore examined of its own motion the Commission's failure to invite associations of undertakings which had participated in a cartel to present observations during the administrative procedure on the possible exercise of the power to impose fines on them[40] and its failure to grant undertakings a hearing before taking decisions on the remission or post-clearance recovery of import duties.[41] For its part, the Civil Service Tribunal has accepted, in particular, that it is able to examine of its own motion the failure by the authorities to invite an official to make known his views before adopting a decision reclassifying his grade;[42] to afford a staff member the opportunity to submit comments on an evaluation document on which the authorities sought to base their decision to refuse to offer him an indefinite-term contract;[43] and to hear a staff member before deciding not to renew his fixed-term contract.[44]

38 — Judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285).

39 — See, to that effect, Opinion of Advocate General Fennelly in *Commission* v *ICI* (C-286/95 P, EU:C:1999:578, point 22).

40 — Judgment in *Cimenteries CBR and Others* v *Commission* (T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 487).

41 — Judgments in *Eyckeler & Malt* v *Commission* (T-42/96, EU:T:1998:40, paragraph 88); *Primex Produkte Import-Export and Others* v *Commission* (T-50/96, EU:T:1998:223, paragraph 71); and *Kaufring and Others* v *Commission* (T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, EU:T:2001:133, paragraphs 134 and 135). With reference to the last judgment, Advocate General Jacobs also considered that it was 'settled case-law' that the non-observance of the rights of defence during the administrative procedure qualified as an infringement of an essential procedural requirement which the General Court was entitled or even obliged to raise of its own motion (see his Opinion in *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (C-78/03 P, EU:C:2005:106, point 89)).

42 — Judgment in *Bui Van* v *Commission* (F-51/07, EU:F:2008:112, paragraphs 77 and 78). That assessment was implicitly but necessarily confirmed on appeal in paragraphs 77 to 81 of the judgment of the Court in *Bui Van* v *Commission* (T-491/08 P, EU:T:2010:191), in which the Court dismissed the Commission's cross-appeal alleging, in particular, errors in law as regards the obligation to hear the interested person before adopting the reclassification decision.

43 — See, inter alia, judgments in *Hanschmann* v *Europol* (F-27/09, EU:F:2010:58, paragraph 53) and *Knöll* v *Europol* (F-44/09, EU:F:2010:68, paragraph 59).

44 — See judgment in *EE* v *Commission* (F-55/14, EU:F:2015:66, paragraphs 35 and 41).

75. That line of case-law does not set out any of the reasons for classifying a failure to respect the rights of the defence, including the right to be heard, as an infringement of an essential procedural requirement within the meaning of Article 263 TFEU.

76. On the other hand, the decisions in question are, almost as a matter of course, based on two judgments of the Court, namely *Interhotel* v *Commission* (C-291/89, EU:C:1991:189, paragraph 14) and *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 67).

77. However, those two judgments do not appear to support the approach taken by the General Court and the Civil Service Tribunal.

78. That is patently clear so far as concerns the judgment in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 67). That case dealt not with respect for the right to be heard, but with an infringement of the duty to state reasons which, it is not disputed, clearly belongs to the category of essential procedural requirements within the meaning of Article 263 TFEU. [45]

79. The judgment in *Interhotel* v *Commission* (C-291/89, EU:C:1991:189) concerned an action for annulment of a decision of the Commission to reduce financial assistance from the European Social Fund given to vocational training and guidance activities in Portugal, assistance which the company Interhotel had received. The applicable Community legislation expressly provided that, in a situation such as that arising in the case in issue, the Commission could, in particular, reduce financial assistance only after giving the relevant Member State an opportunity to comment. After recalling that it was entitled to consider of its own motion the question of infringement of essential procedural requirements, the Court annulled the Commission's decision on the ground that the latter had not given the Portuguese Republic an opportunity to comment beforehand.

80. That finding might, at first sight, suggest that the Court of Justice supports the line of authorities of the General Court and the Civil Service Tribunal considered above.

81. However, in paragraphs 15 to 17 of its judgment in *Interhotel* v *Commission* (C-291/89, EU:C:1991:189), the Court not only recalled that the obligation to hear the Member State concerned was clearly apparent from the provisions of the Community legislation at issue, but also and above all drew attention to the 'central role' and 'the importance of the responsibilities which [the Member State] assumes in the presentation and supervision of the financing of training measures', so that the opportunity for it to comment before a definitive decision to reduce financial assistance is adopted constitutes an 'essential procedural requirement' the disregard of which renders that decision void.

82. In my view, it was the central nature of the role and the importance of the responsibilities of the Member State in the specified field which resulted in the Court classifying the infringement of the obligation to consult the Member State concerned — an obligation which, moreover, was expressly laid down in the applicable Community legislation — as an infringement of an essential procedural requirement. That obligation to consult may ultimately be regarded as a specific expression of the allocation of powers between the institutions and the Member States or, put another way, of the institutional balance within the European Union. Consequently, it is perfectly comprehensible for the infringement of such an obligation to be regarded as undermining a rule serving a fundamental objective or value of the European Union, established in the public interest, and, therefore, that the Court should have to examine it of its own motion.

45 — See, inter alia, judgment in *Ipatau* v *Council* (C-535/14 P, EU:C:2015:407, paragraph 37 and the case-law cited).

83. That is why the Court accepts that a legal person may invoke an infringement of the Member State's rights, which goes beyond the mere infringement of that State's individual rights and entails the invalidity *ipso jure* of the decision of the Commission. [46]

84. In those circumstances, I think it is risky to seek to extract from the judgment in *Interhotel* v *Commission* (C-291/89, EU:C:1991:189) a blanket assertion that failure to respect the rights of the defence, particularly the right of legal and natural persons to be heard in all administrative proceedings, constitutes an infringement of an essential procedural requirement in the EU legal order which must be examined by the EU Courts of their own motion.

85. Such caution is borne out by three other decisive factors.

86. First of all, the Court has never before extended the application of *Interhotel* v *Commission* (C-291/89, EU:C:1991:189) beyond situations involving respect for the procedural safeguards which EU law recognises in favour of the Member States. [47]

87. Next, ruling in the context of an appeal, the Court of Justice has dismissed as new and therefore inadmissible pleas — raised at the reply stage before the General Court or raised for the first time before the Court of Justice — alleging infringement of the right of legal persons to be heard or infringement of the right to fair legal process during administrative proceedings conducted by the Commission concerning the application of the rules on competition. [48]

88. This necessarily means that the Court views such pleas, even though they allege infringement of fundamental rights protected in the EU legal order, as not falling within the category of pleas based on public policy that have to be raised by the EU Courts of their own motion.

89. Lastly, the consequence of infringing an essential procedural requirement, namely the annulment *ipso jure* of the measure concerned, sits uneasily with the case-law of the Court according to which the infringement of the right to be heard results in the annulment of the decision taken at the end of the administrative procedure in question only if, had it not been for such an irregularity, the outcome of the procedure might have been different. [49]

90. As illustrated by the judgment in *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 38), that case-law is fully applicable to an infringement of the right to be heard during an administrative procedure extending the detention of a third-country national with a view to his removal, pursuant to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on

46 — Which might explain why the EU Courts also accept that a recipient of State aid may invoke an infringement of the procedural rights of the Member State which granted the aid and that such an infringement may be raised of their own motion. See, to that effect, judgment in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* (T-228/99 and T-233/99, EU:T:2003:57, paragraphs 143 and 147).

47 — See judgments in *Infortec* v *Commission* (C-157/90, EU:C:1992:243, paragraph 20); *Foyer culturel du Sart-Tilman* v *Commission* (C-199/91, EU:C:1993:205, paragraph 34); and *IRI* v *Commission* (C-334/91, EU:C:1993:211, paragraph 25). Also forming part of this line of authority is the case-law relating to the 'essential guarantee intended by the Treaty' represented by the proper conduct of the pre-litigation procedure concerning infringements, which is necessary not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject matter. This is why the Court is able to raise of its own motion an infringement of such guarantee, even where the Member State has chosen not to avail itself of the opportunity to submit its observations during the pre-litigation stage. See, to that effect, inter alia, judgments in *Commission* v *Italy* (C-365/97, EU:C:1999:544, paragraphs 23 and 35) and *Commission* v *Romania* (C-522/09, EU:C:2011:251, paragraph 16). The Court expressly confirmed the analogy between that case-law and the judgment in *Interhotel* v *Commission* (C-291/89, EU:C:1991:189) as well as the possibility for it to raise of its own motion an infringement of those guarantees in its judgment in *Commission* v *Germany* (C-160/08, EU:C:2010:230, paragraphs 40 to 42).

48 — As regards respect for the right to be heard, see judgments in *Compagnie maritime belge transports and Others* v *Commission* (C-395/96 P and C-396/96 P, EU:C:2000:132, paragraphs 99, 103, 104, 107 and 108); *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 421 and 422); and *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraphs 86 to 91). As regards infringement of the right to fair legal process, see, inter alia, judgment in *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 128) and orders in *Total and Elf Aquitaine* v *Commission* (C-421/11 P, EU:C:2012:60, paragraph 35) and *Total and Elf Aquitaine* v *Commission* (C-495/11 P, EU:C:2012:571, paragraph 33).

49 — See, inter alia, to that effect, judgments in *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 79) and *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 38 and the case-law cited).

common standards and procedures in Member States for returning illegally staying third-country nationals. [50] Despite the fact that the directive is silent as to the consequences of infringing such a right and even though, therefore, it is in principle for the Member States to determine those consequences in the context of their procedural autonomy, in accordance with the principles of equivalence and effectiveness, the Court considers — presumably in the name of the principle of effectiveness — that penalising an infringement of the right to be heard by automatically annulling a decision to extend detention is liable to undermine the effectiveness of the directive. [51]

91. The 'EU law' on which the Court relied in that judgment therefore seems to preclude the situation whereby infringement of the right to be heard results in the automatic annulment of the measure adopted following the disputed administrative procedure, which would nonetheless be the logical consequence if the infringement of that right had to be classified as an infringement of an essential procedural requirement.

92. Moreover, the line of authorities of the General Court and the Civil Service Tribunal is not unequivocal in that regard. Although, in those judgments, the General Court and the Civil Service Tribunal upheld the classification of the right to be heard as an essential procedural requirement, in some of the cases they nevertheless examined — whilst seeking to remain within the confines of the case-law of the Court cited above — whether, had it not been for such an infringement, the outcome might have been different. [52] As stated above, a finding by the EU Courts that a (genuine) essential procedural requirement has been infringed does not, in any way, require such an assessment to be carried out, since the administrative measure in question is automatically void.

93. As the case-law of the Court currently stands, I therefore think that an infringement of the right to be heard during an administrative procedure does not constitute an infringement of an essential procedural requirement, within the meaning of Article 263 TFEU, which the EU Courts are entitled to raise of their own motion. [53]

94. I think that this assessment could only be put in question if the Court wished to place increased value on the 'osmosis' which seemingly exists between the right to be heard and the duty on the authorities to state reasons and, therefore, to link that right more clearly and decisively to the public interest principle of good administration. [54]

95. That approach — which, in essence, was championed by the Commission at the hearing — is admittedly supported to some extent by the case-law of the Court.

96. In its judgments in *Mukarubega* (C-166/13, EU:C:2014:2336, paragraphs 47 and 48) and *Boudjlida* (C-249/13, EU:C:2014:2431, paragraphs 37 and 38), the Court linked the right to be heard to the objective of ensuring that the competent authorities are in a position effectively to take into account, carefully and impartially, all the relevant aspects of the individual case so as to enable them to give a detailed statement of reasons for their decisions. In doing so, the Court held that the statement of reasons for an administrative measure is the 'corollary of the principle of respect for the rights of the defence'.

50 — OJ 2008 L 348, p. 98.

51 — Judgment in *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 41).

52 — See, to that effect, inter alia, judgments in *Bui Van* v *Commission* (F-51/07, EU:F:2008:112, paragraph 81) and *Knöll* v *Europol* (F-44/09, EU:F:2010:68, paragraph 70).

53 — In my view, the same is true of an infringement of the right of access to the file, which may lead to the annulment of the administrative measure in question if the rights of the defence of the person concerned have been infringed and may be remedied during court proceedings, in which case the burden of proof involves demonstrating that the documents could have been used in the defence of that person. See, to that effect, inter alia, judgments in *Solvay* v *Commission* (C-110/10 P, EU:C:2011:687, paragraphs 50 to 52 and 57 and 58) and *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraphs 370 and 371).

54 — The Court has recognised that the right to good administration also reflects a general principle of EU law. See, in particular, judgment in *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 68 and the case-law cited).

97. Moreover, the arguments put forward by the Commission at the hearing also seem to be relatively consistent with the express inclusion of the right to be heard, alongside the obligation of the authorities to state reasons for their decisions, in the list of rights falling within the 'right to good administration' enshrined in Article 41 of the Charter.

98. However, I am of the view that the Court should avoid all syncretism which confuses the nature and scope of the right of individuals to be heard with the nature and scope of the obligation of the authorities to state reasons.

99. In particular, the obligation of the authorities to state reasons is certainly not limited to compliance by those authorities with the obligation to take account of individuals' observations before taking any decision which adversely affects them. As the case-law essentially shows, the obligation to state reasons contributes above all to the achievement of a more general objective, namely to ensure that the EU Courts are able to review the legality of the measure challenged before them.[55] When it is impossible for the EU Courts to conduct that review fully, there is, in my view, good reason for them to examine of their own motion an infringement of that obligation. The fact that an individual was unable effectively to submit his observations in an administrative procedure leading to the adoption of a decision which adversely affects him may, of course, have a bearing on the question whether the statement of reasons was sufficiently detailed or even whether it was well founded.[56] However, that does not automatically prevent the EU Courts from conducting their review of the legality of that decision.[57]

100. Accordingly, I find that the Commission's arguments are not sufficiently convincing to depart from the current approach taken in the case-law of the Court whereby a plea alleging infringement of the right to be heard during an administrative procedure does not constitute an infringement of an essential procedural requirement, within the meaning of Article 263 TFEU, falling within the category of pleas based on public law which the EU Courts are entitled to examine of their own motion. It is therefore for the party who allegedly suffered harm to plead infringement of that right before the EU Courts, which are not required to remedy the omission or negligence of that party.

III – **Conclusion**

101. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question referred for a preliminary ruling by the Conseil d'État (Council of State), Belgium:

Respect for the right of a person to be heard by a national authority before any decision is taken by that authority that is likely to affect that person adversely does not have, in the EU legal order, a ranking or position equivalent to that held by the rules of public policy in the Belgian legal system, as those rules were described by the referring court.

The principle of equivalence does not require a plea, alleging infringement of the right to be heard set out in Article 41(2) of the Charter of Fundamental Rights of the European Union, raised for the first time before an administrative court of last instance, ruling on an appeal on a point of law, such as the referring court, to be declared admissible and examined as to its substance.

55 — See, inter alia, to that effect, judgment in *FLS Plast* v *Commission* (C-243/12 P, EU:C:2014:2006, paragraph 49 and the case-law cited).

56 — See, inter alia, to that effect, judgment in *Commission* v *Edison* (C-446/11 P, EU:C:2013:798, paragraph 54).

57 — So far as is relevant, it should be noted that the EU Courts have considered to be inadmissible a plea alleging infringement of the principle of good administration submitted unduly late before the Court of First Instance as well as a plea submitted for the first time on appeal before the Court of Justice. See, respectively, judgments in *Stadtsportverband Neuss* v *Commission* (T-137/01, EU:T:2003:232, paragraphs 135 and 137) and *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraphs 86 to 91).