

Action in annulation of the classification of Covid-19: Towards an empowerment of workers' interests in the process of adoption of Directives at the EU level?

Strategic Aspects of Occupational Safety and Health Litigation

24-25 February 2021

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Introduction

- (1) Different possibilities to bring a case before the CJUE for Trade Unions – Annulment Proceeding
- (2) T-484/20: *SATSE v. European Commission*
Annulment Proceeding Commission Directive (EU) 2020/739 of 3 June 2020 amending Annex III to Directive 2000/54/EC of the European Parliament and of the Council as regards the inclusion of SARS-CoV-2 in the list of biological agents known to infect humans and amending Commission Directive (EU) 2019/1833, published in the Official Journal of the European Union of 4 June 2020 (OJ 2020 L 175, p.11).
- (3) Way forward? Possibilities to use strategically annulment proceeding

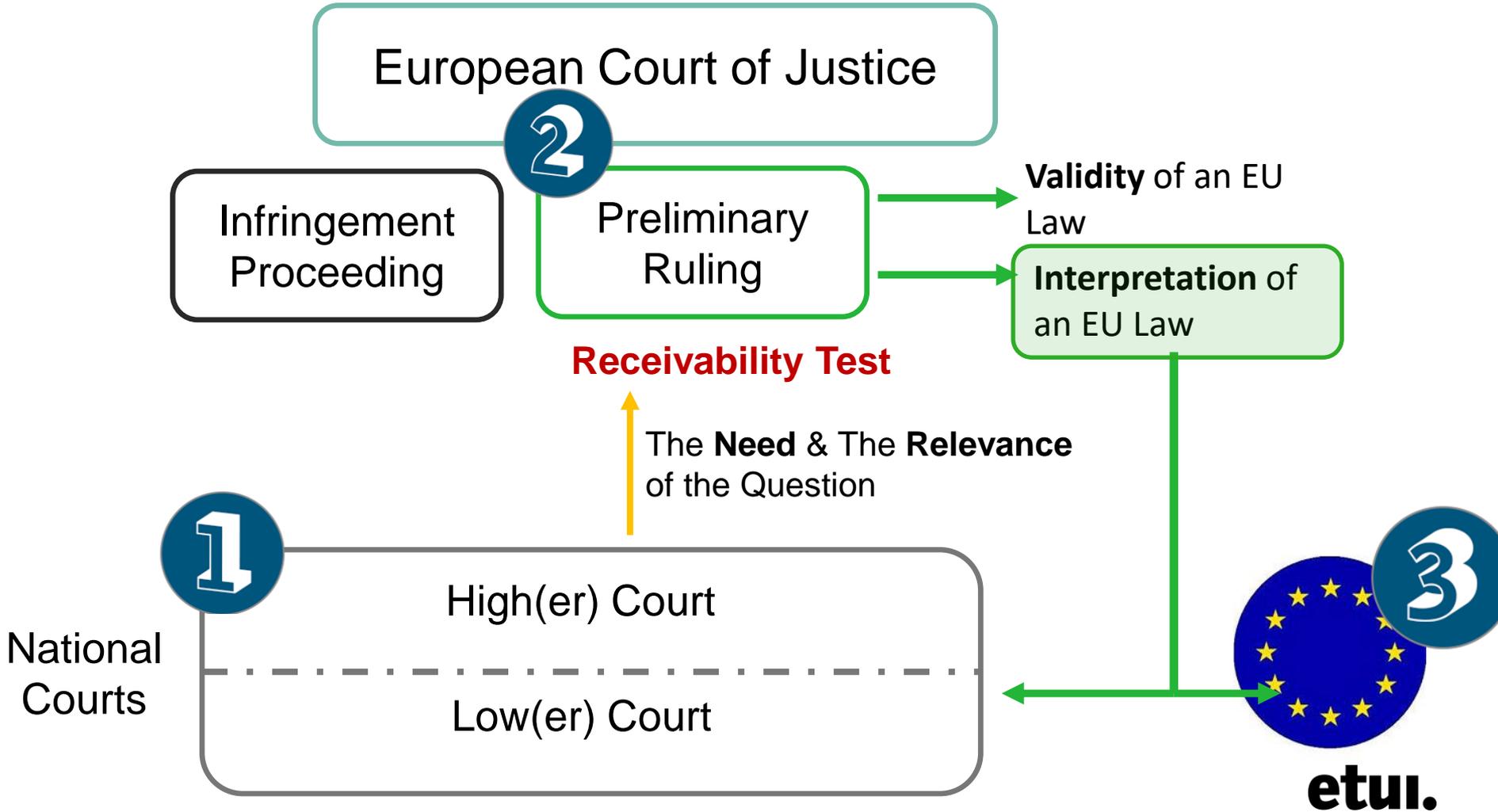
Actions before the CJUE

European Court of Justice

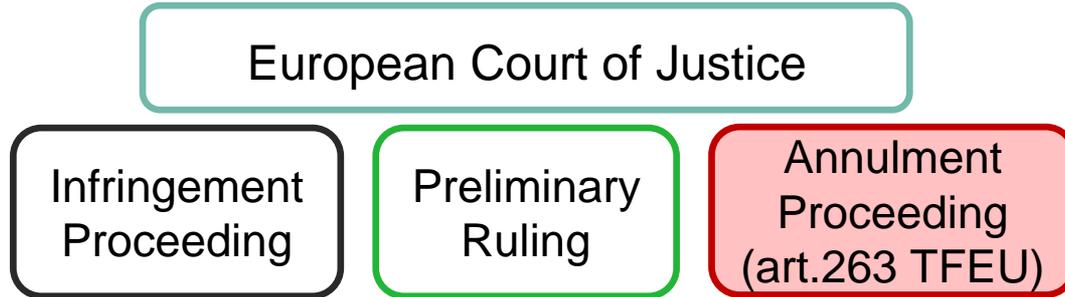
Infringement
Proceeding

Preliminary
Ruling

Actions before the CJUE



Actions before the CJUE



*The CJUE shall review the **legality of legislative acts of the Council, of the 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 effect vis-à-vis third parties. (...)*

*If shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council of the Commission **on grounds of** lack of competence, infringement of an essential procedural requirement, **infringement of the Treaties or of any rule of law relating to their application**, or misuse of powers.*

(...)

***Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person of which is of direct and individual concern to them**, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*

(...)

*The proceedings provided for in this Art shall be instituted within **two months** ...*

Actions before the CJUE

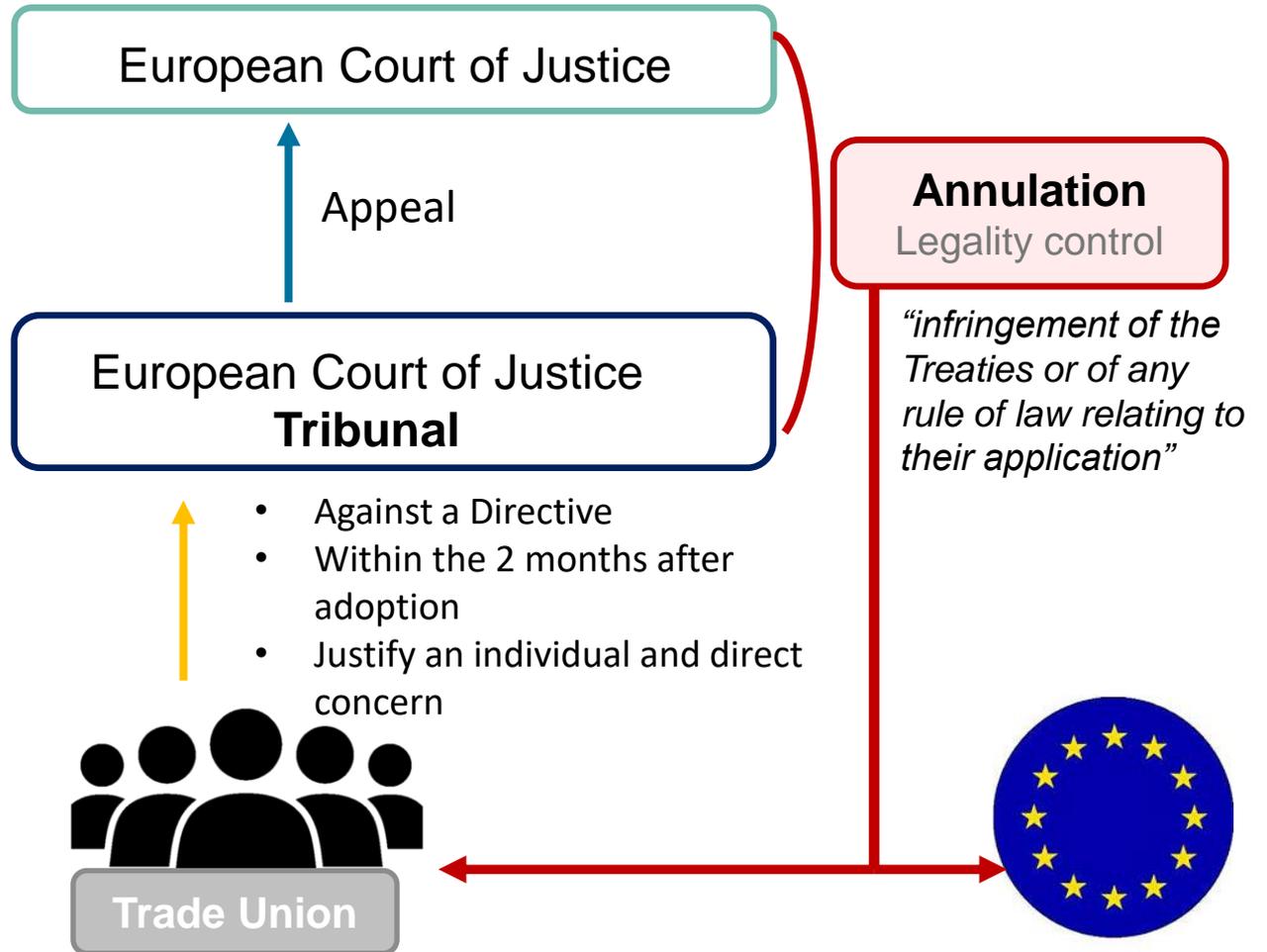
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Annulment
Proceeding
(art.263 TFEU)

Actions before the CJUE



Annulment Directive (EU) 2020/739: T-484/20



- 11th March 2020, the World Health Organization (WHO) declared the COVID-19 outbreak to be a pandemic
- In Europe all Member States have adopted at the national level restrictions of individual freedoms (e.g., curfew, limitation of free movement of person, teleworking whenever possible, closing non-essential shops..) to limit the spread of the virus
- The 3rd June 2020, adoption of the Directive (EU) 2020/739 classifying SARS-CoV-2 as a biological agent of category 3 (amending Dir. 2000/54/EC)
- Action brought on 3rd August 2020 : *SATSE v Commission*

Who is SATSE?

Sindicato de Enfermería (SATSE)(Madrid, Spain) – a Nursing Union, defending nursing and physiotherapy professionals.

Individual and direct concern with the decision to classify it at category 3 and not 4: art.3 of the Directive 2000/54/EC

See: DRAFT MOTION FOR A RESOLUTION pursuant to Rule 112(4) of the Rules of Procedure on the Commission Directive (EU) 2020/739 of 3 June 2020 amending Annex III to Directive 2000/54/EC of the European Parliament and of the Council as regards the inclusion of SARS-CoV-2 in the list of biological agents known to infect humans and amending Commission Directive (EU) 2019/1833 (D067174/03-2020/2672 (RPS))

Annulment Directive (EU) 2020/739: T-484/20



Action brought on 3 August 2020 – SATSE v Commission (Case T-484/20)

Language of the case: Spanish

Parties

Applicant: Sindicato de Enfermería (SATSE) (Madrid, Spain) (represented by: M. Sesmero González, lawyer)

Defendant: European Commission

Form of order sought

The applicant claims that the General Court should:

Annul Commission Directive (EU) 2020/739 of 3 June 2020 amending Annex III to Directive 2000/54/EC of the European Parliament and of the Council as regards the inclusion of SARS-CoV-2 in the list of biological agents known to infect humans and amending Commission Directive (EU) 2019/1833, published in the Official Journal of the European Union of 4 June 2020 (OJ 2020 L 175, p.11).

Pleas in law and main arguments

In support of the action, the applicant relies on two pleas in law.

First plea in law, alleging infringement of Articles 2 and 18 of Directive 2000/54/EC and Annex III thereto.

In that regard, the applicant relies on the absence of any effective treatment or prophylaxis for the biological agent SARS-CoV-2, the fact that it is a virus that is considered to be highly contagious and which mutates and, therefore, is highly likely to spread to the community and the fact that the coronavirus SARS-CoV-2 causes serious conditions and symptoms resulting in severe human disease, presenting a serious hazard to workers.

Second plea in law, alleging infringement of essential procedural requirements on account of the failure to state reasons for the classification of the biological agent SARS-CoV-2 in group 3.

In that regard, the applicant submits that although the Commission acknowledged that there was no vaccine or effective treatment and despite what was provided for in Article 2 of Directive 2000/54/EC, it classified SARS-CoV-2 in risk group 3 rather than in risk group 4.

Annulment Directive (EU) 2020/739: T-484/20



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Legality Control



“First plea in law, alleging infringement of Articles 2 and 18 of Directive 2000/54/EC and Annex III thereto.”

Dir. 2000/54/EC

Art.2: “Biological Agents” four risk groups

Group 3 biological agent means one that can cause severe human disease and present a serious hazard to workers; it may present a risk of spreading to the community, but there is usually effective prophylaxis or treatment available;

Group 4 biological agent means one that causes severe human disease and is a serious hazard to workers; it may present a high risk of spreading to the community; there is usually no effective prophylaxis or treatment available

Art.18: Classification of biological agents

3. If the biological agent to be assessed cannot be classified clearly in one of the groups defined in the second paragraph of Art 2, it must be classified in the highest risk group among the alternatives.

Legality Control



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Dir. 2000/54/EC

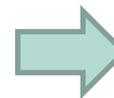
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Legally the biological agent SARS-CoV-2 should have been Group 4 (Politically feasible?)

Other examples? CJUE and OSH

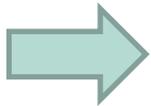
Name	Decision	Object of annulment
VECCO v. European Commission (& ECHA)	T-360/13 (Appeal – C-651/15) (dismissed)	Annulment of Commission Regulation (EU) N°348/2013, amending Annex XIV to REACH
United-Kingdom v Council	C-84/94 (dismissed)	Annulment of the Directive 93/104/EC (2 nd para, art.5)
EPSU and Goudriaan v Commission	T-310/18 (Appeal)	Annulment of Commission refusing to submit to Council a proposal for a decision implementing at EU level, and agreement signed by the European Social partners (on information and consultation on issues likes restructuring, health and safety and equality)
Borax Europe Ltd v ECHA	T-346/10 (dismissed)	Annulment of the decision of ECHA identifying boric acid and disodium tetraborate, anhydrous as substances meeting the criteria referred to in REACH

Other examples? In the future

- Seem **counter intuitive** as a Trade Union to “ask for the annulment” of an OSH Directives – we do not have a lot of them.
- There are cases where might want to be careful:
 - Biological Agent Directive – future pandemic(s)
 - “Mad Cow disease” (Bovine spongiform encephalopathy (BSE)) – Between Category 2 & 3. Classified category 3
 - Carcinogens Agent Directive – If the thresholds are not protecting the workers enough, or if there a protecting more man than women (e.g., discrimination and equal treatment)
- Maybe – ask annulment of other decisions (e.g., Competition filed) **if we think that it is against the fundamental right for all workers to have the right to safe and healthy working conditions (art 3)**

Conclusion

- The Court of Justice of the European Union is a suitable way to develop strategic litigation in OSH
 - So far (almost) exclusively preliminary rulings on **interpretation of an EU Law** (i.e., OSH Directives)
 - One case in **annulment of a Directive** – legality control (with the aim to provide better protection to workers)



EU OSH principles should be respected by Member States, at the National level but also at the EU Level during the adoption (or revision) of Directives

There is a **direct way** for Trade Unions to influence and to impact the adoption of directive if they appear to be in contradiction with EU OSH law.

Possibility to extend this vision to other EU Law that can influence OSH?