

CJEU Rules on Public Security Measure within EU Competence on Approximation of Laws

Thomas Wahl

On 3 December 2019, the CJEU dismissed an action of the Czech Republic that sought the annulment of Directive 2017/853 of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. The [case reference is C-482/17](#).

In view of the abolishment of the internal borders within the Schengen area, the 1991 Directive lays down the conditions under which various categories of firearms can be acquired and held for civil purposes as well as the requirements for the prohibition to acquire firearms for reasons of public safety. With the revision of 2017, the European Parliament and the Council introduced stricter rules for the most dangerous, deactivated, and semi-automatic firearms in response to terrorist acts and in order to prevent the misuse of firearms for criminal purposes.

The Court held that the measures taken by the European Parliament and the Council in the contested directive (Directive 2017/853) do not entail breaches of the principles of conferral of powers, proportionality, legal certainty, protection of legitimate expectations, and non-discrimination as alleged by the Czech Republic in support of its action.

First, the Czech Republic argued that the 2017 Directive could not be based on Art. 114 TFEU (approximation of laws of the Member States in relation to the functioning of the internal market) because the main objective exclusively pursues a higher level of public security. Moreover, there is currently no legal basis in the Treaties for the adoption of the established prohibitions. Art. 84 TFEU specifically excludes harmonisation in the fields of prevention of crime and terrorism.

The CJEU held, however, that, where an act based on Art. 114 TFEU has already removed any obstacles to trade in the area that it harmonises, the EU legislator is not prevented from adapting that act to any change in circumstances or any development of knowledge with regard to its task of safeguarding the general interests recognised by the Treaty, e.g., the fight against international terrorism and serious crime in order to pursue public security. Moreover, the CJEU pointed out that the contested Directive cannot be regarded in isolation, but should include a look at the existing rules that it amends, which are important in order to identify the legal basis. Otherwise the paradoxical result would occur that the amendments could not be based on Art. 114 TFEU, whereas it would have been possible to achieve the same normative result by a full recast of the initial Directive. Ultimately, the CJEU cannot see that the contents of the contested Directive have nothing to do with the internal market. On the contrary, the 2017 Directive adjusts the balance between the free movement of goods and the security of EU citizens. In sum, there is no violation of the principle of conferral of powers.

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Second, the Czech Republic argued that a breach of the principle of proportionality exists. In this context, the Czech Republic particularly blamed the EU institutions for not having carried out an impact assessment. In addition, it raised doubts as to whether the measures adopted are appropriate to achieve the objective of combating the misuse of firearms.

The CJEU, by contrast, found that the EU legislator has broad discretion when it makes political, economic, and social choices. This discretion is subject to a limited judicial review. The CJEU examined the 2016 Inter-institutional Agreement on Better Law-Making. Indeed, the Commission should, as a rule, carry out an impact assessment if a legislative initiative has significant economic, environmental, or social implications. However, not carrying out an impact assessment cannot necessarily be regarded as a breach of the proportionality principle. The EU legislator is only required to have sufficient information enabling it to assess the proportionality of a planned measure. Therefore, during the legislative procedure, co-legislators must take into account the available scientific data and other findings that became available, including scientific documents used by the Member States during Council meetings. The CJEU observed that the EU legislature had at its disposal numerous analyses and recommendations covering all the issues raised in the Czech Republic's argument. These analyses and recommendations did not prove a manifest inappropriateness in relation to the objectives of ensuring public safety and security for EU citizens and the functioning of the internal market in firearms for civilian use. As a result, the CJEU did not see a violation of the EU institution's wide scope of discretion.

In addition, the CJEU rejected specific arguments of the Czech Republic against certain provisions and found no breach of the principles of proportionality, legal certainty, and the protection of legitimate expectations of categories of owners or holders of weapons (potentially subject to a stricter regime under the contested directive).

Ultimately, the CJEU rejected the argument of the Czech Republic that the 2017 Directive is discriminatory because it includes a specific provision that is only valid for Switzerland (to which the Directive also applies as a Schengen country). This provision is a derogation from the general prohibition on converting automatic firearms into semi-automatic firearms. It takes into account the specific Swiss military system based on general conscription and having had in place over the last 50 years a transfer of military firearms to persons leaving the army. The Czech Republic argued that such derogation introduces unequal treatment between Switzerland and the other EU/EFTA Member States.

The CJEU found, however, that the principle of equality first requires establishing that Switzerland and the EU/EFTA Member States are in a comparable situation as regards the subject matter of this derogation. This is not the case here because Switzerland is able to trace and monitor the persons and weapons concerned due to its long-standing culture and tradition. Hence, the country fulfils the public security and safety objectives pursued by the contested directive. This cannot be assumed for the other Member States.

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