Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 September 2024 *

(Reference for a preliminary ruling – Article 267 TFEU – Definition of 'court or tribunal' – Criteria relating to the constitution and function of that body – Exercise of judicial or administrative functions – Public authority not subject to regulation and/or oversight of statutory auditors – Internal organisational arrangements – Power to initiate infringement proceedings – Power to impose penalties – Decision against which an action for annulment may be brought – No status as 'third party' in relation to the authority having adopted the decision under judicial review – Inadmissibility)

In Case C-368/23 [Fautromb], [i]

REQUEST for a preliminary ruling under Article 267 TFEU from the formation restreinte du Haut Conseil du commissariat aux comptes (High Council of Statutory Auditors, Restricted Composition, France), made by decision of 25 May 2023, received at the Court on 12 June 2023, in the proceedings

Haut conseil du commissariat aux comptes

v

MO,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, T. von Danwitz, A. Kumin and I. Ziemele, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2024,

after considering the observations submitted on behalf of:

– MO, by H. Carrasco, F. Molinié and M. Nguyen Chanh, avocats,

– the French Government, by R. Bénard and M. Guiresse, acting as Agents,

* Language of the case: French.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any of the parties to the proceedings.

– the Belgian Government, by A. De Brouwer and L. Van den Broeck, acting as Agents,

– the European Commission, by O. Gariazzo, G. Goddin, M. Mataija and G. von Rintelen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 25 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), read in conjunction with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, and amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ 2006 L 157, p. 87) as amended by Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 158, p. 196) ('Directive 2006/43'), and with Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (OJ 2014 L 158, p. 77).

2 The request has been made in the context of a dispute between the Haut Conseil du commissariat aux comptes (High Council of Statutory Auditors, France) ('the H3C') and MO, a statutory auditor, concerning his joint exercise of statutory audit activities and certain commercial activities.

Legal context

European Union law

Directive 2006/43

3 Article 2(10) of Directive 2006/43 provides:

'For the purpose of this Directive, the following definitions shall apply:

…

10. "competent authorities" means the authorities designated by law that are in charge of the regulation and/or oversight of statutory auditors and audit firms or of specific aspects thereof; …'

4 Article 30 of that directive, headed 'Systems of investigations and penalties', provides, in paragraph 1 thereof:

'Member States shall ensure that there are effective systems of investigations and sanctions to detect, correct and prevent inadequate execution of the statutory audit.'

5 Under Article 30a(1) of that directive, headed ‘Sanctioning powers’:

‘Member States shall provide for competent authorities to have the power to take and/or impose at least the following administrative measures and sanctions …:

…’

6 Article 32(1) and (4) of that directive provides:

‘1. Member States shall organise an effective system of public oversight for statutory auditors and audit firms based on the principles set out in paragraphs 2 to 7, and shall designate a competent authority responsible for such oversight.

…

4. The competent authority shall have the ultimate responsibility for the oversight of:

(a) the approval and registration of statutory auditors and audit firms;

(b) the adoption of standards on professional ethics, internal quality control of audit firms and auditing, except where those standards are adopted or approved by other Member State authorities;

(c) continuing education;

(d) quality assurance systems;

(e) investigative and administrative disciplinary systems.’

Directive 2006/123

7 Article 25(1) of Directive 2006/123 is worded as follows:

‘Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.

However, the following providers may be made subject to such requirements:

(a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality;

(b) providers of certification, accreditation, technical monitoring, test or trial services, in so far as is justified in order to ensure their independence and impartiality.’

French law

The Commercial Code

8 Article L. 822-10 of the code de commerce (Commercial Code), in the version applicable to the dispute in the main proceedings ('the Commercial Code'), provided:

'The functions of a statutory auditor are incompatible with:

…

3. Any commercial activity, whether carried out directly or through an intermediary …'

9 Article L. 824-1 of that code provided, inter alia, that any breach of the legal conditions for the exercise of the profession of statutory auditor constitutes disciplinary misconduct.

10 The Restricted Composition of the H3C was established by Article L. 821-2, II, of the Commercial Code, pursuant to which that composition had jurisdiction to impose the penalties for misconduct to which statutory auditors were subject as a result of disciplinary offences that they had committed.

11 As members of the College of the H3C, the members of the Restricted Composition of the H3C fell within the scope of the provisions of loi nº 2017-55 du 20 janvier 2017, portant statut général des autorités administratives indépendantes et des autorités publiques indépendantes (Law No 2017-55 of 20 January 2017 on the general status of independent administrative authorities and independent public authorities) (JORF of 21 January 2017, Text No 2). It follows from this, inter alia, that their mandate was irrevocable and that they were subject to rules of professional ethics laying down various incompatibilities and requiring them to exercise their functions with dignity, probity and integrity, to put to an end immediately any conflict of interest and not to receive or seek instructions from any authority in the exercise of their powers.

12 Article L. 824-13 of the Commercial Code provided:

'The decision of the [H3C] shall be published on its website. Where appropriate, it shall also be made public in the publications, journals or media that the [H3C] shall designate, in a form of publication that is proportionate to the offence or misconduct committed and to the penalty imposed. The costs shall be borne by the sanctioned persons.

…'

13 Article L. 824-14 of that code, provided:

'The person sanctioned or the president of the [H3C], with the agreement of the College [of the H3C], may bring an appeal before the Conseil d'État [(Council of State, France)] exercising unlimited jurisdiction.'

The Code of Administrative Justice

14 Article L. 311-4 of the code de justice administrative (Code of Administrative Justice), as amended by Article 33 of loi nº 2021-1382, du 25 octobre 2021 (Law No 2021-1382 of 25 October 2021) (JORF of 26 October 2021, Text No 2), provided:

'The Conseil d'État [(Council of State)] shall, at first and last instance, exercise unlimited jurisdiction in proceedings that are brought before it in accordance with:

…

4. Article L. 824-14 of the Commercial Code;

…'

Order No 2023-1142

15 The ordonnance nº 2023-1142, du 6 décembre 2023, relative à la publication et à la certification d'informations en matière de durabilité et aux obligations environnementales, sociales et de gouvernement d'entreprise des sociétés commerciales (Order No 2023-1142 of 6 December 2023 on the publication and certification of information relating to sustainability and environmental, social and corporate governance obligations) (JORF of 7 December 2023, Text No 19) contains provisions on the replacement of the H3C by the Haute autorité de l'audit (Audit Authority).

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 MO has been entered, since 1967, in the register of the ordre des experts-comptables (Order of Accountants) and in the register of statutory auditors.

17 MO owns, directly or indirectly through Fiducial International SA, 99.9% of the capital of Fiducial SC, of which he is the manager. The latter company is the parent company of the multidisciplinary Fiducial Group, established in 1970 by MO, and offers a range of services to undertakings.

18 Within that group, the Société fiduciaire nationale d'expertise comptable Fidexpertise SA – of which MO directly or indirectly holds 98.69% of the capital and of which he is the chairman of the board of directors and the chief executive officer – carries out, together with its subsidiaries, accounting activities. The Société fiduciaire nationale de révision comptable, Fidaudit SA – of which MO directly or indirectly holds 98% of the capital and of which he is also the chairman of the board of directors and the chief executive officer – carries out, with its subsidiaries, statutory audit activities.

19 In addition, that group offers, in areas such as that of security, the sale of office supplies and furniture, the delivery of IT services, property agency and the management of real estate investment companies or even banking, a range of other services to undertakings through the subsidiaries of Fiducial SC. Furthermore, the same group operates a national radio station and regional media.

20 On 3 January 2022, the president of the H3C notified the rapporteur-general of the H3C of facts alleged against MO, capable of establishing engagement in commercial activities that are incompatible with the functions of an auditor.

21 Following an investigation by the rapporteur-general of the H3C as to compliance, by MO, with the obligations relating to the exercise of the functions of a statutory auditor, the H3C composition ruling on individual cases, by a decision of 13 October 2022, decided to open penalty proceedings in respect of MO.

22 According to the complaint drawn up by that composition, MO had, since 3 January 2016, it was claimed, been in breach of Article L. 822-10 of the Commercial Code, by engaging, directly or indirectly, through the intermediary of Fiducial SC and Fiducial International, in commercial activities which cannot be described as 'ancillary to the profession of accountant' and which are, therefore, incompatible with the functions of a statutory auditor.

23 On 3 January 2023, the rapporteur-general of the H3C sent the president of the Restricted Composition of the H3C a copy of the notification of that complaint, accompanied by a copy of the investigation report and the investigation file, and then submitted his final report on 19 January 2023.

24 At the hearing held on 13 April 2023, to which MO was summoned, the rapporteur-general of the H3C requested that MO be struck off the register of statutory auditors, and that a financial penalty be imposed and that the publication of the decision in an economic or financial newspaper be ordered, the costs of which were to be paid by the person concerned.

25 It is in the context of those disciplinary proceedings that the Restricted Composition of the H3C deems it necessary to ask the Court about the interpretation of Article 25 of Directive 2006/123, read in conjunction with the provisions of Directive 2006/43 and Regulation No 537/2014.

26 In its request for a preliminary ruling, the Restricted Composition of the H3C points out that it is a 'court or tribunal', within the meaning of Article 267 TFEU.

27 In that regard, it notes that it was established by Article L. 821-2, II, of the Commercial Code, pursuant to which it had jurisdiction to impose the penalties to which statutory auditors, inter alia, were subject as a result of disciplinary offences that they had committed and failures for which they were responsible.

28 As members of the College of the H3C, the members making up the Restricted Composition of the H3C have an irrevocable mandate. Furthermore, they are subject to rules of professional ethics laying down various incompatibilities requiring them to exercise their functions with dignity, probity and integrity, to put to an end immediately any conflict of interest and not to receive or seek instructions from any authority in the exercise of their powers.

29 As regards penalty proceedings against a statutory auditor, the referring body specifies that it may not assume jurisdiction; the proceedings may only be initiated after referral by the rapporteur-general of the H3C. The latter is responsible for conducting an investigation following which, after having heard the person concerned, he or she sends a report to the H3C. The College of the H3C deliberates in the absence of the members of the referring body and, where appropriate, decides on the complaint(s) notified by the rapporteur-general of the H3C to the person concerned, which are then referred to the Restricted Composition of the H3C.

30 After having heard, at a public hearing, the person concerned, who may, if necessary, seek the recusal of one of the members of the Restricted Composition hearing the matter, the latter deliberates in the absence of that person and the rapporteur-general of the H3C, and then delivers a reasoned decision.

31 In that context, the Restrictive Composition of the H3C may, inter alia, impose penalties.

32 The decisions of the Restricted Composition of the H3C may be challenged by the person penalised or the president of the H3C, with the agreement of the College of the H3C, in the context of an appeal before the Conseil d'État (Council of State) exercising unlimited jurisdiction.

33 In those circumstances, the Restricted Composition of the H3C decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 25 of Directive [2006/123] be interpreted, having regard in particular to the provisions of Directive [2006/43] and of Regulation [No 537/2014], as precluding national legislation which prohibits statutory auditors and audit firms from carrying out any commercial activity, whether directly or through an intermediary?

(2) If the first question is answered in the affirmative, does the same apply where that legislation excludes from the scope of that prohibition, by way of exception, on the one hand, commercial activities ancillary to the profession of accountant, carried out in compliance with the rules governing professional ethics and conduct and the independence of statutory auditors and in accordance with the conditions laid down in the third paragraph of Article 22 of [ordonnance n°]45-2138[, du 19 septembre 1945, portant institution de l'ordre des experts-comptables et réglementant le titre et la profession d'expert-comptable (Order No 45-2138 of 19 September 1945 on the establishment of the ordre des experts-comptables and governing the professional title and profession of accountant) (JORF of 21 September 1945, p. 5938),] and, on the other hand, ancillary commercial activities engaged in by a multidisciplinary partnership in accordance with the conditions laid down in Article 31-5 of [loi n° 90-1258, du 31 décembre 1990, relative à l'exercice sous forme de sociétés des professions libérales soumises à un statut législatif ou réglementaire ou dont le titre est protégé et aux sociétés de participations financières de professions libérales (Law No 90-1258 of 31 December 1990 on the exercise, in the form of a company or firm, of liberal professions governed by particular legislation or regulations or whose professional title is protected, and on holding companies for liberal professions) (JORF of 5 January 1991, p. 216)]?'

Admissibility of the request for a preliminary ruling

34 In its written observations, the French Government maintains that the Restricted Composition of the H3C is not a 'court or tribunal', within the meaning of Article 267 TFEU. In particular, it claims that the decision which that composition of the H3C is called upon to make will not be of a judicial nature. In addition, according to that government, the H3C combines regulatory, sectoral oversight and penalty functions that it may exercise *ex officio*, which confirms the administrative nature of its functions. Such a conclusion does not call into question the internal organisational arrangements of the H3C, which are dictated, inter alia, by French constitutional requirements.

35 According to the settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 41 and the case-law cited).

36 It is also clear from the settled case-law of the Court that a national court may refer a question to it only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 42 and the case-law cited).

37 Therefore, it is appropriate to determine whether a body may refer a case to the Court on the basis of criteria relating both to the constitution of that body and to its function. In that regard, a national body may be classified as a 'court or tribunal', within the meaning of Article 267 TFEU, when it is performing judicial functions, but not when exercising other functions, inter alia functions of an administrative nature (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 43 and the case-law cited).

38 It follows that, in order to establish whether a national body, entrusted by law with different categories of function, must be classified as a 'court or tribunal' within the meaning of Article 267 TFEU, it is necessary to ascertain the specific nature of the functions which it exercises in the particular legal context in which it is called upon to make a reference to the Court (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 44 and the case-law cited).

39 The Court has also stated that that determination is particularly important in the case of administrative authorities whose independence is a direct consequence of the requirements arising under EU law which confers on them powers of scrutiny in the sector and powers to supervise markets. Although those authorities may satisfy the criteria set out in paragraph 35 above, the activity of regulating the sector and supervising the markets is essentially administrative in nature, inasmuch as it involves the exercise of powers which are unrelated to those conferred on the courts (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 45).

40 Thus, even if its establishment by law, its permanent nature, the adversarial nature of the proceedings before it, its application of rules of law and its independence are not in doubt, a national body can make a reference to the Court for a preliminary ruling only if, in the context of the case pending before it, it exercises functions of a judicial nature (see, to that effect, judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 46).

41 In addition, the power to initiate infringement proceedings *ex officio* and the power to impose, also *ex officio*, penalties in matters within its jurisdiction constitute evidence that the body in question exercises not judicial but administrative functions (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 48).

42 For the purposes of assessing the nature of the functions of a body, it is also necessary to take its role and place in the national legal system into account. Thus, the activities of bodies whose task is not to review the legality of a decision but to adopt a position for the first time, on complaints and

whose decisions may be subject to judicial review, must be classified as 'administrative' (see, to that effect, judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraphs 50 and 51 and the case-law cited).

43 The Court has also held that the concept of 'court or tribunal' within the meaning of Article 267 TFEU, by its very nature, can designate only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings (judgment of 3 May 2022, *CityRail*, C-453/20, EU:C:2022:341, paragraph 52 and the case-law cited).

44 Lastly, the Court has considered that a decision appears to be an administrative decision where it is not capable of acquiring the attributes of a judicial decision, in particular the force of *res judicata* (see, to that effect, judgment of 16 September 2020, *Anesco and Others*, C-462/19, EU:C:2020:715, paragraph 48 and the case-law cited).

45 In the light of the foregoing, it is necessary to examine, in the present case, the nature and function of the H3C in the system of public oversight for statutory auditors, laid down by Directive 2006/43.

46 In that regard, it should be recalled that Article 32(1) of that directive requires that Member States organise an effective system of public oversight for statutory auditors and audit firms and appoint a competent authority to be responsible for that oversight.

47 In accordance with Article 32(4) of that directive, that authority is to have the ultimate responsibility for the approval and registration of statutory auditors and audit firms, the adoption of standards on professional ethics, internal quality control of audit firms and auditing, continuing education, quality assurance and investigative and disciplinary systems.

48 The public oversight is carried out by the competent authorities of Member States defined in Article 2(10) of Directive 2006/43 as the authorities or the bodies designated by law that are in charge of the regulation and/or oversight of statutory auditors and audit firms.

49 In addition, it should be borne in mind that, in accordance with Article 30(1) of that directive, Member States are to ensure that there are effective systems of investigations and penalties to detect, correct and prevent inadequate execution of the statutory audit and that, in accordance with Article 30a(1) of that directive, Member States are to provide for competent authorities to have the power to take and/or impose at least the administrative measures and sanctions listed therein.

50 In the light of its oversight and sanction powers under EU law, a competent authority appointed by a Member State pursuant, in particular, to Article 32(1) of Directive 2006/43, generally exercises functions of an administrative nature.

51 That being said, notwithstanding the fact that the functions of such an authority are administrative in nature, it is necessary to determine, as is clear from the case-law set out in paragraph 38 above, whether that authority must be regarded, in the context of the specific functions that it carries out in the main proceedings, as a 'court or tribunal', within the meaning of Article 267 TFEU.

52 In that regard, first of all, as the Advocate General observes in point 42 of his Opinion, the H3C may give a ruling *ex officio*. Moreover, it is clear from the order for reference that, in the main proceedings, the disciplinary proceedings were initiated without the H3C having received a complaint beforehand.

53 Next, it should be borne in mind that, as is clear from Article L. 824-14 of the Commercial Code, the decision to impose a penalty in the context of disciplinary proceedings such as that at issue in the main proceedings may be the subject of an appeal before the Conseil d'État (Council of State).

54 In that regard, it should be observed that, where such an appeal is brought, the H3C has the status of defendant. Such participation by the H3C in appeal proceedings, calling into question its own decision, indicates that, where it adopts that decision, the H3C does not have the status of third party, within the meaning recalled in paragraph 43 above.

55 Finally, as the French Government highlighted in its written observations, the Conseil d'État (Council of State) exercising unlimited jurisdiction rules, at first and last instance, on appeals against such a decision to impose a penalty, in accordance with Article L. 311-4 of the Code of Administrative Justice and Article L. 824-14 of the Commercial Code. It is apparent from the information before the Court that, under French law, that circumstance implies that that decision to impose a penalty is not regarded as having the force of *res judicata*.

56 Admittedly, as MO argued, the Court has been seised, in the context of the present reference for a preliminary ruling, of a specific composition of the H3C, namely its Restricted Composition. In that regard, MO claims, in essence, that it is necessary to separate the action of the latter composition and that of the H3C with regard to both instituting proceedings and the status of that Restricted Composition before the Conseil d'État (Council of State) in the context of appeals before it.

57 However, as the Advocate General observes, in essence, in point 43 of his Opinion, the H3C must be regarded, in the context of the proceedings that gave rise to the present reference for a preliminary ruling, as an oversight authority taken as a whole, even though it acts through the different units of its organic structure.

58 It should be noted, in that regard, that Directive 2006/43 refers only to the 'competent authorities', without distinguishing between those authorities and their different components. Therefore, the fact that, in the definition of the organisational arrangements of such an authority, a Member State has decided to establish an internal procedure involving the successive intervention of several components of that authority, with a view to separating the investigative and inquiry functions from that of imposing a penalty, cannot lead to the finding that the decision taken by that authority, in accordance with that internal procedure, is not administrative in nature.

59 In particular, it cannot be inferred from this that the internal organisation of the H3C allows it to be considered that the Restricted Composition of the H3C has status as a 'third party' in relation to the H3C itself, within the meaning recalled in paragraph 43 above.

60 Moreover, as the French Government noted in its written observations, it is clear from the applicable national law that Article L. 824-13 of the Commercial Code explicitly refers to the decision of the Restricted Composition of the H3C in disciplinary matters as constituting a 'decision of the H3C' and not a decision of that composition.

61 In the light of the foregoing considerations, it must be held that the Restricted Composition of the H3C exercises, in the particular legal context in which it seeks a ruling from the Court, functions that are not of a judicial nature, but rather of an administrative nature. Accordingly, it cannot be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU, with the result that the request for a preliminary ruling which it has made is inadmissible.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring body, the decision on costs is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The request for a preliminary ruling from the formation restreinte du Haut Conseil du commissariat aux comptes (High Council of Statutory Auditors, Restricted Composition, France) by decision of 25 May 2023, is inadmissible.

[Signatures]