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DYSON AND THREE ISSUES OF DAMAGES LIABILITY IN EU LAW

Dyson et trois questions sur la responsabilité pour les dommages causés en raison d'une violation du droit de l'Union

Dyson e tre aspetti della responsabilità extracontrattuale dalla violazione del diritto dell'Unione

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Although the judgment *Dyson and Others* v *Commission* is now dated[2], it addresses aspects that, due to their importance, still deserve to be highlighted in this annotation.

By the judgment *Dyson and Others* v *Commission* the Court of Justice dismissed the appeal brought by Dyson Ltd., a vacuum cleaner manufacturer, and its affiliated companies against the judgment of the General Court in *Dyson and Others* v *Commission*[3], dismissing the claim for compensation following the adoption of a Commission Delegated Regulation concerning the energy labelling of vacuum cleaners.

This damages action was preceded by an action for annulment brought by Dyson. The dispute arose under Directive 2010/30/EU[4], which required that energy-related products provide clear, standardised information on energy consumption "during use". Commission Delegated Regulation (EU) No 665/2013 set out a testing method for vacuum cleaners that, in this case, involved using an empty dust receptacle[5]. Dyson

[1] The views and opinions expressed in this paper are those of the Author. They do not purport to reflect the views or opinions of the Institution.

[2] Court of Justice, 11 January 2024, Case C-122/22 P, *Dyson and Others* v *Commission*, ECLI: EU:C:2024:11.

[3] General Court, 8 December 2021, Case T-127/19, *Dyson and Others* v *Commission*, ECLI: EU:T:2021:870.

[4] Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, in *OJ* L 153, 18.06.2010, p. 1.

[5] Commission Delegated Regulation (EU) n. 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to

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challenged the Commission's testing method on the grounds that it did not comply with the directive's requirement to reflect actual energy consumption during use. Dyson argued that the empty-receptacle test undervalued the performance of certain vacuum cleaners — particularly so-called "cyclonic" models — because it failed to capture changes in performance as the dust receptacle fills during use.

While the annulment action was at first rejected by the General Court[6], this judgment was quashed by the Court of Justice[7]. When the General Court judged the annulment action for the second time, it did eventually annul the contested Commission Delegated Regulation (EU) No 665/2013[8].

The damages action was based on this annulment judgment in T-544/13 RENV. At first instance of the damages action, the General Court held in T-127/19 that while the Commission's choice had been erroneous, it did not rise to the level of a "sufficiently serious breach" of EU law needed to trigger non-contractual liability[9].

The central legal question on the appeal in C-122/22 P was whether the Commission's decision to adopt the empty-receptacle testing method constituted a "manifest and grave" error—i.e. a sufficiently serious breach of the rule of law—that would warrant compensation for the damage suffered by Dyson and its affiliates[10].

There are three aspects to highlight in this instructive series of five judgments. The first relates to the notion of sufficiently serious breach of EU law as a condition for damages liability for the Union. The second concerns procedural issues and the differences between the three action types and the competence of the two courts. The third is about the national courts and their application of the principle of Member State liability.

First, in this judgment the Court clarified the issue of discretion and the notion of sufficiently serious breach for liability by elaborating on the factors under which there is no liability even when the rule of law infringed leaves no discretion for the authority. This approach could be called the *"any other relevant factor" test*.

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energy labelling vacuum cleaners, in *OJ* L 192, 13.07.2013, p. 1.

[6] General Court, 11 November 2015, Case T-544/13, *Dyson* v *Commission*, ECLI:EU:T:2015:836.

[7] Court of Justice, 11 May 2017, Case C-44/16 P, *Dyson* v *Commission,* ECLI:EU:C:2017:357.

[8] General Court, 8 November 2018, Case T-544/13 RENV, *Dyson* v *Commission*, ECLI:EU:T:2018:761.

[9] General Court, 8 December 2021, Case T-127/19, *Dyson and Others* v *Commission*, cit.

[10] Court of Justice, 11 January 2024, Case C-122/22 P, *Dyson and Others* v *Commission*, cit.

There are four conditions for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU. There must be (1) a sufficiently serious breach of (2) a rule of law that is intended to confer rights on individuals. In addition to this, (3) a causal link and (4) proof of damage are required. In this case, the examination concerned only the first condition. These conditions are cumulative, with the effect that if one of the conditions is not met, the damages claim fails.

The first condition consists of two components: there must be a breach, and it must be sufficiently serious. In the present case, the applicants clearly fulfilled the first component, as the existence of a breach had already been established in T-544/13 RENV[11]. The key question centered on the second component, namely whether the breach was so serious as to give rise to liability.

The Court has long operated the second component of the first condition by focusing on the amount of discretion afforded to the Member State or institution in implementing a measure. The classic formula has been that where the Member State or the institution in question has only considerably reduced, or indeed no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach[12].

In the present case, the Court first sets out the relevant case-law, by referring to three Grand Chamber judgments and two others (paras 49-51). Then the Court consolidates the case-law by stating first that "[…] the measure of discretion left by the rule of law breached to the EU authority is *only one* of the factors to take into consideration in order to determine whether that authority committed a sufficiently serious breach of that rule. While that is a relevant factor, which must be assessed in every case, the fact that the provision breached does not leave any discretion *does not necessarily* mean that that breach is sufficiently serious." (para 52, emphasis added). The Court continues, by adding that "[d]epending on the circumstances of each case, *other factors* may be taken into account, having regard to the context in which the infringement was found to have been committed. Accordingly, a breach of a rule of law that leaves no discretion to the authority concerned may not appear, in the light of the circumstances, to be manifest and therefore sufficiently serious, in particular if it results from an error of law that may be excused by having regard to difficulties interpreting the legislation containing that rule." (para 53, emphasis added).

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[11] General Court, 8 November 2018, Case T-544/13 RENV, *Dyson* v *Commission*, cit.

[12] Court of Justice, 4 July 2000, Case C-352/98 P, *Bergaderm and Goupil* v *Commission*, ECLI: EU:C:2000:361, para 44.

The Court then reaches the following conclusion: "Consequently, while simply infringing EU law may in certain situations establish the existence of a sufficiently serious breach when the rule infringed left the EU authority which committed that infringement only a reduced or even no discretion, such a finding *may only follow from all the circumstances* surrounding that infringement, where examination of those circumstances does not disclose *any other relevant factor* that may make it possible to find that the breach of that limit on discretion was not manifest and serious." (para 54, emphasis added).

The "any other relevant factor" test seems to be a new development consolidating the liability conditions, even if it is building on the existing case-law. In the case of only a reduced or even no discretion, all the circumstances relating to the infringement must now be examined. Any of them may be considered as "any other relevant factor" with the effect that the second component of the first condition for sufficiently serious breach may not be fulfilled.

It should be recalled that a finding that a legal act of the European Union is in itself unlawful is not a sufficient basis for holding that the non-contractual liability of the European Union is automatically engaged. The applicant must demonstrate that the institution in question has not merely breached a rule of law, but that the breach is sufficiently serious and that the rule of law had intended to confer rights on individuals[13].

In fact, the requirement that there be a sufficiently serious breach of a rule of EU law stems from the need to strike a balance between, on the one hand, the protection of individuals against unlawful conduct of the institutions and, on the other, the leeway that must be accorded to the institutions in order not to paralyse action by them[14].

It would appear that the "any other relevant factor" test in practical terms requires that in an application for damages, and as early on as before the General Court, the applicant should leave no stone unturned and seek to anticipate any possible excuses the institution may invoke in its defence. Because, if any such relevant factor is found, the liability action could fail on this condition. Whether this might mean, in practice, that the application should set out in full a catalogue of possible relevant factors which the institution could potentially invoke in its defence – thereby resulting in concretely proposing a list of excuses for its counterparty – to which the institution could in turn reply and that the court could then

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[13] General Court, 17 July 2024, Case T-209/22, *Makhlouf* v *Council*, ECLI:EU:T:2024:498, para 90 and the case-law cited.

[14] Court of Justice, 10 September 2019, Case C-123/18 P, *HTTS* v *Council*, ECLI:EU:C:2019:694, para 34.

assess, remains to be seen. Further clarification will certainly come in due course from the two courts.

Second, this series of cases contains some useful illustrations on the roles of the two courts and the specific characters of the three action types at hand. The division of competencies between General Court and the Court of Justice is important. Since the establishment of the General Court, the question "who does what" has become crucial. While the competence of the General Court is "general", the appeal before the Court of justice is limited to points of law[15]. The appeal is no place for a complete retrial of the case before the General Court. The appeal is a legal assessment of the appealed judgment on the basis of arguments brought forward by the appellant.

When comparing the General Court judgment in T-127/19 and the Court of Justice appeal judgment in C-122/22 P, the different roles of the Courts are clearly visible. The General Court, in the first judgment, reviews in detail what has happened in the procedure leading to the action for damages, including the assessment of the evidence. The Court of Justice, in the appeal judgment, analyses very carefully what the General Court judgment contains and how it has been reasoned. It is not focused on the facts of the case. In fact, the Court hints to this issue in the appeal judgment on damages: "[…] determination of the relevant factors for evaluating the existence of a sufficiently serious breach is an assessment that, save for errors of law, may be challenged in an appeal only *on the ground of distortion*. However, in the present ground of appeal the appellants merely *implicitly* raise other factors which, in their opinion, were decisive, as opposed to the factors taken into account by the General Court." (para 57, emphasis added).

Therefore, all the relevant arguments must be presented before the General Court. It is not likely that any additional elements would be accepted on the appeal if they are not related to the contested judgment. Thus, the action before the General Court and appeal before the Court of Justice follow very different procedural rules and logic.

For the sake of completeness, it may be added that an action for annulment, such as present in the first part of this litigation (T-544/13[16] and T-544/13 RENV[17]), has its own independent objectives and logic. In the same context, it should be highlighted that the finding of illegality of an EU measure and its subsequent annulment does not lead to an

[15] See Statute of the Court, article 58 and Practice directions to parties concerning cases brought before the Court (2024), point 26

[16] General Court, 11 November 2015, Case T-544/13, *Dyson* v *Commission*, cit.

[17] General Court, 8 November 2018, Case T-544/13 RENV, *Dyson* v *Commission*, cit.

automatic establishment of liability; this underlines the separate and different nature of an action for annulment and an action for damages.

Third, this case, relating to the condition for engaging the liability of the European Union, is also relevant for the application of Member State liability for breaches of EU law.

Since the judgment in *Bergaderm and Goupil* v *Commission*[18], the liability conditions in the two systems have, in principle, been unified. Therefore, the approach adopted for engaging the liability of the Union is transposable to the approach adopted for engaging the liability of the Members States under the régime of *Francovich and others*[19] and *Brassrie du Pêcheur and Factortame*[20]. The case at hand may thus provide useful elements of interpretation to the national courts. This is an important point, as the vast majority of the damages cases for breach of EU law are decided by the national courts. As argued elsewhere, the convergence between the liability of the European Union and the liability of the Member States is a useful tool to align the two liability systems' conditions[21]. In this respect, the opinion of Advocate General Ćapeta contains an up-to-date classification of case-law relating to non-contractual liability, both for the Union and for Member States[22].

As to Member State liability, while the Court may not yet have pronounced on the conditions under which a Member State, faced in a situation of no discretion, might still be excused, an early hint to this direction was made in *Haim*[23]. While the two Union courts will certainly have the opportunity, in the context of future damages actions against the Union, to shed more light on the new condition laid down in paragraph 54, the courts of the 27 Member States will most likely need to refer further issues of interpretation by way of a request for a preliminary ruling. At the very least, any government as a defendant in national proceedings might well be interested to learn how the ruling in the appeal judgment in Dyson is applicable to Member State liability.

One final remark: the judgment in case C-122/22 P and the opinion of Advocate General Ćapeta are a perfect illustration of the difficulties in

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[18] Court of Justice, 4 July 2000, Case C-352/98 P, *Bergaderm and Goupil* v *Commission*, cit.

[19] Court of Justice, 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich and others*, ECLI: EU:C:1991:428.

[20] Court of Justice, 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brassrie du Pêcheur and Factortame*, ECLI: EU:C:1996:79.

[21] See P. AALTO, *Public Liability in EU Law. Brasserie, Bergaderm and Beyond*, Oxford, 2011, p. 202.

[22] Opinion of Advocate General Ćapeta, 6 July 2023, Case C-122/22 P, *Dyson and Others* v *Commission*, ECLI:EU:C:2023:552, point 76.

[23] Court of Justice, 4 July 2000, Case C-424/97, *Haim*, ECLI:EU:C:2000:357, para 41.

evaluating whether the Court "followed" the opinion of the Advocate General or not. On the face of it, the Advocate General allowed the appeal and concluded for EU liability. The Court, however, dismissed the appeal in its totality. One could therefore hastily conclude that the AG's opinion was not followed. However, her suggestion, also in relation to earlier opinions and case-law of the Court, on how to design the conditions for liability in the absence of discretion seems to be taken on by the Court as the basis of its new orientation for the "any other relevant factor" test[24].

[24] See Opinion of Advocate General Ćapeta, 6 July 2023, Case C-122/22 P, *Dyson and Others* v *Commission*, cit., points 61 and 91 and Court of Justice, 11 January 2024, Case C-122/22 P, *Dyson and Others* v *Commission*, cit., para 52.