

**JOINED CASES C-92/09 AND C-93/09 VOLKER UND
MARKUS SCHECKE GbR, HARTMUT EIFERT v. LAND
HESSEN, JUDGMENT OF THE COURT OF JUSTICE
(GRAND CHAMBER) OF 9 NOVEMBER 2010.**

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Introduction

The case of *Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen*² is a textbook example of a clash between two well-established legal principles, being the right to privacy and the principle of transparency, neither of which can be allowed to unconditionally fall victim to the other. Simply put, the question is how much transparency can the right to privacy and the protection of personal data withstand before being infringed. The case is all the more fascinating since it concerns the Common Agricultural Policy (hereinafter ‘CAP’), which has traditionally occupied a privileged position both in terms of EU budget allocations and as regards the heated debate over its alleged lack of transparency and efficacy. Commencing at a little more than 70 percent share of the total EU budget in 1980, CAP amounted to more than 40 percent in 2010.³ On numerous occasions, national prosecuting bodies, in cooperation with OLAF, have pressed charges against the dubious use of farming subsidies.⁴ While the debate does not seem to be fading out, the Commission has reacted to the growing pressure by adopting a series of political and legal instruments to fight the misuse of agricultural subsidies. In the so-called European Transparency Initiative (hereinafter ‘ETI’), the Commission stressed the importance of a high level of transparency to make the Union ‘open to public scrutiny and accountable for its work’.⁵ ETI has in part found its materialisation in the instruments that were in the epicentre of the judicial considerations of this case. Moreover, the case might also serve as a prime example of the exercise of judicial self-restraint. Who is to decide and prove what is the concrete aim underlying an

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² Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen* [2010] OJ C 13/6.

³ Commission, DG Agriculture and Rural Development, ‘CAP expenditure in the total EU expenditure’ <http://ec.europa.eu/agriculture/cap-post-2013/graphs/graph1_en.pdf> accessed 28 March 2011.

⁴ James Clasper, ‘Fraud, chicanery & rule bending’ <<http://eutransparency.org/cap-fraud-part-one/>> accessed 28 March 2011.

⁵ Green Paper European Transparency Initiative, 3.5.2006, COM (2006) 194 final 3.

adopted measure and what are the sources that may be used for its identification?

The Facts

The case revolves around two separate businesses operating in the farming industry. Volker und Markus Shecke GbR, a partnership established in the Land of Hesse, Germany, and Mr Helmut Eifert, an individual residing in the same *Bundesland*, had decided to make use of funding available under the CAP regime and filed an application for agricultural subsidies from the European Agricultural Guarantee Fund (hereinafter ‘EAGF’) and the European Agricultural Fund for Rural Development (hereinafter ‘EAFRD’). Both applications were approved on 31 December 2008 and 5 December 2008 respectively, with the respective payments amounting to EUR 64,623.65 and EUR 6110.11.

Both applicants were required, as part of the conditions for the allocation of the funds, to give their consent to the publication of their personal information. Subsequently, the *Bundesanstalt für Landwirtschaft und Ernährung*⁶ published names, localities, postal codes and amounts for each of the beneficiaries on its official webpage.

The beneficiaries were deeply displeased with the publication of their personal data and data relating to their businesses and brought an action before the *Verwaltungsgericht Wiesbaden*⁷ seeking an order prohibiting the publication of their personal details. In the wake of these proceedings, the German court decided to submit six questions to the Court of Justice of the European Union (hereinafter ‘ECJ’) for a preliminary ruling. The scope of this case comment is, however, limited to the first question and the first part of the second question as, in the words of Advocate General (hereinafter ‘AG’) Sharpston, these questions constitute the core of the reference.⁸ The relevant questions for the purpose of this case comment were as follows:

1. Are point 8b of Article 42 and Article 44a of [Council Regulation No 1290/2005] inserted by [Council Regulation No 1437/2007], invalid?
2. Is Commission Regulation No 259/2008 (a) invalid?

Legal background

⁶ Translated as Federal Agency for Agriculture and Nutrition.

⁷ Administrative Court in Wiesbaden.

⁸ Joined Cases C-92/09 and C-93/09 *Volker und Markus Shecke GbR, Hartmut Eifert v Land Hessen* [2010] OJ C19/6, Opinion of AG Sharpston, para 61.

The regime of financial management of the two CAP funds was established by Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the CAP (hereinafter ‘Regulation 1290/2005’).⁹ It encompasses both the obligation of Member States and the Commission to ensure confidentiality of the information communicated or obtained,¹⁰ as well as the delegation of power to promulgate follow-up legislation implementation of the Regulation.¹¹

Later on, Regulation 1290/2005 was modified by Council Regulation (EC) No 1437/2007 of 26 November 2007 amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy (hereinafter ‘Regulation 1437/2007’).¹² In particular, Article 42, point 8b binds the Commission to adopt detailed rules on the publication of information on the beneficiaries of the CAP, subjecting such publication expressly to the principles laid down in Community legislation on data protection. Article 44a, on the contrary, invites Member States to publish information on the amounts received per each beneficiary.

Eventually, by virtue of Article 42(8b), the Commission adopted Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 regarding the publication of information on the beneficiaries of funds deriving from the EAGF and the EAFRD (hereinafter ‘Regulation 259/2008’).¹³ It was precisely this piece of legislation that set out detailed rules on the content, form, period and limits of publication in Article 1(1) and an obligation to inform beneficiaries about publication and their rights regarding data protection under Community law in Articles 4(2) and 4(3).

The Opinion of AG Sharpston

⁹ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005] OJ L 209/1 (‘Regulation 1290/2005’).

¹⁰ *Ibid* art. 44.

¹¹ *Ibid* art. 42.

¹² Council Regulation (EC) No 1437/2007 of 26 November 2007 amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy [2007] OJ L 322/1 (‘Regulation 1437/2007’)

¹³ Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) [2008] OJ L 76/28.

As suggested in the introduction, this author shall confine his examination of AG Sharpston's Opinion¹⁴ solely to the analysis of the core issue of validity of the provisions questioned. In her preliminary observations, AG Sharpston acknowledged the applicability of Articles 7, 8 and 52 of the Charter of Fundamental Rights of the European Union (hereinafter 'Charter') along with Article 8 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter 'ECHR'). She further approached the analysis by aggregating the settled relevant case-law into a four-step test as follows:

Firstly, an interference with a protected right must be identified. Secondly, such interference has to be in accordance with the law. Thirdly, it has to be necessary in a democratic society corresponding to the pressing social need. Lastly, any such measure has to be proportionate. As is the case with the majority of EU jurisprudence, the last step proved to be the most difficult to establish. However, before tackling proportionality, this author shall address all the three preceding steps.

Due to the fact that the names, municipality and postcodes of the beneficiaries under the CAP were all made available, it would be hardly plausible to argue that the beneficiaries were not identified individually. Furthermore, AG Sharpston contended that the combination of the data may enable anyone to draw correct or incorrect conclusions about the beneficiaries' overall level of income.¹⁵ In support of this argument, the Court has already found interference in the famous case of *Österreichischer Rundfunk*,¹⁶ where a public body was required to publish employees' salaries which exceeded a certain threshold. In *Satakunnan Markkinapörssi*,¹⁷ Finnish tax authorities made available the personal data on the level of income and wealth tax levied on natural persons identified by their names. Once again, Directive 95/46 was deemed applicable and were it not for Article 9, dealing with the derogations based on the use of personal data solely for journalistic purposes, the Court would have rendered such an infringement unlawful. AG Sharpston thus considered the measures at stake to interfere with both the right to privacy and the right to protection of personal data.

At the same time, with a minor reservation on Article 1(2) of Regulation 259/2008¹⁸, the AG considered the measures to be

¹⁴ *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8) paras 64-128.

¹⁵ *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8) para 92.

¹⁶ *Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others* [2003] ECR I-4989.

¹⁷ *Case C-73/07 Teitosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECR I-9831.

sufficiently clear and precise and therefore, to be in accordance with the law¹⁹.

With regard to the third criterion, AG Sharpston was, in her own words, prepared to accept that transparency is a pressing social need in the name of which the rights to privacy and to the protection of personal data may be compromised to a certain degree.²⁰ However, the AG distinguished between Article 42, point 8b, being merely an enabling provision, and Article 44a, laying down a framework which may have contributed to the infringement of the protected rights. While the former only delegated a limited power to the Commission,²¹ the latter, read in conjunction with recitals 13 and 14 of Regulation 1437/2007, unequivocally demanded individualised publication.²² It does not come as a surprise then that while Article 42, point 8b escaped the proportionality test and its validity was not questioned further, Article 44a made it to the next round alongside Regulation 259/2008.

While the general principle of proportionality seems to be well-defined,²³ the proportionality test cannot be applied if there is no solid concept of what exactly it is that the measure aims to achieve.²⁴ This is mainly due to the fact that as the desired aims change, so does the analysis of whether the legislator had less onerous measures at his disposal, or whether the measure was appropriate.²⁵ Surprisingly enough, this has emerged as a real

¹⁸ Article 1(2) of Regulation 259/2008 is slightly different in this regard, because Member States have to obey the fundamental rights in question regardless of whether or not they were granted a certain measure of leeway from the legal instruments promulgated by the Commission. Moreover, the provision was not drafted in a way which could provide citizens with a clear indication of the extent to which an interference with their privacy and personal data may go before falling foul with the law. To put it simply, AG rejected the notion that the Commission could enable Member States to impose stricter publication duties that would contradict the EU data protection regime. The AG would hence consider Article 1(2) of Regulation 259/2008 invalid even in the event that Regulation 259/2008 was not invalidated in its entirety. For a more detailed account see AG Sharpston's Opinion (n 6) paras 126-128.

¹⁹ *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8) para 93.

²⁰ In Charter terms, this means that transparency may form a legitimate basis for the processing of the data otherwise protected as well as an objective of general interest required by Article 52(1) of the Charter.

²¹ Limited by the express reference to the data protection legislation.

²² *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8), para 102.

²³ Paraphrasing para 104 of the Opinion, a measure may not exceed the limits of what is appropriate and necessary to obtain the legitimate objective, while being the least onerous measure possible and keeping the disadvantages caused by it in proportion to the aim pursued.

²⁴ *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8) para 105.

²⁵ *Ibid* para 118.

stumbling block to the vindication of the contested measures. While the measures were justified by repeated references to the principle of transparency, the institutions did not seem to be able to find common ground on the definition of this rather elusive concept. The Council claimed that the legislation was not solely about transparency, but was also aimed at promoting public control of the sound financial management of public funds.²⁶ When asked about this point, however, the Commission adamantly refused this rationale and instead invoked as a justification the ease of public debate on potential improvements of the CAP. Ultimately, this incongruence led the AG to the conclusion that the failure to identify the concrete objective behind the policy precluded any credible assessment of the proportionality of the measure by the Court and effectively entailed that the interference with fundamental rights was not justified.

Accordingly, the AG recommended to the ECJ to render Article 44a invalid to the extent that it requires automatic publication of the names, municipality, postcodes and sums received per beneficiary, while Regulation 259/2008 was to be considered invalid in its entirety.

Judgment of the Court

The Court launched its reasoning on the merits by acknowledging the right of legal persons to invoke the protection of their privacy and personal data. While this line of thought may seem fully in compliance with the Opinion, drawing the distinction between natural and legal persons proved to be a very important step in the subsequent course of the Court's reasoning.

Materially adopting the same four-step procedure used by AG Sharpston in delivering her opinion, the Court concurred with the AG's opinion upon the interference on fundamental rights and the fact that it was provided for by law.²⁷ The first substantial departure from the AG's opinion emerges from the straightforward affirmation of both the transparency and public control as legitimate interests sought to be achieved by the measures.²⁸ Using the logic of the AG's opinion, the Court reasoned that the rationale behind the provisions seems concrete enough.

²⁶ *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8) para 114.

²⁷ It is worth noting that in analysing the merits, the Court paid considerably more attention to the Charter as a litmus test for the lawfulness of the contested provisions than to any other legal instrument. Hence, 'in accordance with the law,' together with all the other criteria of the test considered by the AG in the Opinion, underwent a slight change in meaning. Nonetheless, the test remained of the same character in essence.

²⁸ *Joined Cases C-92/09 and C-93/09* (n 2) paras 68 – 70, 75.

However, the Court blamed the institutions for not providing a thorough assessment of the provisions' necessity and stated that they failed to show that the same goal could not have been achieved using less onerous measures; e. g. that the measure could have imposed less burdens on the beneficiaries' rights by limiting publication by either the periods of time for which they received aid, or the frequency, nature and amount of aid received.²⁹ In other words, *en bloc* publication of all the beneficiaries' data without a thorough analysis of potentially less onerous publication that would achieve the same goal was deemed unacceptable. Furthermore, the Court rejected the notion that the mere importance of the CAP should lower the standards of protection accorded to the beneficiaries' fundamental rights.

Another important novelty comes with the distinction between legal and natural persons. According to the Court, legal persons may not benefit from the same level of protection afforded by Articles 7 and 8 of the Charter as the breach of their rights is less serious; the Court furthermore obliged the relevant authorities to examine whether publication of the name of a person representing a legal entity actually identifies natural persons and consequently imposes an unreasonable administrative burden on them. It thus concluded that in regard to the legal persons, the measures are generally not disproportionate.³⁰ Consequently, the Court found both Article 44a of Regulation 1290/2005 and Regulation No 259/2008 invalid to the extent that the provision and the Regulation do not draw a distinction upon which data is to be published based on the relevant criteria, such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof.³¹ Finally, the Court also found invalid, in a like manner, Article 42(8b), on the ground that it was meant to adopt the detailed rules solely under Article 44a;³² Being a clause which was meant to execute a clause declared to be invalid by the Court, its annulment logically followed on the same grounds.

Analysis

Firstly, this author notes that AG Sharpston's Opinion and the Court's judgment diverge substantially in their different perception on the level of clarity with which the Council and Commission approached the identification of the aim of the contested measures. The AG paid more attention to the oral

²⁹ *Joined Cases C-92/09 and C-93/09* (n 2) para 80.

³⁰ *Ibid* para 87.

³¹ *Ibid* para 89.

³² *Ibid* paras 90-91.

submissions of the Council and Commission, finding incongruences in their positions.³³ This ambiguity alone was considered sufficient to make the measures impossible to review under the proportionality test and consequently also invalid. The ECJ, on the other hand, emphasised the wording of recital 14 of the preamble to Regulation 1437/2007 and recital 6 of the preamble to Regulation 259/2008, thus expressly acknowledging both the sound financial management and public control to be legitimate aims of the two measures.³⁴ This author considers the ECJ's departure from the Opinion to be counter-productive. Adopting the AG's argumentation would most certainly pressure the legislature to strive for more clarity and foreseeability when promulgating legislation that could potentially interfere with the constitutionally-protected rights of individuals. It also shifts the burden to justify such measures back to the legislature, where it ultimately belongs. When subjecting the legislation to judicial review, courts should not rummage through the ambiguous and overly general aims of secondary legislation and cherry-pick the ones that seem reasonable or applicable. The difference between a genuine 'public control' that invites virtually anyone to be his neighbour's watchdog, and a very broad concept of 'public debate' or 'sound financial management', seems way too important to be left to a judge's discretion. On the contrary, law-making bodies should be expected to propose justifications that are unequivocal and therefore reviewable.

Secondly, as demonstrated above, the ECJ drew a line between natural and legal persons. This distinction seems misplaced, however. While the ECJ appeared to accept Commission's submission that some of the largest beneficiaries were in fact natural persons,³⁵ it did not provide any substantial counter-argument that would justify this distinction. The mere fact that the legal persons are already subject to more onerous measures is not very convincing as it does not address the issue.³⁶ Subsidies are provided on the basis of professional activities, whether carried out by legal or natural persons. They reveal very little in terms of their recipients' personal status. It may well be that the applicants were right in stating that the subsidies may have represented between 30 and 70 percent of their total income.³⁷ Publication of the sums received per beneficiary, however, says nothing about other potential incomes or property that the farmers as natural persons may enjoy. It might shed some light on the soundness of

³³ *Joined Cases C-92/09 and C-93/09, Opinion of AG Sharpston* (n 8) paras 117-118.

³⁴ *Joined Cases C-92/09 and C-93/09* (n 2) paras 67, 69.

³⁵ *Joined Cases C-92/09 and C-93/09* (n 2) para 78.

³⁶ *Ibid* para 87.

³⁷ *Ibid* para 73.

their farming business, but that information appears to be much less onerous.³⁸ Moreover, subsidies are provided from the public funds and as such should be scrutinised more vigilantly.

Thirdly, since the ECJ only suggested what should have been the considerations of the Council and Commission, the meaning of the judgment may not be construed with absolute certainty.³⁹ Arguably, subsidies granted to natural persons might be subject to certain publication requirements. Institutions that lay down these requirements, however, have to consider at the very least limiting publication by the periods for which the subsidies were granted, their frequency, their nature and amount.⁴⁰ Nonetheless, by accepting public control as a legitimate aim of the discussed measures, these limitations might be limited themselves. This could easily result in a convoluted situation when protecting the beneficiaries from intrusion of their privacy would leave the public with no effective means of controlling the distribution of subsidies and vice versa.

Conclusions

The case of *Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen* has indeed opened a number of interesting questions. Alas, by adopting a more activist approach in the interpretation of the deemed legitimate aims that the reviewed measures ought to follow, the ECJ seems to have missed the chance to establish a more demanding approach towards the legislative process that would lead to more legislative clarity. In effect, however, the right balance between the major constitutional values of transparency and privacy is yet to be struck.

³⁸ *Joined Cases C-465/00, C-138/01 and C-139/01* (n 16) para 52.

³⁹ *Joined Cases C-92/09 and C-93/09* (n 2) para 81.

⁴⁰ *Ibid.*