Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

20 February 2018 *

(Appeal — Consumer protection — Online gambling services — Protection of consumers and players and prevention of minors from gambling online — Commission Recommendation 2014/478/EU — EU act which is not legally binding — Article 263 TFEU)

In Case C-16/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 January 2016,

Kingdom of Belgium, represented by L. Van den Broeck, M. Jacobs and J. Van Holm, acting as Agents, and by P. Vlaemminck, B. Van Vooren, R. Verbeke and J. Auwerx, advocaten,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Wilman and H. Tserepa-Lacombe, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, C. Toader (Rapporteur), C. Lycourgos and M. Vilaras, Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 June 2017,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2017,

gives the following

* Language of the case: Dutch.

Judgment

1 By its appeal, the Kingdom of Belgium requests the Court to set aside the order of the General Court of the European Union of 27 October 2015, *Belgium* v *Commission* (T-721/14, 'the order under appeal', EU:T:2015:829), by which the General Court dismissed as inadmissible its action seeking annulment of Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (OJ 2014 L 214, p. 38) ('the contested recommendation').

Legal context

2 The first paragraph of Article 263 TFEU states:

'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council [of the European Union], of the [European] Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'

3 Article 288 TFEU, which features in a section entitled 'The legal acts of the Union', provides:

'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.'

4 Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59), as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ 2013 L 158, p. 1), provides:

'The official languages and the working languages of the institutions of the Union shall be Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.'

Background to the dispute

5 On 14 July 2014, the European Commission adopted, pursuant to Article 292 TFEU, the contested recommendation.

6 It is apparent from recital 9 of that recommendation that its objective is 'to safeguard the health of consumers and players and thus also to minimise eventual economic harm that may result from compulsive or excessive gambling'.

7 Section I of that recommendation, entitled 'Purpose', is worded as follows:

'1. Member States are recommended to achieve a high level of protection for consumers, players and minors through the adoption of principles for online gambling services and for responsible commercial communications of those services, in order to safeguard health and to also minimise the eventual economic harm that may result from compulsive or excessive gambling.

2. This Recommendation does not interfere with the right of Member States to regulate gambling services.'

8 Sections III to X of that recommendation relate, respectively, to 'Information requirements', 'Minors', 'Player registration and account', 'Player activity and support', 'Time out and self-exclusion', 'Commercial communication', 'Sponsorship' and 'Education and awareness'.

The proceedings before the General Court and the order under appeal

9 By application lodged at the Registry of the General Court on 13 October 2014, the Kingdom of Belgium brought an action seeking annulment of the contested recommendation.

10 By separate document lodged at the Registry of the General Court on 19 December 2014, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court of 2 May 1991. The Kingdom of Belgium lodged its observations on that plea on 20 February 2015.

11 The Commission claimed that the action brought before the General Court was inadmissible on the ground that the contested recommendation does not constitute an act open to challenge under Article 263 TFEU. In essence, it asserted that, both in its form and in its content, the contested recommendation is a 'genuine' recommendation within the meaning of Article 288 TFEU, which has no binding force and does not impose any binding obligations. That, it is submitted, is shown by the formal presentation of the recommendation based on Article 292 TFEU and by its non-binding and conditional wording. The Commission added that none of the arguments raised by the Kingdom of Belgium in the application could cast doubt on that classification of the contested recommendation as an act not open to challenge.

12 The Kingdom of Belgium considered the action to be admissible. In essence, relying in particular on the judgments of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32) and of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646) and on the principle of effective judicial protection, it claimed that the contested recommendation must be amenable to judicial review. First, it asserted that the recommendation produces 'negative legal effects' because, as was shown by the first, third and fourth pleas in law raised in its application, it infringes fundamental principles of EU law, namely the principle of conferral and the duty of sincere cooperation between EU institutions and between those institutions and the Member States. Second, it maintained, in connection with the second and fifth pleas in law raised in support of its action, that the contested recommendation stems from the intention to harmonise the application of the provisions of Articles 49 and 56 TFEU in the area of gambling and in fact constitutes a hidden directive, which must be reviewed by the EU Courts. It added that the contested recommendation produces indirect legal effects because, on the one hand, under their duty of sincere cooperation, the Member States are subject to an obligation to use their best endeavours to comply with it and, on the other, national courts and tribunals will also have to take the recommendation into consideration.

13 By documents lodged at the Registry of the General Court on 12 and 16 January 2015 respectively, the Hellenic Republic and the Portuguese Republic applied for leave to intervene in those proceedings in support of the form of order sought by the Kingdom of Belgium.

14 By the order under appeal, adopted pursuant to Article 130(1) of the Rules of Procedure of the General Court, the latter upheld the plea of inadmissibility without going to the substance of the case. The General Court, in effect, ruled that the contested recommendation does not have, and was not intended to have, binding legal effects, with the result that it cannot be classified as a 'challengeable act' for the purposes of Article 263 TFEU. Consequently, the General Court dismissed the action as inadmissible and found that there was therefore no need to rule on the applications to intervene.

Forms of order sought by the parties

15 By its appeal, the Kingdom of Belgium claims that the Court should:

– set aside the order under appeal in its entirety;

– declare the action for annulment to be admissible;

– rule on the substance of the case;

– declare the applications to intervene lodged by the Hellenic Republic and the Portuguese Republic to be admissible; and

– order the Commission to pay the costs.

16 The Commission contends that the Court should:

– dismiss the appeal; and

– order the Kingdom of Belgium to pay the costs.

The appeal

17 In support of its appeal, the Kingdom of Belgium relies on three grounds of appeal.

The first and second grounds of appeal

Arguments of the parties

18 In the first ground of appeal, the Kingdom of Belgium submits that the adoption of any legal act within the meaning of Article 288 TFEU is sufficient, by itself, to produce legal effects capable of justifying a review of legality under Article 263 TFEU. The exclusion of recommendations from the scope of that review must, it submits, be subject to strict interpretation. Consequently, contrary to the General Court's finding in the order under appeal, it should be possible to have recourse to the EU Courts in order for them to monitor the observance, by the institution which adopted the contested recommendation, of the principles of conferral, sincere cooperation and institutional balance, which are of fundamental importance in the division of powers between the European Union and its Member States as well as between the EU institutions. Even in a case involving a genuine

recommendation, it submits, the General Court thus has jurisdiction to determine whether or not those principles had been infringed during the adoption of that recommendation, without requiring a full review of the material content thereof.

19 In that regard, the Kingdom of Belgium argues that Article 292 TFEU, which is indicated as being the legal basis on which the contested recommendation was adopted, is not a substantive legal basis but merely a procedural legal basis, granting not only the Commission but also the Council the power to adopt recommendations. Observance of the principle of institutional balance implies, as a consequence, that the EU Courts can verify whether the Commission had, in the present case, a substantive legal basis on which to adopt the contested recommendation.

20 The Kingdom of Belgium also submits that it follows from the judgment of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32), that the EU Courts must be able to check, at the stage of assessing the admissibility of the action for annulment, whether the contested act is capable of producing legal effects as regards the prerogatives of the other EU institutions and the Member States, without having to rule on the merits of the validity of that act.

21 In the second ground of appeal, the Kingdom of Belgium argues that the order under appeal, in particular paragraphs 53 to 55 thereof, leads to a procedural inequality in that it would not be allowed to seek review, by the EU Courts, of the Commission's compliance with the principle of sincere cooperation, even though that institution, for its part, has the possibility of submitting for judicial review the issue of whether legal acts respect that principle, even if they did not produce binding effects.

22 The Kingdom of Belgium also submits that the General Court's conclusion, in paragraph 52 of the order under appeal, cannot be reconciled with what has been held by the Court in the judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166), and of 22 May 1990, *Parliament* v *Council* (C-70/88, EU:C:1990:217), according to which an action for annulment must be declared admissible, even in the absence of a provision to that effect in the Treaties, when it seeks to have the observance by an EU institution of the fundamental principles of the EU legal order made subject to review.

23 The Kingdom of Belgium also notes that, in the judgment of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663), the Court did not question the admissibility of an action for annulment even though the subject matter of that action related to the European Union's position in the context of advisory opinion proceedings which had no binding effects.

24 The Commission contends that these grounds of appeal should be rejected.

Findings of the Court

25 In the first place, in so far as the first two grounds of appeal, which it is appropriate to examine together, allege that the General Court erred in law in finding that the contested recommendation does not produce any legal effects capable of justifying a review of legality under Article 263 TFEU, it should be recalled that, according to the first paragraph of that article, the Court of Justice is to review the legality of, inter alia, acts of the Council, of the Commission and of the ECB 'other than recommendations'.

26 By establishing recommendations as a specific category of EU acts and by stating expressly that they 'have no binding force', Article 288 TFEU intended to confer on the institutions which usually adopt recommendations a power to exhort and to persuade, distinct from the power to adopt acts having binding force.

27 Against that background, the General Court was correct to find, in paragraph 17 of the order under appeal, by relying on well-established case-law of the Court of Justice, that 'any act not producing binding legal effects, such as … mere recommendations … falls outside the scope of the judicial review provided for in Article 263 TFEU'.

28 Contrary to what the Kingdom of Belgium submits, it is not therefore sufficient that an institution adopts a recommendation which allegedly disregards certain principles or procedural rules in order for that recommendation to be amenable to an action for annulment, although it does not produce binding legal effects.

29 However, in exceptional cases, the impossibility of bringing an action for annulment against a recommendation does not apply if the contested act, by reason of its content, does not constitute a genuine recommendation.

30 In that regard, during the analysis of the content of the contested act with a view to determining whether that act produces binding legal effects, account must be taken of the fact that, as was noted in paragraph 25 above, recommendations are, in accordance with Article 263 TFEU, excluded from the scope of that provision and that, pursuant to the fifth paragraph of Article 288 TFEU, they have no binding force.

31 That being said, it should be borne in mind that any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as 'challengeable acts' for the purposes of Article 263 TFEU (see, to that effect, judgments of 31 March 1971, *Commission* v *Council*, '*AETR*', 22/70, EU:C:1971:32, paragraphs 39 and 42, and of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 47 and the case-law cited).

32 In order to determine whether the contested act produces binding legal effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (see, to that effect, judgments of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 55 and the case-law cited, and of 25 October 2017, *Slovakia* v *Commission*, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 47).

33 In the present case, in paragraph 18 of the order under appeal, for the purpose of establishing whether the contested recommendation was liable to produce such effects and, accordingly, was amenable to an action for annulment under Article 263 TFEU, the General Court examined its wording and the context in which it appears, its content, and the intention of the institution which adopted it.

34 More specifically, the General Court took the view, first, in paragraph 21 of the order under appeal, that 'the contested recommendation is worded mainly in non-mandatory terms', as is clear from the analysis which it carried out in paragraphs 22 and 23 of the order under appeal. In that regard, the General Court specified, in paragraphs 26 and 27 of that order, that certain language versions of that recommendation, although containing more mandatory terms in places, are nonetheless drafted in an essentially non-binding manner.

35 Secondly, the General Court noted, in paragraph 29 of that order, that 'the content of the contested recommendation also shows that that act is not intended to have any binding legal effects and that the Commission had no intention to confer such effects on it'. In particular, it is noted, in paragraph 31 of the order under appeal, that 'paragraph 2 of the contested recommendation expressly states that the recommendation does not interfere with the right of Member States to regulate gambling services'. Moreover, in paragraph 32 of that order it is pointed out that the contested recommendation does not include any explicit indication that the Member States were required to adopt and to apply the principles set out therein.

36 Thirdly, the General Court held, in paragraph 36 of the order under appeal, with regard to the context of which the contested recommendation forms part, that, 'without this being disputed by the Kingdom of Belgium', it follows from an extract from Communication COM(2012) 596 final of 23 October 2012 from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Towards a comprehensive European framework for online gambling', that 'overall, it does not appear appropriate at this stage to propose sector-specific EU legislation for online gambling'.

37 Accordingly, it was after an analysis, conducted to the requisite legal standard, of the wording, the content and the purpose of the contested recommendation, as well as of the context of which it forms part, that the General Court was able properly to conclude, in paragraph 37 of the order under appeal, that that recommendation 'does not have and is not intended to have binding legal effects, with the result that it cannot be classified as a challengeable act for the purposes of Article 263 TFEU'.

38 The foregoing analysis is not called into question, first, by the argument of the Kingdom of Belgium alleging that, in the judgment of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663), the Court did not cast doubt on the admissibility of the Council's action for annulment even though that action related to the presentation of the European Union's position in the context of advisory opinion proceedings which had no binding effect. It suffices to note that that action was not directed against a recommendation within the meaning of the fifth paragraph of Article 288 TFEU, but rather against a decision of the Commission which, in accordance with the fourth paragraph of Article 288 TFEU, produces binding legal effects. Moreover, using as a pretext the fact that that decision was taken in the context of the European Union's involvement in such proceedings is, as the Commission has correctly pointed out, incorrectly to confuse the nature of the effects of that decision and the nature of the advisory opinion proceedings in question.

39 Second, in so far as the first ground of appeal alleges infringement by the General Court of the scope of the principles of conferral, sincere cooperation and institutional balance, it should be noted that the Kingdom of Belgium thereby criticises the General Court for not having inferred the challengeable nature of the contested recommendation from the Commission's alleged disregard of those principles. As has been pointed out in paragraph 28 above, such reasoning cannot be accepted.

40 Furthermore, in so far as the second ground of appeal alleges a disregard by the General Court of the alleged reciprocity of the principle of sincere cooperation, it should be noted, first, as the General Court pointed out, essentially, in paragraph 55 of the order under appeal, that infringement proceedings and an action for annulment are legal remedies which serve different purposes and have different conditions governing admissibility, and, second, that the principle of sincere cooperation cannot have the effect of setting aside the conditions governing admissibility expressly laid down in Article 263 TFEU.

41 Thirdly, the argument of the Kingdom of Belgium alleging that, in the judgment of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32), the Court, for the purpose of ruling on the admissibility of the action for annulment, examined whether the Council act at issue in the case giving rise to that judgment was capable of producing legal effects as regards the prerogatives of the other EU institutions and the Member States, is not such as to invalidate the finding made in paragraph 37 of the present judgment.

42 Suffice it to note, in this respect, that that act was a Council deliberation recorded in the minutes of a meeting, in regard to which the Court, in order to assess whether it could be challenged, examined whether it was intended to produce binding legal effects. The present case, by contrast, relates to a recommendation, which is expressly excluded under the first paragraph of Article 263 TFEU from the scope of the review of legality laid down by that article, as the Court, moreover, pointed out in paragraphs 38 and 39 of the judgment of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32) in the context of Article 173 of the EEC Treaty (subsequently Article 173 of the EC

Treaty and then Article 230 EC). Moreover, as is clear from paragraphs 33 to 37 of the present judgment, the General Court examined whether the contested recommendation was intended to produce binding legal effects and correctly held that this was not the case.

43 In the second place, in so far as the first two grounds of appeal allege infringement of Article 263 TFEU on the ground that the General Court ruled out, by the order under appeal, the possibility that the contested recommendation might be amenable to judicial review under that article, which would be contrary to the requirements stemming from the judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166), and of 22 May 1990, *Parliament* v *Council* (C-70/88, EU:C:1990:217), it should be pointed out that, unlike the cases which gave rise to those two judgments, the present case is characterised, not by the absence, in the Treaties, of a provision providing the right to bring an action for annulment such as that at issue in the present case, but by the existence of an express provision, namely, the first paragraph of Article 263 TFEU, which excludes recommendations from the scope of actions for annulment since those measures do not produce binding legal effects, a fact which the General Court correctly established in the present case.

44 Moreover, even though Article 263 TFEU excludes the review, by the Court, of acts which are in the form of recommendations, Article 267 TFEU confers on the Court jurisdiction to deliver a preliminary ruling on the validity and interpretation of all acts of the EU institutions without exception (see, to that effect, judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 8, and of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 30).

45 It follows that the first and second grounds of appeal must be rejected in their entirety.

The third ground of appeal

Arguments of the parties

46 By its third ground of appeal, the Kingdom of Belgium submits that the General Court, after finding that the contested recommendation is drafted in mandatory terms in its German- and Dutch-language versions, ought to have recognised that that recommendation seeks to produce binding legal effects, at least with regard to it.

47 According to the Commission, this ground of appeal must be rejected in so far as, by basing itself on a textual criticism relating solely to certain language versions, that ground of appeal disregards the principle of uniform interpretation of the provisions of EU law.

Findings of the Court

48 Under Article 1 of Regulation No 1, as amended by Regulation No 517/2013, all the official languages of the European Union listed in that provision are the authentic languages of the acts in which they are drafted.

49 It follows that all language versions of an EU act must, in principle, be recognised as having the same value. In order to maintain the uniform interpretation of EU law, in the case of divergence between those versions, the provision in question must therefore be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, judgments of 2 April 1998, *EMU Tabac and Others*, C-296/95, EU:C:1998:152, paragraph 36, and of 20 November 2003, *Kyocera*, C-152/01, EU:C:2003:623, paragraphs 32 and 33 and the case-law cited).

50 Thus, the wording used in one of the language versions of an act cannot serve as the sole basis for the interpretation of that act, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of EU law (see, to that effect, judgments of 22 October 2009, *Zurita García and Choque Cabrera*, C-261/08 and C-348/08, EU:C:2009:648, paragraph 55 and the case-law cited, and of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195, paragraph 65 and the case-law cited).

51 In the present case, as is clear from paragraph 34 above, the General Court, in the order under appeal, carried out a comparative assessment of the different language versions of the contested recommendation and concluded that that recommendation was worded mainly in non-binding terms.

52 Furthermore, as is evident from paragraph 37 above, it was after an analysis, conducted to the requisite legal standard, of the wording and the content of the contested recommendation, as well as of the context of which it forms part, that the General Court was able properly to conclude, in paragraph 37 of the order under appeal, that that recommendation 'does not have and is not intended to have binding legal effects, with the result that it cannot be classified as a challengeable act for the purposes of Article 263 TFEU'.

53 Accordingly, the third ground of appeal cannot succeed.

54 In the light of all of the foregoing, the appeal must be dismissed in its entirety.

Costs

55 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Kingdom of Belgium and since the latter has been unsuccessful, the Kingdom of Belgium must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeal;

2. Orders the Kingdom of Belgium to pay the costs.

[Signatures]