Legal Nature of European Union Agricultural Penalties

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ABSTRACT

The article analyses the ECJ's judgment in Bonda (C-489/10), which addressed whether exclusions and reductions of agricultural aid under EU law constitute criminal penalties. The Court confirmed that such measures are specific administrative instruments linked to participation in aid schemes and aimed at protecting the EU budget, not criminal sanctions. Consequently, the ne bis in idem principle does not preclude subsequent criminal proceedings for the same conduct. The authors discuss the reasoning of the ECJ, its reference to ECtHR case law on the notion of "criminal proceedings," and the implications for applying ne bis in idem under both the Charter and the ECHR in national proceedings.

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Excluding a farmer from receiving a single area payment in a given year and reducing the payment he could claim within the following years, imposed as a penalties for the breach of the EU agricultural provisions, do not constitute criminal sanctions. They are specific administrative instruments applied against the farmer who had decided to participate in an agricultural aid scheme. In such a case, the *ne bis in idem* principle does not apply. Thus, exclusion and reduction of agricultural payments do not preclude sentencing the farmer in criminal proceeding for the same breach of the EU agricultural provisions. This conclusion follows from the judgment of the European Court of Justice (ECJ) delivered on 5 June 2012 in case C-489/10 criminal proceedings against Ł. Bonda.

I. Background of the *Bonda* Case

In May 2005, Łukasz Bonda, a Polish farmer, submitted an application to the local agricultural paying agency[1] for a single area payment for 2005. In his application for payment, he overstated the area used for agriculture by giving a figure of 212.78 hectares instead of 113.49 hectares. The paying agency discovered the false information and reduced the single area payment available to him for 2005 up to the amount of the difference between the real area and the area declared. It also excluded him from payments for the three years following the year 2005. Exclusion and reduction were imposed on the basis of Art. 138 (1) paragraph 2 and 3[2] of Regulation 1973/2004.[3] Then, the Prosecutor initiated a criminal proceeding against Ł. Bonda and, on 14 July 2009, the District Court convicted him of subsidy fraud, defined in Art. 297(1) of the Polish Criminal Code.[4] The District Court stated that Ł. Bonda made a false declaration to obtain an unjustifiably high amount of a single area payment and sentenced him to eight months of imprisonment, suspended for the three years, and a fine of 1600 Polish zloty (approx. € 400). The farmer appealed to the Regional Court, which set the contested judgement aside. The Regional Court stated that the criminal proceeding was inadmissible because administrative penalties, consisting of exclusion and reduction, had already been imposed on Ł. Bonda for the same act. In consequence, due to the *ne bis in idem* principle, as envisaged in Art. 17(1)(11) of the Criminal Procedure Code (CPC),[5] it discontinued the criminal proceeding. The Principal Public Prosecutor filed an appeal against this verdict to the Supreme Court, arguing that the Regional Court infringed Art. 17(1)(11) CPC. The Supreme Court considered that in order for such a statement to be made, it must determine whether the proceedings launched by the agricultural paying agency may be regarded as criminal proceedings within the meaning of Art. 17 (1)(11) CPC. It declared that, while a literal interpretation of this provision requires the question to be answered in the negative, it must be interpreted in the light of Art. 4(1) of Protocol No. 7 to the European Convention of Human Rights (ECHR) establishing the *ne bis in idem* principle. Considering that the legal nature of the exclusion and reduction imposed on the basis of Art. 138 (1) paragraph 2 and 3 of Regulation No. 1973/2004 must be assessed, the Supreme Court referred a preliminary question to the ECJ, asking whether these provisions constitute criminal penalties.

As the preliminary question of the Polish court considered only the legal nature of the penalties envisaged in Art. 138 (1) of Regulation 1973/2004, the ECJ limited its considerations to this issue. The ECJ ruling, however, raises a fundamental question of application of the *ne bis in idem* principle in the national case. Therefore, commentary on the *Bonda* case requires a twofold approach: it must focus on the legal nature of penalties imposed for the breach of the EU agricultural provisions as well as on application of the *ne bis in idem* principle.

II. Penalties Imposed for Breaches of the Union's Agricultural Legislation

1. Case-law of the European Court of Justice on penalties imposed for breaches of the Union's agricultural legislation

The ECJ had many occasions to express its view on the legal nature of penalties imposed for breaches of the EU agricultural provisions. Already in the 90s, in the case C-240/90 *Germany v Commission,* it stated that temporary exclusion of an operator from an aid scheme due to the irregularities committed by him does not constitute a criminal sanction.[6] Then, in case C-210/00 *Käserei Champignon Hofmeister,* the ECJ analysed whether a penalty established in agricultural regulation could be regarded as being of a criminal nature. The case concerned provisions establishing a fine as a penalty for false declarations in an application for an export refund. The question arose as to whether such a fine had to be assessed in the light of the *nulla poena sine culpa* principle. The ECJ answered this question in the negative, explaining that the penalty at issue was an integral part of the export refund scheme and not of a criminal nature.[7]

Analysing the legal nature of the penalties, the ECJ underlines that exclusion, as a type of a penalty foreseen in the EU agricultural legislation, may be imposed only on a farmer who has chosen to take advantage of an agricultural aid scheme.[8] In such a case, proceedings launched against farmers under EU legislation are not of a criminal nature. The ECJ also examines the objectives of the penalties. It states that exclusion is intended to combat numerous irregularities, which are committed within the framework of EU agricultural aid. Because these irregularities weigh heavily on the EU budget financing implementation of the Common Agricultural Policy (CAP), exclusions are of such a nature as to jeopardise the actions undertaken by the EU's institutions in the agricultural field, stabilise markets, support the standard of living of farmers, and ensure that supplies reach consumers at reasonable prices.[9] Moreover, under EU agricultural aid, schemes granting the aid are subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness. The penalty imposed in the event of non-compliance with these requirements therefore intends to ensure the sound financial management of EU public funding.[10]

In the above-mentioned jurisprudence, the ECJ applied two conditions that are decisive for claiming that agricultural penalties, *in casu* exclusions and reductions, are not of a criminal nature; thus, they are administrative ones. Firstly, they may be imposed only on farmers who, on the basis of their own decisions, participate in the agricultural aid schemes. Secondly, the ECJ aligned the administrative nature of penalties with their objectives. They are intended to ensure that goals of the CAP are accomplished and that the EU funds allotted for its implementation are spent properly, so that the financial interests of the EU are duly protected, as required by Art. 325 of the Treaty on the Functioning of the European Union (TFEU). From this perspective, the ECJ declares that penalties imposed for breaches of the EU agricultural provisions constitute "a specific administrative instrument forming an integral part of the scheme of aid."

The same rationale was applied in the *Bonda* case. The ECJ reiterated that only farmers who have applied for a single area payment under Regulation No 1973/2004 and provided false information in the application for aid can be subject to the exclusions and reductions foreseen in this Regulation. The ECJ also found that exclusions and reductions constitute a specific administrative instrument forming an integral part of an aid scheme intended to ensure the sound financial management of EU public funds. The ECJ also reiterated Regulation No. 2988/95 on the protection of the EU's financial interests,[11] which, as a horizontal (general) legal act, applies to all EU policies, including CAP. This Regulation foresees that the total or partial removal of an advantage granted by EU rules, even if the operator has wrongly benefited from only a part of that advantage, as well as the exclusion from or withdrawal of an advantage for a period subsequent to that of

the irregularity, constitutes administrative penalties (Art. 5(1)(c) and (d) of Regulation No. 2988/95). This Regulation also foresees that the administrative penalties laid down in pursuance of the CAP objectives form an integral part of the aid schemes; they have a purpose of their own and may be applied independently of any criminal penalties, if and in so far as they are not equivalent to such penalties (Art. 6(1) to (5) of Regulation No. 2988/95).

2. Legal Notion of "Criminal Proceedings" in the Case-Law of the European Court of Human Rights (ECtHR)

After excluding the criminal nature of exclusions and reductions foreseen in Art. 138 (1) paragraph 2 and 3 of Regulation No. 1973/2004 in the context of its own case-law, the ECJ analysed whether the same conclusion would be valid if conditions formulated in the case-law of the European Court of Human Rights (ECtHR) would apply. The ECJ made this reference because the *ne bis in idem* principle is established both in Art. 50 of the Charter of the Fundamental Rights (Charter)[12] and in Art. 4 (1) of Protocol No. 7 to ECHR. This analysis allowed the ECJ to comply with the requirement of homogeneity, which stipulates that rights contained in the Charter are to have the same meaning and scope as the corresponding rights guaranteed by the ECHR, as interpreted by the case-law of the ECtHR (Art. 6 (1) third subparagraph Treaty on European Union and Art. 52 (3) of the Charter).[13]

As a point of departure, the ECJ took the *Engel* case,[14] in which the ECtHR formulated a concept of "criminal proceedings" within the meaning of Art. 4 (1) of Protocol No. 7. According to this judgement, three conditions are decisive for stating that proceedings are of a criminal nature. The first is the legal classification of the offence under national law, the second is the very nature of the offence, and the third condition relates to the nature and degree of severity of the penalty that the person concerned is liable to incur.

As regards the legal classification of the offence under national law (the first *Engel*'s condition), the ECJ stated that, in the *Bonda* case, "national law" in the meaning of the case-law of the ECtHR must be equated with "EU law." Then, the ECJ found that, under EU law, the exclusion and reduction provided for in Art. 138 (1) paragraph 2 and 3 of Regulation No. 1973/2004 are not regarded as being criminal in nature. As concerns evaluation of the very nature of the offence (the second *Engel*'s condition), the ECJ stated that it must be ascertained whether the purpose of the applied exclusion and reduction is punitive. It then declared that they are applicable only to farmers who have recourse to the aid scheme set up by that regulation and that the purpose of these exclusion and reduction is not punitive. They are essentially aimed at protecting the management of EU funds by temporarily excluding a recipient who has made incorrect statements in his application for aid. In addition, a reduction in the amount of aid that may be paid to the farmer for the three years following the irregularity is not absolute, as it is subject to the submission of an application in respect of those years. Thus, if the farmer makes no application for the three following years, the reduction is rendered ineffective. This is also the case if the farmer no longer satisfies the conditions for granting of the aid. Finally, the reduction also becomes partly ineffective if the amount of aid the farmer can claim in respect of the following years is lower than the amount of aid to be withheld pursuant to the measure reducing the aid wrongly paid. The ECJ declared that these arguments exclude the punitive nature of penalties foreseen under the Regulation No 1973/2004. Finally, the ECJ evaluated the nature and degree of the severity of the penalties that the farmer concerned is liable to incur (the *Engel*'s third condition). The sole effect of the exclusion and reduction is to deprive the farmer of the prospect of obtaining aid. Therefore, the exclusion and reduction cannot be equated with criminal penalties. The ECJ concluded that the characteristics of the applied exclusion and reduction exclude the possibility to consider them criminal penalties.

III. The Ne Bis in Idem Principle

As explained previously, the Polish Criminal Procedure Code considers the *ne bis in idem* principle to be an obstacle to continuing criminal proceedings. According to Art. 17(1), points (7) and (11) of the CPC, "proceedings shall not be initiated, and those initiated shall be discontinued, if: criminal proceedings concerning the same act and the same person have been definitively concluded or those already initiated are continuing (…), there are other circumstances excluding prosecution." For this reason, the Supreme Court asked the ECJ to specify the nature of the penalties envisaged in Art. 138(1) of Regulation No. 1973/2004. As the ECJ ruled that the penalties in question are of an administrative nature, the imposition of administrative penalties on the farmer is not an obstacle to continuing a criminal procedure against him.

The case, nevertheless, raises issues of different nature, as the *ne bis in idem* is not only the principle of Polish criminal procedure but also constitutes an international legal standard. In its preliminary question, the Supreme Court indicated only the ECHR standard (Art. 4 of Protocol No. 7 to the ECHR) and made no reference to the Charter (Art. 50 of it). Nonetheless, the *Bonda* case concerned the application of EU law in the national system of the Member State, which implied the application of the Charter. In consequence, two questions should be answered: the first concerns application of Art. 50 of the Charter to the *Bonda* case; the second refers to interpretation of that article.

Answering the first question, it should be kept in mind that, according to Art. 51(1) of the Charter, the Member States are obliged to respect provisions of the Charter, including Art. 50, only to the extent "they are implementing Union law." This proviso has been interpreted by the ECJ as follows:

1) either that the national provision constitutes "a measure implementing EU law" or is "connected in any other way with EU law;"[15]

2) or that the case "is covered by European Union law."[16]

In the *Bonda* case, the paying agency directly applied Art. 138 (1) of Regulation No. 1973/2004, and the criminal court applied Art. 297(1) of the Polish Criminal Code, which implements the Convention on the Protection of the European Communities' Financial Interests.[17] For this reason, the Advocate General Julianne Kokott rightly pointed out that "if the obligation can thus arise from the European Union law for the Member States to provide for criminal penalties in respect of risks to the financial interests of the Union in connection with agricultural aid, then conversely the possible limits to this obligation must also arise from European Union law and in particular from the fundamental rights of the European Union. The European Union law obligation to impose criminal penalties for infringements of European Union law can only exist to the extent that the fundamental rights of the persons concerned, which are guaranteed at European Union level, are not affected."[18]

In the context of application of the Charter before the Polish criminal court, another problem arises, concerning the possible limitative character of Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.[19] In particular, attention shall be paid to Art. 1(1) therein, stating that "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."

This clause, however, should not be interpreted as granting to the Member States concerned an opt-out, excluding the application of the Charter on their territories. This view was consequently supported by the Advocates General V. Trstenjak (case C-411/10 *N.S. and others*[20]) and J. Kokott (case C-489/10 *Bonda*[21]). It

was also expressly confirmed by the ECJ in case C-411/10 *N.S. and others*, when it stated that "Protocol (No. 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland." The ECJ declared that Art. 1(1) of Protocol (No. 30) explains Art. 51 of the Charter with regard to the scope thereof and does not intend to exempt Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.[22]

Apart from the reference to the Charter, it must be underlined that the *ne bis in idem* principle was included in the EU provisions concerning the protection of the EU's financial interests long before the Charter entered into force. The tenth recital in the preamble to Regulation No 2988/95, reiterated by the ECJ in *Bonda* case, states: "… not only under the general principle of equity and the principle of proportionality but also in the light of the principle of *ne bis in idem*, appropriate provisions must be adopted while respecting the *acquis communautaire* and the provisions laid down in specific Community rules existing at the time of entry into force of this Regulation, to prevent any overlap of Community fines and national criminal penalties imposed on the same persons for the same reasons." After the Charter entered into force, the ECJ confirmed, in the context of national proceedings concerning the imposition of penalties for the breach of EU law on the protection of the EU's financial interests, that the *ne bis in idem* principle is enshrined in Art. 50 of the Charter[23] For these reasons, the Supreme Court could rather seek to establish the Charter standard of the *ne bis in idem* principle on the basis of Art. 50 of the Charter (as proposed by the AG J. Kokott) instead of referring to the national standard enshrined in the Polish Criminal Procedure Code.

This conclusion leads to the second question concerning the interpretation of Art. 50 of the Charter, stating that "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law." Interpretation of this Article necessitates an integrative approach, including both the jurisprudence of the ECtHR and of the ECJ. On the one hand, according to Art. 52 (3) of the Charter (mentioned earlier in this text), the *ne bis in idem* principle enshrined in Art. 50 of the Charter must be interpreted with reference to Art. 4 of Protocol No. 7 to the ECHR. Possible doubts arise from the fact that this Protocol has not been ratified by all Member States of the Union so far, and the ratifications completed by some of them were made conditional to reservations. This means that the standard established by Art. 4 of Protocol No. 7 is not commonly and unconditionally adopted by all the Member States. Luckily, these doubts are not valid in the case of Poland, which ratified Protocol No. 7, and it entered into force on its territory on 1.03.2003. Moreover, the circumstances concerning the ratifications of Protocol No. 7 by the Member States did not prevent the ECJ from referring to the ECHR standard when it recognized the *ne bis in idem* principle as a general principle of EU law in competition law cases (on the basis of Arts. 101 and 102 TFEU as well as Regulation No. 1/2003). In this context, the ECJ has consistently held that "the principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Art. 4(1) of Protocol No. 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision."[24] Still, it must be emphasized that the ECJ referred to the ECHR standard, established in Art. 4 (1) of Protocol No. 7, in the context of obligations imposed on the institutions of the EU (the Commission) and not on the Member States. It may also be surprising that the principle has been recognized in the context of proceedings (and penalties), which are considered to be of an administrative and not of a criminal nature.

On the other hand, interpretation of Art. 50 of the Charter cannot ignore the jurisprudence of the ECJ, confirming the obligation of Member States to respect the *ne bis in idem* principle within the framework of judicial cooperation in criminal matters. The interpretation given by the ECJ to the *ne bis in idem* principle enshrined in Art. 54 CISA[25] and on the grounds of the European Arrest Warrant[26] has been construed in an

autonomous way, without reference to the ECHR standard. This may be explained, however, by the fact that the criminal nature of the national proceedings in which the principle was invoked was not in question. For this reason, the jurisprudence of the Court concerned mostly the "*idem*" and not "*bis*."

IV. Conclusion

The *Bonda* case confirms the ECJ jurisprudence concerning the legal character of penalties imposed for the breach of EU agricultural law. From this point, the question of the Supreme Court was not as problematic as it appeared, because the ECJ applied its earlier case-law. It was, however, interesting to see how the ECJ adopts the integrative approach, applying the rules concerning the "criminal nature" of penalties formulated by the ECtHR.

The *Bonda* case is also attention-grabbing from the point of view of what the ECJ *did not* state, namely whether the *ne bis in idem* principle applies in this particular case. Taking into account earlier jurisprudence of that same Court concerning the interpretation of Art. 51(1), the answer to this question should be affirmative. In consequence, the Polish Supreme Court should apply – in parallel – Art. 50 of the Charter and Art. 4 of Protocol No. 7 to the ECHR. The *Bonda* case also shows that the ECJ is willing to accept an integrative approach when interpreting EU law with reference to human rights issues, accepting the jurisprudence of the ECtHR concerning the *ne bis in idem* principle.

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1. District Office of the Agricultural Restructuring and Modernisation Agency.↩
2. This provision foresees that:
   1. Except in cases of force majeure or exceptional circumstances as defined in Art. 72 of Regulation (EC) No. 796/2004, where, as a result of an administrative or on-the-spot check, it is found that the established difference between the area declared and the area determined, within the meaning of point (22) of Art. 2 of Regulation (EC) No. 796/2004, is more than 3 % but no more than 30 % of the area determined, the amount to be granted under the single area payment scheme shall be reduced, for the year in question, by twice the difference found. If the difference is more than 30 % of the area determined, no aid shall be granted for the year in question. If the difference is more than 50 %, the farmer shall be excluded once again from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding.↩
3. Commission Regulation (EC) No. 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No. 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials, *O.J. L 345, 20.11.2004, pp. 1–84. This regulation was compelled by the* Commission Regulation (EC) No. 1121/2009 of 29 October 2009 laying down detailed rules for the application of Council Regulation (EC) No. 73/2009 as regards the support schemes for farmers provided for in Titles IV and V thereof (O.J. L 316, 2.12.2009, p. 27). Presently binding regulation does not foreseen exclusions and reductions commented in the *Bonda* case. Nonetheless, ECJ's rationale applied in that case should be taking into consideration when application of the *ne bis in idem* principle is considered.↩
4. „A person who with the intention of obtaining for himself or another person from a bank or organisational entity carrying on a similar economic activity on the basis of a law, or from a body or institution in receipt of public funds, a credit, pecuniary loan, guarantee, warranty, letter of credit, grant, subsidy, confirmation by a bank of an obligation under a guarantee or warranty or a similar financial provision for a specific economic aim, an electronic payment instrument or public order, submits a document that is forged, altered, attests falsehoods or is dishonest, or a dishonest written statement concerning circumstances of essential importance for obtaining the said financial support, payment instrument or order, shall be liable to a penalty of deprivation of liberty for a period of three months to five years".↩
5. "Proceedings shall not be initiated, and those initiated shall be discontinued, if: (...) criminal proceedings concerning the same act and the same person have been definitively concluded or those already initiated are continuing (...)".↩
6. Case C-240/90 *Germany v Commission* [1992] ECR I-5383, para. 25.↩
7. Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, para. 25.↩
8. *Käserei Champignon Hofmeister*, para. 41; Case 137/85 *Maizena and Others* [1987] ECR 4587, para. 13; *Germany v Commission*; para. 26.↩
9. *Käserei Champignon Hofmeister* , para. 38.↩
10. *Käserei Champignon Hofmeister* , para. 41↩
11. Council Regulation (EC, Euratom) No. 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (O.J. L 312, 23.12.1995, p. 1).↩
12. "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."↩
13. Case C-400/10 *McB* [2010] ECR I-0000, para. 53; Case C-256/11 *Dereci and Others* [2011] ECR I-0000, para. 70.↩
14. *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22.↩
15. Case C-339/10 *Estov,* 12.11.2010, para. 14; Case C-457/09 *Chartry,* 1.03.2011, para. 25.↩

16. Case C-256/11 *Dereci,* 15.11.2011, para. 72.↩
17. A case involving implementation of EU law will not always be a clear-cut case as the opinion of the AG in case C-617/10 *Aklagaren v. Hans Akerberg Fransson* reveals.↩
18. Opinion of 15.12.2011 in case C-489/10 *Bonda,* para. 19.↩
19. O.J. C 83, 30.3.2010, p. 313.↩
20. Opinion of 22.09.2011 in case C-411/10, *N.S. and others,* para. 169.↩
21. Opinion of 15.12.2011 in case C-489/10 *Bonda,* para. 23.↩
22. Case C-411/10, *N.S. and others*, 21.12.2011, paras. 119-120.↩
23. Case C-150/10 *Beneo-Orafti*, 21.07.2011, nyr., para. 68.↩
24. Case C-238/99 *P LVM and others v. Commission*, 15.10.2002, para. 59; Case C-289/04 P *Showa Denko v. Commission*, 29.06.2006, para. 50; case 308/04 P *SLG Carbon v. Commission,* 29.06.2006, para. 26.↩
25. Joined cases C-187/01 and C-385/01 *Gözütok and Brügge,* 11.2.2003, ECR 2003, p. I-1345; case C-469/03 *Miraglia,* 10.3.2005, ECR 2005, p. I-2009; case C-436/04 *Van Esbroeck,* 9.3.2006, ECR 2006, p. I-2333; case C-467/04 *Gasparini, 28*.9.2006, ECR 2006, p. I-9199; case C-150/05 *Van Straaten,* 28.9.2006, ECR 2006 p. I-9327; case C-288/05 *Kretzinger*, 18.7.2007, ECR 2007, p. I-6441; case C-367/05 *Kraaijenbrink*, 18.7.2007, ECR 2007, p. I-6619; case C-297/07 *Bourquain*, 11.12.2008, ECR 2008, p. I-9425.↩
26. Case C-66/08 *Kozlowski*, 17.7.2008, ECR 2008, p I-6041; case C-261/09 *Mantello*, 16.11.2010, nyr.↩

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