COURT OF JUSTICE
OF THE EUROPEAN UNION

ANNUAL REPORT 2016

JUDICIAL ACTIVITY

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Synopsis of the judicial activity of the Court of Justice,
the General Court and the Civil Service Tribunal

Luxembourg, 2017

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OF THE EUROPEAN UNION

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Koen LENAERTS

President of the Court of Justice
of the European Union

The European Union experienced painful events in the course of 2016.

After Paris in November 2015, Brussels, Nice and Berlin have, like numerous other places in the world, been confronted in recent months with the atrocity of large-scale terrorist attacks which scorn in cowardly fashion the fundamental values of peace, humanity, tolerance and mutual respect on which the European project dear to us is founded.

On 23 June 2016, the British people took the decision to leave the European Union. This democratic and sovereign choice confronts the European Union and its institutions with major challenges which will need to be addressed as effectively as possible in a climate that is currently beset with uncertainty.

However, 2016 also provides us with a number of reasons for satisfaction.

Following the appointment, last September, of the Advocate General falling, under the rotation system, to Bulgaria, there is finally a full complement of Advocates General at the Court of Justice (the number of whom was increased to 11 in June 2013) — a development that I welcome in the light of the increasing number of cases which, in particular in areas linked to the major challenges that the European Union must currently deal with (fighting terrorism, the migration crisis, measures linked to the banking and financial crisis ...), raise important new questions of law that warrant the light shed by an Opinion.

It is also to be welcomed that the first two of the three stages of the reform of the judicial structure of the European Union which was adopted by the European legislative institutions in December 2015 were implemented almost in their entirety in 2016. Eleven of the twelve additional judges at the General Court of the European Union provided for under the first stage of the reform were appointed in the course of the year. The second stage took concrete form, in September 2016, in the dissolution of the European Union Civil Service Tribunal, whose former members and their staff I wish to thank here once more for their valuable contribution to the development of the case-law in the frequently sensitive branch of litigation relating to the European civil service. Furthermore, five of the additional seven judges at the General Court whose entry into office is also provided for by this second stage of the reform joined us in September 2016.

Finally, whilst, with the exception of the arrival of a new Advocate General, the composition of the Court of Justice remained entirely unchanged in 2016, on the other hand the year brought the departure of six members of the General Court, in the context of the partial renewal of its membership and as a result of the resignation of one of its members.

As regards statistics, the past year was one of unflagging activity. Whilst the overall number of cases brought before the three courts in 2016 (1 604 cases) was slightly below that of 2015 (1 711), the number of cases completed in 2016, on the other hand, remained at a high level (1 628 cases). This is true, in particular, of the Court of Justice, which, with 704 cases completed, settled more cases in 2016 than it received (692 cases), and of the Civil Service Tribunal, which made it a point of honour to complete as many cases as possible before it was dissolved and staff cases were transferred to the General Court. No fewer than 169 cases were thus completed by the Tribunal from January to August 2016.

On a more physical level, everyone will have been able to see that works have started on the construction of the third tower, the first stone of which was symbolically laid on 27 June 2016. I am already greatly looking forward to the final completion of this major building project, which will, eventually, enable all the institution's staff to be brought together on one site, helping to strengthen professional and human contact between us.

Alongside these matters, I would like to recall that the second edition of the event 'Bâtisseurs d'Europe' — following the first edition in November 2014 — took place on 11 November 2016, the day of commemoration of the armistice that ended the First World War. Particularly welcome in these unsettled times for the construction of Europe, this event, organised at the Court's initiative, enabled some 250 students from secondary schools in the surrounding area to engage in dialogue, in a very informal atmosphere, with the Presidents of the European Parliament, the European Commission and the Court of Justice on a series of topical European issues.

This report provides a full record of changes concerning the institution and of its work in 2016. As in previous years, a substantial part is devoted to succinct but exhaustive accounts of the main judicial activity of the Court of Justice, the General Court and the Civil Service Tribunal. Separate statistics for each court, preceded by a brief introduction, supplement and illustrate the analysis.

I would like to take this opportunity to thank warmly my colleagues and the entire staff of the institution for the outstanding work carried out by them during the year.

CHAPTER I

THE COURT OF JUSTICE

A | THE COURT OF JUSTICE IN 2016: CHANGES AND ACTIVITY

By Mr **Koen LENAERTS,** President of the Court of Justice

This first chapter summarises the activities of the Court of Justice in 2016. It begins, in the present part (A) of the chapter, by describing briefly how the Court of Justice evolved during the past year and providing an overview of its judicial activity. The second part (B) presents, as it does each year, the main developments in the case-law, arranged by subject matter, the third and fourth parts set out the activity of the Court Registry during the reference period (C) and the statistics relating to the past judicial year (D), and the fifth part sets out the Court's composition during that year (E).

1. 1. The past year was one of absolute stability as regards the Court's judges in that no judge departed or entered into office in the course of 2016. So far as concerns the Advocates General, the entry into office of the Bulgarian Advocate General, Mr Evgeni Tanchev, on 19 September 2016 results in a full complement of Advocates General (the number of whom has been raised from 8 to 11 following the Council decision of 25 June 2013 increasing the number of Advocates General at the Court of Justice); this is very much welcomed in the context of an increasing flow of cases posing new and difficult questions of law.

1. 2. As regards the functioning of the institution, 2016 brought implementation, almost in their entirety, of the first two phases of the reform of the judicial structure of the European Union resulting from Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

Thus, at the formal sittings which were held on 13 April, 8 June and 19 September 2016, 11 new judges of the General Court of the European Union entered into office in the context of the reform's first phase, which provides for an increase of 12 in the number of judges of the General Court.

The second phase of the reform, which the EU legislative institutions wanted to coincide with the partial renewal of the membership of the General Court in September 2016, resulted in the European Union Civil Service Tribunal ceasing to exist and in the transfer of its jurisdiction to the General Court, a transfer that was brought about by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137), which applied from 1 September 2016.

This second phase of the reform provides concomitantly for the appointment of seven additional judges at the General Court, a number which corresponds to the number of the former judges of the Civil Service Tribunal. It was in that context that the entry into office of five additional judges at the General Court was greeted at the formal sitting on 19 September 2016, with the hope that the final appointments to complete implementation of the first two phases of the reform are made before long.

The third phase of the reform will take place upon the partial renewal of the membership of the General Court in September 2019. The number of judges of the General Court will then be increased by a further 9, bringing their total number to 56, that is to say, two judges per Member State.

2. As regards statistics, the reader is referred to the comments on the data relating to the past year that are made at the beginning of Part C of this chapter of the Annual Report, and only the major trends that can be identified from that data are summarised briefly now.

The first striking aspect relates to the overall number of cases completed by the Court in 2016: with 704 cases completed (a 14% increase compared with 2015), in 2016 the Court settled more cases than the number registered in the course of the year (692), a fact which betrays remarkable productivity on the part of the Court over the past year and has led to a slight decrease in the number of cases pending on 31 December 2016 (872) compared with the number at the end of 2015 (884).

So far as concerns cases brought in 2016, 470 concerned requests for a preliminary ruling, a figure which is a record in the history of the Court and reflects both the importance of the preliminary ruling procedure in developing EU law and the trust placed by national courts in this form of judicial cooperation with a view to uniform interpretation and application of EU law.

Another striking trend of the past year relates to the average duration of proceedings before the Court. In the case of references for a preliminary ruling, in 2016 the average duration of proceedings was 15 months, a figure comparable to that of 2014, which amounts to the shortest duration recorded for more than 30 years. This figure can be largely explained, first, by the increased use of orders to deal with cases concerning references for a preliminary ruling in which the Court's answer is obvious and, secondly, by the particularly high number, in 2016, of cases concerning references for a preliminary ruling that have been dealt with under the urgent preliminary ruling procedure (PPU) or the expedited procedure. As for appeals, the significantly reduced average period for dealing with them, namely 12.9 months (as against 14 months in 2015) — that is to say, the shortest duration ever recorded since the General Court's creation — is largely attributable to the simplified method, adopted by the Court of Justice in 2016, for dealing with appeals brought in the areas of access to documents, public procurement and intellectual and industrial property.

B | CASE-LAW OF THE COURT OF JUSTICE IN 2016

I. FUNDAMENTAL RIGHTS

In 2016, the Court ruled on a number of occasions on fundamental rights in the EU legal order. Some of those decisions are covered in this report. [1]

Among such decisions, the judgment in ***Paoletti and Others*** (C-218/15, EU:C:2016:748), delivered on 6 October 2016, merits special attention. In that judgment, the Court was called upon to examine, *in the light of the principle of retroactivity of the more lenient criminal law, the effect of the accession of a third State to the European Union on the application of the criminal legislation of a Member State relating to the offence of facilitating illegal immigration and implementing Article 3 of Directive 2002/90.* [2] In the case in point, criminal proceedings had been brought against a number of Italian nationals for having facilitated illegal immigration into Italy for Romanian nationals before the accession of Romania to the European Union. Since the Romanian nationals had subsequently become Union citizens, the referring court sought to ascertain, first, whether accession had had the effect of abolishing the offence of facilitating illegal immigration committed before Romania's accession to the European Union and, secondly, whether the principle of the retroactive application of the more lenient criminal law had to apply to the accused in the main proceedings.

First, after noting that the principle of the retroactivity of the more lenient criminal law, as enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union, is part of primary EU law, the Court held that the application of the more lenient criminal law necessarily involves a succession of laws over time and is based on the conclusion that the legislature changed its position either on the criminal classification of the act or the penalty to be applied to an offence. In the case in point, the Italian criminal legislation at issue had not been amended since the commission of the offences with which the accused had been charged.

Secondly, the Court found that, under Article 6 TEU and Article 49 of the Charter of Fundamental Rights, the accession of a State to the European Union does not preclude another Member State from imposing a criminal penalty on persons who committed, before accession, the offence of facilitation of illegal immigration for nationals of the first State. Criminal legislation which imposes, in accordance with Directive 2002/90 and Framework Decision 2002/946, [3] a term of imprisonment for such a crime is not directed at illegal immigrants, but at persons who facilitate the unlawful entry and residence of those immigrants in the territory of that

1 | The following judgments are included: judgment of 6 September 2016, ***Petruhhin*** (C-182/15, EU:C:2016:630), presented in Section II.1 'Rights of Union citizens'; judgment of 5 July 2016, ***Ognyanov*** (C-614/14, EU:C:2016:514), presented in Section V 'Proceedings of the European Union'; judgment of 9 June 2016, ***Pesce and Others*** (C-78/16 and C-79/16, EU:C:2016:428), presented in Section VI 'Agriculture'; judgment of 21 December 2016, ***AGET Iraklis*** (C-201/15, EU:C:2016:972), presented in Section VII.3 'Freedom of establishment and freedom to provide services'; judgment of 15 February 2016, ***N.*** (C-601/15 PPU, EU:C:2016:84), presented in Section VIII.1 'Asylum policy'; judgment of 5 April 2016, ***Aranyosi and Căldăraru*** (C-404/15 and C-659/15 PPU, EU:C:2016:198), presented in Section X.1 'European arrest warrant'; judgment of 29 June 2016, ***Kossowski*** (C-486/14, EU:C:2016:483), presented in Section X.3 'Criminal proceedings and decisions in other Member States'; judgment of 28 July 2016, ***Ordre des barreaux francophones et germanophone and Others*** (C-543/14, EU:C:2016:605), presented in Section XII 'Fiscal provisions'; judgment of 21 December 2016, ***Tele2 Sverige and Watson and Others*** (C-203/15 and C-698/15, EU:C:2016:970), presented in Section XIII.2 'Protection of personal data'; judgment of 20 September 2016, ***Ledra Advertising and Others*** v ***Commission and ECB*** (C-8/15 P to C-10/15 P, EU:C:2016:701), presented in Section XV 'Economic and monetary policy'; and judgment of 8 November 2016, ***Lesoochranárske zoskupenie VLK*** (C-243/15, EU:C:2016:838), presented in Section XVIII 'Environment'.

2 | Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17).

3 | Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1).

other State. The mere fact that, after their illegal entry, those immigrants have become Union citizens has no bearing on the course of the criminal proceedings brought against persons who have facilitated illegal immigration.

Thirdly, the Court stated that no provision of EU law indicates that the acquisition of Union citizenship ought to entail the disappearance of the offence committed by persons who have engaged in labour trafficking. To decide otherwise would encourage such trafficking once a State has initiated the process of accession to the European Union. In that case, the aim achieved would be the opposite of the aim pursued by the EU legislature.

II. CITIZENSHIP OF THE UNION

As regards European citizenship, mention must be made of six judgments. Three of them concern the rights enjoyed by nationals of Member States by virtue of having European citizenship. The other three relate to the derived right of residence of third country nationals who are members of a Union citizen's family.

1. RIGHTS OF UNION CITIZENS

On 2 June 2016, in the judgment in ***Bogendorff von Wolffersdorff*** (C-438/14, EU:C:2016:401), the Court ruled on *the limits on a Member State's obligation to recognise the surname acquired by a citizen during a period of residence in another Member State of which he is also a national.* The dispute in the main proceedings concerned a German national who, during a period of residence in the United Kingdom, had acquired British nationality and changed his forenames and surname, with the result that the latter included German titles of nobility. Upon his return to Germany, the authorities had refused to recognise the new surname and forenames acquired under United Kingdom law.

The Court held that, in this case, the refusal by the authorities of a Member State to recognise the forenames and surname of a national of that State, as determined and registered in another Member State of which that national also holds the nationality, constitutes a restriction on the freedoms recognised by Article 21 TFEU. Since the applicant was registered under different forenames and surnames in the German register of civil status and with the United Kingdom authorities, there was not only a real risk of being obliged, because of the existence of multiple names, to dispel doubts as to his identity, but also a risk of encountering difficulties in proving family ties with his daughter.

In this case, the German Government stated that, in accordance with Paragraph 123 of the Basic Law, read in conjunction with the third paragraph of Article 109 of the Weimar Constitution, all privileges and inequalities based on birth or condition are abolished in Germany and that, even though the use and transmission of titles of nobility as elements of a surname are permitted, the creation and grant of new titles of nobility are prohibited. Those provisions, which form part of German public policy, are intended to ensure equal treatment of all German citizens.

The Court accepted that, in the context of the German constitutional choice, the third paragraph of Article 109 of the Weimar Constitution, as an element of the national identity of a Member State, referred to in Article 4(2) TEU, may be taken into account as an element justifying a restriction on the right to freedom of movement of persons that is recognised by EU law. More specifically, the justification relating to the equality of German citizens before the law and the constitutional choice to abolish the bearing of titles of nobility as such must be interpreted as relating to a ground of public policy. In the Court's view, it would run counter to the intention

of the German legislature for German nationals, using the law of another Member State, to adopt afresh abolished titles of nobility. Systematic recognition of changes of name such as that at issue in the main proceedings could lead to that result.

The Court held that the authorities of a Member State may, in circumstances such as those of the case in point, refuse to recognise the surname of a national which was legally acquired in another Member State. Such a refusal constitutes a restriction on the freedoms recognised by Article 21 TFEU but is justified on public policy grounds if it is appropriate and necessary to ensure compliance with the principle that all citizens of the first Member State are equal before the law. The assessment of the proportionate nature of such a practice requires an analysis and weighing-up of various elements of law and fact peculiar to the Member State concerned, which the referring court was in a better position to carry out than the Court. Among the elements to be taken into account for that purpose, the Court drew attention to the fact that the applicant in the main proceedings had exercised the right to freedom of movement and held dual German and British nationality; that the elements of the name acquired in the United Kingdom did not formally constitute titles of nobility either in Germany or in the United Kingdom but gave the impression of noble origins; and that the change of name under consideration rested on a purely personal choice and the difference in name which followed therefrom cannot be attributed to the circumstances of the applicant's birth, to adoption, or to acquisition of British nationality.

In the judgment in ***Petruhhin*** (C-182/15, EU:C:2016:630), delivered on 6 September 2016, the Grand Chamber of the Court considered whether, *for the purposes of applying an extradition agreement concluded between a Member State and a third State, the nationals of another Member State must benefit, in the light of the principle of non-discrimination on grounds of nationality and the freedom of movement and residence of Union citizens, from a rule of the State of residence prohibiting the extradition of its own nationals.* The case concerned a request for the extradition of an Estonian national issued by the Russian authorities to the Latvian authorities in connection with a drug trafficking offence.

The Court noted, first of all, that by moving to Latvia, the person concerned made use, in his capacity as a Union citizen, of his right to move freely within the European Union, so that his situation fell within the scope of application of the Treaties and, therefore, of the principle of non-discrimination on grounds of nationality. Rules entailing unequal treatment which allow the extradition only of Union citizens who are nationals of another Member State constitute a restriction on freedom of movement, within the meaning of Article 21 TFEU. The Court also pointed out that such a restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions. In this instance, even though the objective relied on by the State in question of preventing the risk of impunity for nationals of other Member States who have committed an offence in a third State must be regarded as a legitimate objective in EU law, the Court considered it necessary to ascertain whether there was an alternative measure less prejudicial to the exercise of the rights conferred by Article 21 TFEU which would be equally effective in achieving the objective. In the absence of rules of EU law governing extradition between the Member States and a third State, it is necessary to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law. In particular, the exchange of information with the Member State of which the person concerned is a national must be given priority. Accordingly, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584, [4] provided that that Member

4| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

State has jurisdiction, pursuant to its national law, to prosecute the person for offences committed outside its national territory.

Furthermore, where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter of Fundamental Rights, pursuant to which no one may be removed, expelled or extradited to a State where there is a serious risk that he would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. In that regard, the Court stated that the existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to by the authorities which are manifestly contrary to the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

Lastly, in its judgment in ***García-Nieto and Others*** (C-299/14, EU:C:2016:114), delivered on 25 February 2016, the Court confirmed its recent case-law [5] according to which *a Member State may exclude nationals of other Member States from entitlement to certain social benefits during the first three months of residence.* The main proceedings involved a dispute between a Spanish family and a German employment centre which had refused, in accordance with national law, to grant subsistence benefits for jobseekers and their children to a father and his son during the first three months of their stay in Germany. The father and son had arrived in Germany at the end of June 2012, a few months after the mother and daughter. At that time, the mother already had regular employment in Germany, for which — from July — she was compulsorily insured under the social security system.

The Court recalled that, under Directive 2004/38, Union citizens have the right of residence in another Member State for a period of up to three months without any conditions or formalities other than the requirement to hold a valid identity card or passport. Since, during that period, the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover, the directive allows them, in order to maintain the financial equilibrium of their social assistance system, to refuse to grant those persons, other than workers, self-employed persons or those who retain that status, any social assistance during the first three months. In the Court's view, such a refusal does not presuppose an assessment of the individual situation of the person concerned.

2. DERIVED RIGHT OF RESIDENCE OF THIRD COUNTRY NATIONALS

In the cases giving rise to the judgment in ***Rendón Marín*** (C-165/14, EU:C:2016:675) and the judgment in ***CS*** (C-304/14, EU:C:2016:674), delivered by the Grand Chamber on 13 September 2016, the Court examined the question whether *EU law allows a Member State to refuse automatically the grant of a residence permit to a third country national, on the sole ground that he has a criminal record, where he has sole care of two minors with Union citizenship, one a national of a Member State other than the Member State of residence and the other a national of the Member State of residence.*

First, the Court found that the refusal to allow the parent, a third country national who has actual care of a minor residing in a Member State other than the Member State of nationality, to reside with him in the host

5| Judgments of the Court of 11 November 2014, ***Dano*** (C-333/13, EU:C:2014:2358), and of 15 September 2015, ***Alimanovic*** (C-67/14, EU:C:2015:597).

Member State would deprive the child's right of residence of any useful effect. The Court thus held that Article 21 TFEU and Directive 2004/38 allow the parent to reside with his child, who has the status of Union citizen, in the host Member State if he satisfies the conditions laid down in Article 7(1)(b) of that directive, namely having sufficient resources and comprehensive sickness insurance cover. Secondly, as regards the situation of a minor who has always resided in the Member State of which he is a national, the Court stated that Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which includes the right to move and reside freely within the territory of the Member States. That article precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of their rights. Such deprivation occurs where the effect of refusing to grant a residence permit to a third country national or of his expulsion would be to oblige his child, a Union citizen for whom he has sole care, to accompany him and, therefore, to leave the territory of the European Union.

In respect of the effect of a criminal record on recognition of a derived right of residence of member of a Union citizen's family, the Court held that EU law precludes a limitation on the right of residence that is founded on grounds of a general preventive nature and ordered for the purpose of deterring other foreign nationals, in particular where that measure has been adopted automatically following a criminal conviction. Any restrictive measures adopted by the Member States must comply with the principle of proportionality and be based exclusively on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or public security, which presupposes a specific assessment of, among other things, the personal conduct of the individual concerned.

Thus, the Court emphasised that, in a case such as the case in point, any derogation from the right of residence of Union citizens or members of their family in order to uphold public policy or safeguard public security must be interpreted strictly. Even though Article 20 TFEU does not affect the possibility of Member States relying on such an exception, the exception's scope cannot be determined unilaterally by them without being subject to control by the EU institutions, since that assessment must also take account of the child's best interests and the right to respect for private and family life, as laid down in Article 7 of the Charter.

In the case giving rise to the judgment in ***NA*** (C-115/15, EU:C:2016:487), delivered on 30 June 2016, the Court dealt with the question whether *a third country national who is divorced from a Union citizen and is the children's primary carer is entitled to retain her right of residence in the host Member State even where the commencement of divorce proceedings post-dates the departure from that Member State of the Union citizen spouse.* The main proceedings concerned a Pakistani national married to a German national. The couple resided in the United Kingdom, where the husband had been a worker or self-employed. The relationship having deteriorated, the wife — who had been the victim of domestic violence on a number of occasions — began divorce proceedings in the United Kingdom in 2006, after her husband had left that Member State, and she obtained sole custody of their two children. Although the children held German nationality, they were born in the United Kingdom and had attended school there since 2009 and 2010. The Pakistani national concerned had also applied for a right of permanent residence in the United Kingdom, which was refused by the competent national authority.

As regards the wife's right of residence in the United Kingdom, the Court first of all recalled that, under Article 13(2)(c) of Directive 2004/38, [6] divorce should not entail that a Union citizen's family members who are not nationals of a Member State should lose the right of residence where this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence. However, referring to the judgment

6| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34).

in ***Singh and Others***, [7] the Court reiterated that, in accordance with Article 7(2) of that directive, the Union citizen who is the spouse of a third country national must reside in the host Member State up to the commencement of divorce proceedings, if that third country national is to be able to claim the retention of his or her right of residence. That was not the case in the main proceedings.

However, the Court held that, on the basis of the right of access of the children of migrant workers to education in the host Member State under Article 12 of Regulation No 1612/68, [8] the children and the third country national parent who has sole custody of them are entitled to a right of residence in the host Member State in a situation, such as that in the main proceedings, where the other parent is a Union citizen and has worked in that Member State but ceased to reside there before the date on which the children began to attend school. In circumstances where the children enjoy, under that provision, the right to continue their education in the host Member State although the parent who is their carer is at risk of losing her right of residence, if that parent were denied the possibility of remaining in the host Member State during the period of her children's education, that might deprive those children of a right which is granted to them by the EU legislature.

Lastly, the Court recalled that, under Article 21 TFEU, minor Union citizens and the parent who is their primary carer have a right of residence provided that those Union citizens satisfy the conditions referred to in Article 7(1) of Directive 2004/38, [9] including the condition that they must have sufficient resources, which may also be provided by the third country national parent.

III. INSTITUTIONAL PROVISIONS

1. LEGAL BASIS OF ACTS OF THE EUROPEAN UNION

In 2016, the Court delivered three important judgments relating to the legal basis of acts of the European Union. They concern, respectively, the common foreign and security policy (CFSP), agriculture and judicial cooperation in criminal matters.

First, in its judgment in *Parliament* v *Council* (C-263/14, EU:C:2016:435) of 14 June 2016, the Court, sitting as the Grand Chamber, annulled *Council Decision 2014/198/CFSP of 10 March 2014 on the signature and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania*. [10]

In support of its action for annulment, the Parliament had put forward two pleas in law. By the first plea, it argued that the contested decision had been wrongly adopted in accordance with the specific procedure for agreements that relate exclusively to the CFSP, provided for in the first clause of the second subparagraph

7| Judgment of the Court of 16 July 2015, ***Singh and Others*** (C-218/14, EU:C:2015:476).

8| Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

9| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34).

10| OJ 2014 L 108, p. 1.

of Article 218(6) TFEU, which excludes any participation of the Parliament. By the second plea, alleging infringement of Article 218(10) TFEU, the Parliament complained that the Council had failed to keep it immediately and fully informed at all stages in the negotiation and conclusion of the agreement in question.

As regards the procedure followed to adopt the contested decision, the Court first noted that, if an examination of an EU measure reveals that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main purpose or component, whereas the other is merely incidental, the act must in principle be based on a single legal basis, namely that required by the main or predominant purpose or component. Thus, since the examination of the EU-Tanzania agreement showed that it falls predominantly within the scope of the CFSP, and not within the scope of judicial cooperation in criminal matters or police cooperation, the Court held that the decision concerning its signature and conclusion was correctly adopted in accordance with the specific procedure for agreements relating to the CFSP.

While recalling the fact that the Parliament does not participate in the negotiation and conclusion of agreements falling within the scope of the CFSP, the Court found that the requirement to inform the Parliament under Article 218(10) TFEU extends also to the intermediate results reached by the negotiations. Thus, in the case in point, the Council should have sent the text of the draft agreement and that of the draft decision in so far as the text of those drafts had been communicated to the Tanzanian authorities with a view to concluding the EU–Tanzania agreement. Since disregard for that information requirement had prevented the Parliament from exercising its right of scrutiny with respect to the CFSP and, where appropriate, from stating its position with respect to the correct legal basis on which the decision concerning the signature and conclusion of the agreement should be based, the Court annulled the contested decision for infringement of an essential procedural requirement.

Secondly, *the relationship between the legal basis provided for in Article 43(2) TFEU and that provided for in Article 43(3) TFEU* was clarified by the Court in its judgment in ***Germany* v *Parliament and Council*** (C-113/14, EU:C:2016:635), delivered on 7 September 2016. By its action for annulment, the Federal Republic of Germany had claimed that, by adopting Article 7 of Regulation No 1308/2013 [11] on the basis not of Article 43(3) TFEU but of Article 43(2) TFEU, the Parliament and the Council had chosen an incorrect legal basis. Article 7 of Regulation No 1308/2013 fixes the reference thresholds of various agricultural products which may be the subject of public interventions in order to support the market. These thresholds relate to the agricultural products referred to in Article 2 of Regulation No 1370/2013. [12]

The Court pointed out that, under Article 43(2) TFEU, the Parliament and the Council are required to adopt, in accordance with the ordinary legislative procedure, the 'provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy'. On the other hand, in accordance with Article 43(3) TFEU, the Council, acting on a proposal from the Commission, is to adopt 'measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'. According to the Court, the latter measures are principally technical and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2) TFEU. In the case in point, the fixing and review of the reference thresholds provided for in Article 7(2) of Regulation No 1308/2013 require assessments that are principally technical and scientific to be carried out. Since there is nothing in Regulation No 1308/2013 which allows a distinction to be validly made between the review of the thresholds and the initial fixing thereof,

11 | Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

12 | Council Regulation (EU) No 1370/2013 of 16 December 2013 determining measures on fixing certain aids and refunds related to the common 'organisation of the markets in agricultural products (OJ 2013 L 346, p. 12).

and in the light of the fact that the intervention prices are derived from the reference thresholds, the Court concluded that the fixing of those thresholds constitutes a measure on fixing prices. It followed that Article 7 of Regulation No 1308/2013 should have been adopted on the basis of Article 43(3) TFEU.

The Court upheld the action and annulled not only Article 7 of Regulation No 1308/2013 but also Article 2 of Regulation No 1370/2013, in view of the inextricable links between them. However, taking account of the severe consequences which could arise were they to be annulled with immediate effect, the Court decided to maintain the effects of the articles in question until the entry into force, within a reasonable period of time not to exceed five months from the date of delivery of the judgment, of a new regulation on the correct legal basis.

Lastly, on 22 September 2016, in its judgment in ***Parliament*** v ***Council*** (C-14/15 and C-116/15, EU:C:2016:715), the Court upheld the action brought by the Parliament for annulment of *Implementing Decisions 2014/731,* [13] *2014/743,* [14] *2014/744* [15] *and 2014/911,* [16] *allowing four Member States access to a system for the exchange of information concerning DNA profiles, digital fingerprints and certain vehicle registration data*. The Court held that the legal basis for those decisions, namely Article 25 of Decision 2008/615, [17] had provided for the adoption of measures to implement that decision in accordance with detailed rules which differed from those laid down in the Treaties.

The Court first of all recalled that, as the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties. It then pointed out that the lawfulness of an EU act must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted. At the time of the adoption of Decision 2008/615, Article 34(2)(c) EU laid down two distinct procedures for adopting legislative acts and implementing measures, whereby only legislative acts had to be adopted by unanimous vote of the Council.

Having examined Article 25(2) of Decision 2008/615, the Court held that it had to be interpreted as providing for the adoption, by the Council voting unanimously, of measures to implement that decision, as regards, in particular, data protection. It concluded that, by requiring that measures necessary to implement Decision 2008/615 at the level of the European Union be adopted by the Council by means of a unanimous decision, whilst Article 34(2)(c) EU provided that such measures had to be adopted by the Council acting by a qualified majority, Article 25(2) of that decision unlawfully lays down detailed rules for adoption that are more stringent

13| Council Decision 2014/731/EU of 9 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Malta (OJ 2014 L 302, p. 56).

14| Council Decision 2014/743/EU of 21 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Cyprus (OJ 2014 L 308, p. 100).

15| Council Decision 2014/744/EU of 21 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Estonia (OJ 2014 L 308, p. 102).

16| Council Decision 2014/911/EU of 4 December 2014 on the launch of automated data exchange with regard to dactyloscopic data in Latvia (OJ 2014 L 360, p. 28).

17| Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ 2008 L 210, p. 1).

in comparison with the procedure laid down for that purpose by the Treaties. Consequently, the contested decisions were annulled.

2. COMPETENCE AND POWERS OF THE INSTITUTIONS

As regards the competence of the institutions of the European Union, mention must be made of the judgment in ***Council*** v ***Commission*** (C-660/13, EU:C:2016:616), delivered on 28 July 2016. In that judgment, the Court, sitting as the Grand Chamber, annulled the decision of the Commission approving an addendum to the *Memorandum of Understanding between the European Union and the Swiss Confederation on a Swiss financial contribution to the enlarged EU* and authorising some members of the Commission to sign that addendum on behalf of the European Union. The Council had challenged the Commission's power to sign the addendum at issue without the Council's prior approval.

Relying on the principles of conferral of powers and institutional balance, the Court first of all recalled that the Council's duty is to plan the European Union's external action in accordance with, in particular, Article 16 TEU, while the Commission's duty is to ensure the European Union's external representation. In the view of the Court, the Commission's external representation power alone is not sufficient to determine whether the prior approval of the Council had to be obtained before signing the addendum at issue. The Court also pointed out that, although the Commission was authorised to initiate negotiations for that purpose with Switzerland, it did not, however, have authorisation to sign the resulting addendum on behalf of the European Union. Therefore, the Commission could not be regarded as having the right to sign a non-binding agreement resulting from those negotiations. Furthermore, since a decision concerning the signature of such an agreement is one of the measures by which the European Union's external action is planned for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU, that signature entails the assessment by the European Union of whether the agreement still reflects its interest, as defined by the Council in particular in the decision to open negotiations. That assessment requires verification of the content of the agreement, which cannot be determined in advance or predicted when the decision to start such negotiations is made. Thus, the mere fact that the content of the agreement corresponds to the negotiating mandate given by the Council is not sufficient to confer on the Commission the power to sign such a measure without the Council's prior approval.

The Council's action for annulment was therefore upheld. However, the Court maintained the effects of the Commission's decision until the entry into force, within a reasonable period of time, of a new decision to replace it.

In its judgment in ***Parliament*** v ***Commission*** (C-286/14, EU:C:2016:183) of 17 March 2016, the Court had occasion to define *the scope of the power delegated to the Commission to supplement a legislative act, within the meaning of Article 290(1) TFEU.*

Ruling on an action for annulment brought by the European Parliament against Delegated Regulation No 275/2014, [18] the Court was required to consider a single plea in law alleging that the Commission had exceeded the delegated power conferred on it by Regulation No 1316/2013. [19] Specifically, the Parliament

18| Commission Delegated Regulation (EU) No 275/2014 of 7 January 2014 amending Annex I to Regulation (EU) No 1316/2013 of the European Parliament and of the Council establishing the Connecting Europe Facility (OJ 2014 L 80, p. 1).

19| Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 (OJ 2013 L 348, p. 129).

complained that the Commission had added a Part VI to Annex I to Regulation No 1316/2013, instead of adopting a separate delegated act.

As regards the rules laid down in Article 290 TFEU governing the delegation of powers, the Court noted that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general scope which 'supplement' or 'amend' certain non-essential elements of the legislative act and that these two categories of delegated powers are clearly distinguished. Where the Commission exercises a power to supplement a legislative act, its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified. By contrast, the delegation of a power to amend a legislative act aims to authorise the Commission to modify or repeal non-essential elements laid down by the legislature in that act. The differences between the two categories of delegated powers referred to in Article 290(1) TFEU preclude the Commission from being granted the power to determine the nature of the delegated power conferred on it.

In the case in point, by empowering the Commission to adopt delegated acts 'detailing' certain elements, Article 21(3) of Regulation No 1316/2013 authorised the Commission to 'supplement' that regulation, within the meaning of Article 290 TFEU. For reasons of regulatory clarity and transparency of the legislative process, the Commission may not add an element to the actual text of that act. Such an incorporation would be liable to create confusion as to the legal basis of that element, given that the actual text of a legislative act would contain an element arising from the exercise, by the Commission, of a delegated power which does not entitle it to amend or repeal that act. Accordingly, the Commission was required to adopt an act separate from Regulation No 1316/2013. By adding a Part VI to Annex I to that regulation, the Commission failed to have regard to the difference between the two categories of delegated powers provided for in Article 290(1) TFEU and such failure entails the annulment of the delegated regulation.

Referring to significant grounds of legal certainty, the Court nonetheless decided to maintain the effects of Delegated Regulation No 275/2014 until the entry into force of a new act intended to replace it, within a reasonable period not to exceed six months from the date of delivery of the judgment.

IV. EU LAW AND NATIONAL LAW

On 15 November 2016, in the judgment in ***Ullens de Schooten*** (C-268/15, EU:C:2016:874), the Grand Chamber of the Court ruled on the possibility of pleading *the non-contractual liability of a Member State for damage caused to individuals by breaches of the fundamental freedoms laid down in Articles 49, 56 and 63 TFEU in a situation which is confined in all respects within a single Member State*. In the main proceedings, the applicant — a Belgian national who had operated a clinical biology laboratory in Belgium — had pleaded the liability of that State for damage caused to him as a result of breaches of Articles 49, 56 and 63 TFEU by national legislation which had been applied to him.

As a preliminary point, the Court recalled that the provisions on the freedom of establishment, the freedom to provide services and the free movement of capital do not apply to a situation which is confined in all respects within a single Member State.

Nonetheless, the Court stated that requests for a preliminary ruling concerning those provisions that are submitted in purely domestic cases may be regarded as admissible in the following situations: if it is not inconceivable that nationals established in other Member States may be interested in making use of those freedoms for carrying on activities in the territory of the Member State that has enacted the national

legislation in question; if the referring court made the request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States; where national law requires the referring court to grant the same rights to its own nationals as those which nationals of other Member States in the same situation would derive from EU law; and if the provisions of EU law have been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, follows the same approach as that provided for by EU law. The Court pointed out that it is for the referring court to indicate to the Court, in its order for reference, in accordance with the requirements of Article 94 of the Rules of Procedure of the Court, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute.

In the case in point, the Court concluded that in a situation where the dispute in the main proceedings is confined in all respects within a single Member State, and where it is not apparent from the decision to refer that there is any connecting factor between the subject or circumstances of that dispute and Articles 49, 56 or 63 TFEU, those provisions, which are intended to protect persons making actual use of the fundamental freedoms, are not capable of conferring rights on individuals and EU law cannot therefore give rise to non-contractual liability of the Member State concerned.

In its judgment in ***Association France Nature Environnement*** (C-379/15, EU:C:2016:603) of 28 July 2016, the Court provided clarification on *the power of national courts to maintain, in exceptional cases, certain effects of a national measure incompatible with EU law*. The request for a preliminary ruling arose from proceedings for the review of legality relating to the compatibility of national transposing provisions with Directive 2001/42. [20] The referring court had found that the requirements set out in the directive regarding the autonomy of the entities that must be consulted when conducting an environmental assessment had not been transposed correctly. Considering, however, that the retroactive effect of partial annulment of the national transposing measure could be damaging for the environment, the national court asked the Court about the possibility of limiting the temporal effects of that declaration of illegality.

In reply to that question, the Court recalled the line of authority devolving from its judgment in *Inter-Environnement Wallonie and Terre wallonne,* [21] according to which a national court may, exceptionally, provisionally maintain certain effects of a national measure held to be incompatible with EU law provided that their maintenance is dictated by an overriding consideration linked to environmental protection and having regard to the specific circumstances of the case pending before it. However, the national court is required to establish that all of the conditions set out in that judgment are satisfied. Thus, it must first of all establish that the contested national measure, despite having been adopted in disregard of the obligations provided for by Directive 2001/42, correctly transposes EU law in the field of environmental protection. It must then check that the adoption and entry into force of a new provision of national law do not make it possible to avoid the damaging effects on the environment arising from the annulment of the contested measure. Lastly, the national court must establish that the annulment of the measure has the effect of creating a legal vacuum that is damaging to the environment and that the exceptional maintaining of the effects of the contested provision of national law lasts only for the period strictly necessary for the adoption of measures making it possible to remedy the irregularity found.

20| Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).

21| Judgment of the Court of 28 February 2012, ***Inter-Environnement Wallonie and Terre wallonne*** (C-41/11, EU:C:2012:103).

As regards the question whether a national court ruling at last instance is required to make a reference to the Court for a preliminary ruling before exercising that exceptional power, the Court replied in the affirmative. However, the national court is relieved of that obligation when it is able to establish in detail that no reasonable doubt exists as to the interpretation and application of the conditions set out in the judgment in Inter-Environnement Wallonie and Terre wallonne.

V. PROCEEDINGS OF THE EUROPEAN UNION

In 2016, the Court delivered three important judgments concerning references for a preliminary ruling. The first two judgments develop settled case-law to the effect that EU law precludes all domestic legislation preventing national courts from submitting a question for a preliminary ruling on the interpretation of relevant provisions of EU law. The third is the judgment in ***Ullens de Schooten*** (C-268/15, EU:C:2016:874), which specifies the conditions for the admissibility of references for a preliminary ruling submitted in purely domestic cases. That judgment is presented in Section IV 'EU law and national law'. [22]

First, the judgment in ***PFE*** (C-689/13, EU:C:2016:199) of 5 April 2016 was delivered in the context of a dispute before a national court of final instance between an unsuccessful tenderer and the successful tenderer in a public procurement procedure. As the successful tenderer had challenged by way of counterclaim the admissibility of the unsuccessful tenderer's action, the court seised was required, pursuant to its own case-law adopted in plenary session, to give precedence to examination of the counterclaim. According to the applicable national rules, since that case-law of the plenary assembly was binding on the other chambers of that court, the chamber to which the dispute at issue had been assigned could not depart from it without referring the case to the plenary assembly as a matter of priority, even if the approach of the plenary assembly was contrary to the case-law of the Court. On account of the apparent conflict between that internal procedural rule and the case-law of the Court, the referring court sought to ascertain *whether Article 267 TFEU precludes a situation whereby a chamber of a national court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus prevented from itself making a request to the Court for a preliminary ruling.*

The Court, sitting as the Grand Chamber, first recalled that national courts have the widest discretion in referring questions to the Court involving the interpretation of relevant provisions of EU law, that discretion being replaced by an obligation for courts of final instance, subject to certain exceptions. Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court, established by Article 267 TFEU, and of the functions of the court responsible for the application of EU law which are entrusted by that provision to the national courts. As a consequence, the Court stated that a provision of national law cannot prevent a chamber of a court of final instance faced with a question concerning the interpretation of EU law from referring a question to the Court for a preliminary ruling.

As regards the obligation on national courts to apply EU law as interpreted by the Court, the Court reaffirmed its settled case-law in that regard, dating back to the judgment in *Simmenthal*. [23] It held that, after receiving the answer of the Court to a question concerning the interpretation of EU law which it has submitted to the Court,

22| Mention should also be made of the judgments ***in Mallis and Others*** v ***Commission and ECB*** (C-105/15 P to C-109/15 P, EU:C:2016:702), and ***Ledra Advertising and Others*** v ***Commission and ECB*** (C-8/15 P to C-10/15 P, EU:C:2016:701) on the admissibility of actions for annulment against decisions concerning economic and monetary policy (see Section XV 'Economic and monetary policy').

23| Judgment of the Court of 9 March 1978, ***Simmenthal*** (C-106/77, EU:C:1978:49).

or where the case-law of the Court already provides a clear answer to that question, a chamber of a court of final instance is required to do everything necessary to ensure that that interpretation of EU law is applied.

Applying those principles, in the judgment in ***Ognyanov*** (C-614/14, EU:C:2016:514) of 5 July 2016, the Court, sitting as the Grand Chamber, answered the questions submitted in the light of the application to references for a preliminary ruling of provisions of Bulgarian law designed to ensure the impartiality of judges in criminal proceedings. Under those provisions, *the judges who, in the context of a reference for a preliminary ruling, set out the facts and their legal classification must disqualify themselves from the case*. The referring court also indicated that, pursuant to the national code of conduct, the presentation, in decision to refer, of the factual and legal background to the case in the main proceedings is regarded as the expression of a provisional opinion that will result in an action for liability being brought against the national judge for a disciplinary offence.

After recalling the key aspects of the procedure provided for in Article 267 TFEU, the Court observed that in setting out, in its request for a preliminary ruling, the factual and legal context of the main proceedings, a referring court is doing no more than meeting the requirements of Article 267 TFEU and Article 94 of the Rules of Procedure of the Court. The presentation of that factual and legal context is therefore a response to the requirement of cooperation that is inherent in the preliminary reference mechanism and cannot, in itself, be a breach of either the right to a fair trial, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights, or the right to the presumption of innocence, guaranteed by Article 48(1) thereof.

In the light of those considerations, the Court held that the effect of the domestic provisions of criminal law and of the national code of conduct referred to by the national court is likely to be that a national court may choose to refrain from referring questions for a preliminary ruling to the Court, in order to avoid, on the one hand, being disqualified and exposed to disciplinary penalties or, on the other, lodging requests for preliminary rulings that are inadmissible. Such provisions are therefore detrimental to the prerogatives granted to national courts by Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national courts established by the preliminary ruling mechanism.

As regards the possibility for the referring court to alter its initial assessment of the legal and factual context following delivery of the preliminary ruling, the Court stated that the national court may alter the findings of fact or law made in the request for a preliminary ruling, provided that that court gives full effect to the interpretation of EU law adopted by the Court.

VI. AGRICULTURE

In its judgment in ***Pesce and Others*** (C-78/16 and C-79/16, EU:C:2016:428), delivered on 9 June 2016 under the expedited procedure, the Court ruled *on the validity of Article 6(2)(a) of Implementing Decision 2015/789,* [24] *adopted on the basis of Directive 2000/29.* [25] Directive 2000/29 aims to ensure a high level of phytosanitary protection against the bringing into the European Union of harmful organisms in produce imported from non-member countries. In accordance with that objective, Article 6(2)(a) of the contested implementing decision, which seeks to eradicate the bacterium *Xylella fastidiosa*, requires the Member States concerned to remove immediately host plants, regardless of their health status, within a radius of 100 metres around

24| Commission Implementing Decision (EU) 2015/789 of 18 May 2015 as regards measures to prevent the introduction into and the spread within the Union of Xylella fastidiosa (OJ 2015 L 125, p. 36).

25| Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community (OJ 2000 L 169, p. 1), as amended by Council Directive 2002/89/EC of 28 November 2002 (OJ 2002 L 355, p. 45).

plants infected by that bacterium. In the case in point, the Italian authorities had applied that rule to several agricultural holdings in the region of Puglia.

As regards the question of validity relating to the compatibility of Article (6)(2)(a) of Implementing Decision 2015/789 with EU law and, in particular, with Directive 2000/29 read in the light of the precautionary principle and the principle of proportionality, the Court held that, having regard to the scientific data available and the alternative measures conceivable at the date of adoption of that decision, the measure at issue was appropriate and necessary in order to attain the objective of preventing the bacterium from spreading. However, the Court also pointed out that, if the situation were to change to the effect that the eradication of the bacterium *Xylella fastidiosa* no longer requires, on the basis of new relevant scientific data, such removal of host plants, it would be for the Commission to amend Implementing Decision 2015/789 or to adopt a new decision, in order to take account of that development.

As regards the fact that the implementing decision does not provide for a compensation scheme, the Court acknowledged that the obligation set out in Article 6(2)(a) of that decision was, inter alia, capable of harming the right to property in respect of the agricultural holdings concerned. However, in so far as the right to compensation flows directly from Article 17 of the Charter of Fundamental Rights, the mere fact that neither Directive 2000/29 nor the implementing decision provides specifically for a compensation scheme or that they do not impose an explicit obligation to provide for such a scheme does not mean that such a right is precluded. Therefore, Decision 2015/789 is not invalid on that ground.

The case giving rise to the judgment in ***Masterrind*** (C-469/14, EU:C:2016:609), delivered on 28 July 2016, raises two distinct issues. It relates, first, to *journey times and rest periods for animals during their transport by road and, secondly, to the effects of the declaration issued by the official veterinarian of the exit Member State as regards the authority of another Member State competent for the payment of export refunds*. The main proceedings concerned the transport of cattle by lorry from Germany to France, where the animals were then loaded on to a ship bound for Morocco. Following checks, as referred to in Article 2 of Regulation No 817/2010, [26] carried out in France by the official veterinarian at the exit point, who found that the transport did not satisfy the requirements of Regulation No 1/2005, [27] the German authorities sought to recover the export refunds which had been advanced, a decision that was challenged before a German court.

First, the Court shed light on the rule laid down in Regulation No 1/2005, which establishes a maximum of 28 hours of travel, interrupted by a minimum rest period of one hour after the first 14-hour section. As regards the rest period between the periods of travel, the Court stated that it may be longer than one hour, while pointing out that its length must not, in practice, constitute a risk of injury or undue suffering for the transported animals. Furthermore, the combined journey time and rest period must not exceed 29 hours, subject to the possibility of extending those periods by two hours in the interests of the animals [28] or in the event of unforeseeable circumstances. [29] Lastly, the periods of travel of 14 hours may include one or more break periods, but those break periods must be in addition to the periods of travel that count towards the overall period of travel of a maximum of 14 hours to which they belong.

26| Commission Regulation (EU) No 817/2010 of 16 September 2010 laying down detailed rules pursuant to Council Regulation (EC) No 1234/2007 as regards requirements for the granting of export refunds related to the welfare of live bovine animals during transport (OJ 2010 L 245, p. 16).

27| Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 (OJ 2005 L 3, p. 1).

28| Annex I, Chapter V, point 1.8 of Regulation No 1/2005.

29| Article 22 of Regulation No 1/2005.

Secondly, the Court held that, pursuant to Regulation No 817/2010, the authority competent for the payment of export refunds for bovine animals is not bound by the assessment of the official veterinarian at the exit point that the provisions of Regulation No 1/2005 were not adhered to in the context of the transport of those animals. The decision on the adherence to the conditions to which the entitlement to payment of export refunds is subject falls within the remit of the national authority competent for that payment. In that respect, the indications provided by the official veterinarian at the exit point indeed constitute an item of evidence, but are refutable.

VII. FREEDOMS OF MOVEMENT

1. FREEDOM OF MOVEMENT FOR WORKERS

In the area of freedom of movement for workers, three judgments merit special attention. The first judgment concerns the entitlement to a retirement pension of a person who has settled in another Member State while the other two judgments relate to a scheme of aid for higher education studies granted to residents of another Member State.

In the judgment in ***Pöpperl*** (C-187/15, EU:C:2016:550), delivered on 13 July 2016, the Court provided important guidance on the interpretation of Article 45 TFEU. The main proceedings concerned *the entitlement of a former civil servant of a German Land, who left to work in another Member State, to the retirement pension provided for employees of that Land*.

The Court held that Article 45 TFEU had to be interpreted as precluding national legislation under which a person having the status of civil servant in one Member State, who leaves his post voluntarily in order to be employed in another Member State, loses his retirement pension rights under the special pension scheme, and is insured retrospectively under the general old-age insurance scheme, conferring entitlement to a retirement pension lower than the pension that would result from those rights. Such legislation constituted a restriction on freedom of movement for workers since, even though it also applies to civil servants of that Member State who resign in order to work in the private sector in the same Member State, it is liable to prevent or deter them from exercising their right to freedom of movement in the territory of the European Union.

The Court also ruled that it is incumbent on the national court to give full effect to Article 45 TFEU by interpreting domestic law in conformity with that article or, if such an interpretation is not possible, by disapplying any contrary provision of domestic law. In addition, where national law, in breach of EU law, provides that a number of groups of persons are to be treated differently, the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned. Consequently, the arrangements applicable to members of the group placed at an advantage remain, for want of the correct application of EU law, the only valid point of reference.

In the judgments in ***Bragança Linares Verruga and Others*** (C-238/15, EU:C:2016:949) and ***Depesme and Others*** (C-401/15 to C-403/15, EU:C:2016:955), delivered on 14 and 15 December 2016 respectively, the Court, called upon to examine again *the Luxembourg legislation on State financial aid for higher education studies*, provided clarification relating to freedom of movement for workers and social security. Originally, the legislation at issue made the grant of aid conditional on residence by the student. That condition was removed to take account

of the judgment in *Giersch and Others*. [30] However, under the amended version of the legislation, which was in force at the time of the events giving rise to the main actions, a non-resident student was entitled to the financial aid in question only if he was the child of a worker and if the worker had worked in Luxembourg for a continuous period of at least five years at the time of the application for aid.

In the two judgments delivered in 2016, the Court recalled first of all (i) that Article 7(2) of Regulation No 1612/68, [31] the wording of which was reproduced in Article 7(2) of Regulation No 492/2011, [32] is the particular expression, in the specific area of the grant of social advantages, of the principle of equal treatment enshrined in Article 45(2) TFEU and (ii) that the members of a migrant worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation No 1612/68 and, therefore, of the social advantages referred to in that article, such as study funding granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State.

Thus, in the judgment in ***Bragança Linares Verruga and Others***, the Court held that Article 7(2) of Regulation No 492/2011 precludes the legislation in question. That legislation constitutes indirect discrimination on the ground of nationality, since a distinction based on residence is liable to operate mainly to the detriment of nationals of other Member States. Such legislation can be accepted only if it is appropriate for securing the achievement of a legitimate objective, without going beyond what is necessary to attain that objective. In that regard, first, the Court pointed out that the social objective pursued, to promote higher education and to increase the number of residents holding a higher education degree, is an objective in the public interest acknowledged at the level of the European Union. Secondly, the condition relating to the five-year period of work is appropriate in order to attain that objective, since (i) it seems legitimate that the State providing the aid would seek to ensure that the frontier worker does in fact have a link of integration with society in order to combat the risk of 'study grant forum shopping' and (ii) that condition is capable of establishing such a connection. However, the condition at issue involves a restriction that goes beyond what is necessary in order to attain the objective pursued. It does not permit the competent authorities to grant the aid where the parents, notwithstanding a few short breaks, have worked in Luxembourg for a significant period of time in the period preceding the application for financial aid, even though such breaks are not liable to sever the connection between the applicant and Luxembourg.

In the judgment in ***Depesme and Others***, the Court ruled on the concept of 'child of a worker' appearing in the national legislation in question, in the light of Article 45 TFEU and Article 7(2) of Regulation No 492/2011. Specifically, it considered whether this concept includes the children of the spouse or partner of the worker and answered in the affirmative. Thus, it follows from the judgment that this expression covers not only a child who has a child-parent relationship with the worker, but also the child of the spouse or registered partner of that worker, where the worker supports that child. The latter condition concerns a factual situation, which it is for the national authorities and, if appropriate, the national courts, to assess, and it is not necessary for them to determine the reasons for that contribution or make a precise estimation of its amount. However, the status of family member of a frontier worker who is dependent on that worker may be evidenced by objective factors, such as a joint household shared by the worker and the student. As is apparent, in particular, from

30| See judgment of the Court of 20 June 2013, ***Giersch and Others*** (C-20/12, EU:C:2013:411), presented in the 2013 Annual Report, p. 23.

31| Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

32| Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

Article 2(2)(c) of Directive 2004/38, [33] the EU legislature takes the view that children are presumed to be dependent until the age of 21 years.

2. FREE MOVEMENT OF GOODS

On 21 June 2016, in its judgment in ***New Valmar*** (C-15/15, EU:C:2016:464), the Court, sitting as the Grand Chamber, ruled on the question whether *legislation requiring invoices, including those relating to cross-border transactions, to be drawn up exclusively in a national language, failing which they are null and void,* infringes EU law. This case involved a dispute concerning unpaid invoices between a company established in the Dutch-speaking region of Belgium and a company established in Italy. The latter had argued that those invoices were null and void because they infringed language rules falling, in its view, within the scope of Belgian public policy. Under Flemish legislation, undertakings established in the region in question are required to use Dutch to draw up, inter alia, acts and documents required by law. All the standard details and general terms and conditions in the invoices concerned were worded in Italian and not in Dutch.

In its judgment, the Court held that the language legislation in question constitutes a restriction on the free movement of goods within the European Union. In depriving the traders concerned of the possibility of choosing freely a language which they are both able to understand for the drawing up of their invoices and in imposing on them a language which does not necessarily correspond to the one they agreed to use in their contractual relations, that legislation is likely to increase the risk of disputes and non-payment of invoices. The recipients of invoices could be encouraged to rely on their actual or alleged inability to understand the invoices' content in order to refuse to pay them. Conversely, the recipient of an invoice drafted in a language other than Dutch could, given that such an invoice is null and void in its entirety, be encouraged to dispute its validity for that reason alone.

Even though the objectives of such legislation, namely to promote and encourage the use of one of the official languages of a Member State, may, in principle, justify such a restriction, that is not the case here. In the Court's view, the language legislation in question goes beyond what is necessary to attain those objectives and cannot therefore be regarded as proportionate.

3. FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

In relation to freedom of establishment and freedom to provide services, mention should be made of five judgments. The first two judgments concern the refusal of credit institutions and payment institutions to provide information on their customers; the third provides clarification on the procedure for extending concessions over State-owned land; the fourth concerns the imposition of costs for a licence to pursue a commercial activity; and the fifth relates to the application of domestic legislation on collective redundancies to a foreign undertaking.

In the judgment in ***Sparkasse Allgäu*** (C-522/14, EU:C:2016:253), delivered on 14 April 2016, the Court held that Article 49 TFEU does not preclude *legislation of a Member State which requires credit institutions having their head*

33| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34).

office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who was resident in the first Member State, where there is no similar notification obligation in the second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence. The main proceedings involved a dispute between Sparkasse Allgäu, a credit institution established in Germany, and the German tax authorities regarding the former's refusal to disclose to the latter information relating to accounts held at its dependent branch established in Austria by persons who, at the time of their death, had their place of residence for tax purposes in Germany. Against that background, the referring court sought to ascertain whether, as a result of the obligation provided for in German law, German credit institutions may be deterred from exercising, by means of a branch office, commercial operations in Austria.

The Court answered that question in the negative. It pointed out that the adverse consequences which might arise from such a notification obligation result from the exercise in parallel by two Member States of their powers with regard to maintaining banking secrecy and fiscal supervision, leading to significant differences between the legislation concerned. The Member State of the credit institution's head office favours the effectiveness of fiscal supervision by the forwarding of information to the tax authorities whilst, in the Member State of the branch office, banking secrecy must, in principle, be respected, including with regard to the tax authorities.

In the absence of any harmonising measure in relation to the exchange of information for the requirements of fiscal supervision, Member States are free to impose such a notification obligation on national credit institutions, so far as concerns their branches operating abroad, with the objective of ensuring the effectiveness of fiscal supervision, on condition that the transactions carried out in those branches are not treated in a manner that is discriminatory in comparison with *transactions carried out by their national branches. The Court also pointed out that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules and, in particular, a notification obligation on the basis of those in another Member State in order to ensure, in all circumstances, that any disparities arising from national rules are removed.*

In its judgment in ***Safe Interenvios*** (C-235/14, EU:C:2016:154), delivered on 10 March 2016, the Court had the opportunity to rule on the application *of due diligence measures by a financial institution with regard to an entity or person also subject to the obligations of Directive 2005/60* [34] *in relation to money laundering and terrorist financing*. The main proceedings concerned the refusal, by a Spanish payment institution that handled transfers of funds to other States, to provide information on its customers. Requests for information had been sent by three banks after discovering irregularities regarding the agents who transferred funds through the accounts which the payment establishment held with those banks. After finding the irregularities, the banks closed the accounts in question on the basis of domestic law.

The Court held that Directive 2005/60 does not preclude national legislation which, first, authorises the application of standard customer due diligence measures in so far as the customers are financial institutions whose compliance with due diligence measures is supervised when there is a suspicion of money laundering or terrorist financing and, secondly, requires the institutions and persons covered by the directive to apply, on a risk-sensitive basis, enhanced customer due diligence measures in situations which, by their nature, can present a higher risk of money laundering or terrorist financing, such as that of the transfer of funds. Furthermore, even in the absence of such a suspicion or such a risk, that directive allows the Member States

34| Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15) as amended by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 (OJ 2010 L 331, p. 120).

to adopt or retain in force stricter provisions where those provisions seek to strengthen the fight against money laundering and terrorist financing.

According to the Court, national legislation designed to combat money laundering or terrorist financing pursues a legitimate aim capable of justifying a restriction on the fundamental freedoms. Furthermore, to presume that transfers of funds by an institution covered by Directive 2005/60 to States other than the State in which it is established always present a higher risk of money laundering or terrorist financing is appropriate for securing the attainment of that aim. However, such legislation exceeds what is necessary for the purpose of achieving the aim which it pursues where the presumption which it establishes applies to any transfer of funds, without providing for the possibility of rebutting the presumption in the case of transfers of funds not objectively presenting such a risk.

The Court also stated that the institutions and persons covered by Directive 2005/60 may not compromise the task of supervising payment institutions with which the competent authorities are entrusted and may not take the place of those authorities. Therefore, whilst a financial institution may, in performing the supervisory obligation which it owes in respect of its customers, take account of the due diligence measures applied by a payment institution in respect of its own customers, all the due diligence measures that it adopts must be appropriate to the risk of money laundering and terrorist financing.

On 14 July 2016, in the judgment in ***Promoimpresa*** (C-458/14 and C-67/15, EU:C:2016:558), the Court ruled on whether EU law precludes *concessions for the exercise of tourist and leisure-orientated business activities on State-owned maritime and lakeside property* from being extended automatically without any selection procedure for potential candidates.

In its judgment, the Court stated that, if Directive 2006/123 ('the Services Directive') [35] is applicable, the grant of authorisations relating to the economic exploitation of State-owned maritime and lakeside property must be subject to a selection procedure for potential candidates which must ensure full guarantees of impartiality and transparency. The automatic renewal of authorisations does not allow for such a selection procedure to be organised.

Article 12 of the Services Directive admittedly allows the Member States to take into account, in establishing the selection procedure, overriding reasons relating to the public interest, such as, inter alia, the need to safeguard the legitimate expectations of the holders of authorisations so that they can recoup the cost of investments made. However, such considerations cannot justify automatic renewal where no selection procedure was organised at the time of the initial grant of the authorisations. That provision therefore precludes a national measure which, without any selection procedure for potential candidates, provides for the automatic extension of authorisations for tourist and leisure-oriented business activities on State-owned maritime and lakeside property.

The Court also stated that, if the Services Directive is not applicable, where such concessions are of certain cross-border interest the automatic extension of their award to an undertaking located in one Member State results in a difference in treatment to the detriment of undertakings located in the other Member States which might be interested in the concessions, that difference in treatment being, in principle, inconsistent with freedom of establishment.

35| 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).

Lastly, the principle of legal certainty, which seeks to allow concessionaires to recoup the cost of their investments, cannot be relied on in order to justify such a difference in treatment in so far as the concessions were awarded when it had already been established that that type of contract, which is of certain cross-border interest, was subject to a duty of transparency.

In the judgment of 16 November 2016, ***Hemming and Others*** (C-316/15, EU:C:2016:879), the Court ruled on *the interpretation of the concept of 'charges which may be incurred from the application of authorisation procedures' for access to a service activity, for the purpose of Article 13(2) of the Services Directive.* That judgment was delivered in the context of proceedings in which a group of sex shop licence holders had contested the consistency with that *directive of United Kingdom legislation providing for the payment of a fee for the grant or renewal of a* licence. That fee was made up of two parts, one for the administration of the application and non-refundable, and the other (considerably larger) for the management and enforcement of the authorisation scheme concerned and refundable if the application was refused.

The Court held that Article 13(2) of the Services Directive precludes the requirement to pay a fee part of which corresponds to management and enforcement costs, even if that part is refundable if the application is refused. According to the Court, the fact that a fee must be paid constitutes a financial obligation, and therefore a charge, which the applicant must pay notwithstanding the fact that the amount may subsequently be refunded if the application is refused. The Court went on to find that, in order to comply with the Services Directive, the charges must be reasonable and proportionate to the cost of the authorisation procedures and must not exceed the cost of those procedures. In that connection, the Member States are entitled to take account not only of the material and salary costs which are directly related to the effecting of the transactions in respect of which they are incurred, but also of the proportion of the overheads of the competent authority which can be attributed to those transactions.

Nevertheless, the costs taken into account may not include the expenditure linked to the general supervisory activities of the authority in question since, first, Article 13(2) of the Services Directive is directed only at the cost of the procedures and, secondly, it pursues the aim of facilitating access to service activities. That aim would not be served by a requirement to pre-finance the costs of the management and enforcement of the authorisation scheme concerned, including, inter alia, the costs of detecting and prosecuting unauthorised activities.

Lastly, on 21 December 2016, in its judgment in ***AGET Iraklis*** (C-201/15, EU:C:2016:972), the Court, sitting as the Grand Chamber, had the opportunity to rule on *the compatibility of Greek legislation on collective redundancies with, first, Directive 98/59* [36] *and, secondly, the fundamental freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights*. In the case in point, the Greek Minister for Labour, Social Security and Social Solidarity had decided not to authorise a company governed by Greek law, which was owned by a French multinational group, to make a number of workers collectively redundant. The company subsequently contested the compatibility with EU law of Greek legislation conferring upon administrative authorities the power to oppose collective redundancies after assessing the conditions in the labour market, the situation of the undertaking and the interests of the national economy.

In its judgment, the Court examined the domestic legislation at issue in the light of, first, Directive 98/59 and, secondly, Articles 49 and 63 TFEU, relating to freedom of establishment and the free movement of capital, read in conjunction with Article 16 of the Charter of Fundamental Rights. As regards Directive 98/59, the Court observed that the substantive conditions to which the ability of the employer to effect or refrain from

36| Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16, and corrigendum OJ 2007 L 59, p. 84).

effecting collective redundancies might be subject are not covered, in principle, by the provisions of Directive 98/59 and remain a matter for the Member States. Consequently, that directive does not, in principle, preclude national legislation such as that at issue. The position would be different, however, if such legislation were to prove to have the consequence of depriving the provisions of the directive of their practical effect. That would be so if, on account, for example, of the criteria in the light of which the competent authority is called upon to take a decision or of the specific way in which it interprets and applies those criteria, any actual possibility for the employer to effect such collective redundancies were, in practice, ruled out.

On the other hand, the Court found that the national legislation at issue runs counter to Article 49 TFEU, relating to freedom of establishment, since it constitutes a significant interference in certain freedoms which economic operators generally enjoy. However, a mechanism imposing a framework on collective redundancies, such as that at issue, could prove to be a mechanism of the sort that contributes to enhancing the level of actual protection of workers and of their employment, thereby being appropriate for ensuring the attainment of the objectives in the public interest. Nevertheless, in this instance, according to the Court, the particular detailed rules which characterise the mechanism imposing a framework for collective redundancies that is laid down by Greek law and, in particular, the criteria which the competent public authority is called upon to take into account in order to decide to authorise or refuse the planned collective redundancies are too vague, with the result that the national legislation at issue goes beyond what is necessary to attain the objectives stated. Furthermore, the fact that the context in a Member State may be one of acute economic crisis and a particularly high unemployment rate is not such as to affect that interpretation.

VIII. BORDER CONTROLS, ASYLUM AND IMMIGRATION

1. ASYLUM POLICY

In the field of asylum policy, five judgments are worthy of note. The first judgment concerns the possibility of detaining an asylum seeker for reasons of national security or public order. The second addresses the question whether the beneficiaries of subsidiary protection are entitled to choose their place of residence within a Member State. The last three judgments concern the obligations of the Member State responsible for examining an application for international protection, pursuant to Regulation No 604/2013 ('the Dublin III Regulation'). [37]

In its judgment in ***N.*** (C-601/15 PPU, EU:C:2016:84), delivered on 15 February 2016 under the urgent preliminary ruling procedure, the Grand Chamber of the Court examined, *in the light of the Charter of Fundamental Rights, the validity of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33,* [38] *enabling an asylum seeker to be detained when protection of national security or public order so requires*. In the case in point, the applicant had made three applications for asylum between 1995 and 2013, each of which was rejected by the Netherlands authorities. Upon rejecting the last application, the competent authority ordered the applicant to leave the territory of the European Union and imposed an entry ban on him. The rejection decisions were confirmed

37 | Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ 2013 L 180, p. 31).

38 | Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

by final judgment. Between 1999 and 2015, the person concerned was convicted on several occasions for a number of offences. In 2015, while serving a sentence for theft and failure to comply with the entry ban, the applicant made a fourth application for asylum and was subsequently placed in detention. He argued that his detention was contrary to Article 5(1)(f) of the ECHR, under which the detention of a foreign national may be justified only by the fact that action is being taken against him with a view to deportation or extradition.

In response to a question from the referring court on the validity of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 in the light of the fundamental rights of the person concerned in this case, the Court recalled that that examination must be undertaken solely in the light of the rights guaranteed by the Charter, and not the ECHR, but in observance of Article 52(3) of the Charter, which provides that the meaning and scope of the rights guaranteed by the Charter are to be the same as those laid down by the ECHR.

Next, after noting that the relevant provision of Directive 2013/33 provides for a limitation on the exercise of the right to liberty entrenched in Article 6 of the Charter, the Court pointed out that limitations may be imposed on the exercise of the rights guaranteed by the Charter only if they are necessary and genuinely meet objectives of general interest recognised by the European Union. The Court held that the protection of national security and public order constitutes such an objective. Thus, the detention of an asylum seeker when the protection of national security or public order so requires is a limitation on his right to liberty which is provided for in the exhaustive list appearing in the first subparagraph of Article 8(3) of Directive 2013/33. By its very nature, that measure is appropriate for protecting the public from the threat which the conduct of such a person represents and is suitable for attaining the general interest objective referred to. The Court therefore took the view that Directive 2013/33 strikes a fair balance between, on the one hand, the applicant's right to liberty and, on the other, requirements which are strictly necessary for the protection of national security and public order. In that connection, the Court made clear that the relevant provision of the directive cannot form the basis for measures ordering detention without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail. Therefore, the Court concluded that consideration of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 does not disclose any factor of such a kind as to affect the validity of that provision in the light of Articles 6 and 52 of the Charter.

In the judgment in ***Alo*** (C-443/14 and C-444/14, EU:C:2016:127), delivered on 1 March 2016, the Court, sitting as the Grand Chamber, was required to interpret *Articles 29 and 33 of Directive 2011/95* [39] *in order to determine the extent to which a Member State may impose a condition requiring residence in a particular place on beneficiaries of subsidiary protection*. The main proceedings had been brought by two Syrian nationals who had obtained subsidiary protection status in Germany, but whose residence permits included a condition requiring them to reside in a particular place because they were receiving certain social security benefits.

The Court stated that such a residence condition constitutes a restriction of the freedom of movement guaranteed by Article 33 of Directive 2011/95, even when it does not prevent the beneficiary of subsidiary protection from moving freely within the territory concerned and from staying on a temporary basis in that territory outside the place designated by the residence condition.

39| Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

Nevertheless, the Court took the view that a residence condition may be imposed solely on beneficiaries of subsidiary protection if they are not, so far as the objective of the national rules in question is concerned, in a situation which is objectively comparable with that of non-EU citizens legally resident in the Member State concerned or that of nationals of that State.

Next, the Court acknowledged that the movement of recipients of social security benefits or the fact that they are not equally concentrated throughout a Member State may mean that the financial burden connected with those benefits is not evenly distributed among the various institutions with competence in that regard. However, there is no special link between an uneven distribution of that burden and the possible qualification of recipients of social security benefits for subsidiary protection status. Accordingly, Directive 2011/95 precludes the imposition of a residence condition exclusively on beneficiaries of subsidiary protection status for the purpose of achieving an appropriate distribution of the burden connected with the benefits in question.

However, the Court stated that it would be for the German court to determine whether beneficiaries of subsidiary protection in receipt of social assistance face greater difficulties relating to integration than other non-EU citizens legally resident in Germany and receiving social assistance. If those two groups of persons are not in a comparable situation so far as the objective of facilitating the integration of non-EU citizens in Germany is concerned, the directive does not prevent beneficiaries of subsidiary protection status from being subject to a residence condition for the purpose of promoting their integration, even if that condition does not apply to other non-EU citizens legally resident in Germany.

In the judgment in ***Mirza*** (C-695/15, EU:C:2016:188), delivered on 17 March 2016 under the urgent preliminary ruling procedure, the Court considered *the circumstances in which a Member State may propose to send an applicant for international protection to a safe third country, pursuant to Article 3(3) of the Dublin III Regulation, without examining the substance of his application.* In the case in point, the applicant, a Pakistani national, had entered Hungarian territory illegally from Serbia. He made a first application for international protection in Hungary. During the procedure, he left the place of residence which had been assigned to him by the Hungarian authorities. The Hungarian authorities therefore discontinued the examination of the application on the ground that it had been implicitly withdrawn by the applicant. Subsequently, the applicant was arrested in the Czech Republic while attempting to reach Austria. The Czech authorities asked Hungary to take him back, which Hungary agreed to do. The applicant then submitted a second application for international protection in Hungary, which the Hungarian authorities rejected as inadmissible, without examining its substance. They considered that, for the applicant, Serbia had to be classified as a safe third country. The applicant then brought an action against that decision.

The Court first of all observed that the right to send an applicant for international protection to a safe third country may also be exercised by a Member State which has admitted, within the context of the take-back procedure, to being responsible for examining an application for international protection submitted by an applicant who left that Member State before a decision regarding the substance of his first application for international protection had been taken.

Next, the Court found that, within the context of that procedure, the Dublin III Regulation does not subject the Member State responsible (in this instance, Hungary) to an obligation to inform the Member State carrying out the transfer (in this instance, the Czech Republic) of the wording of its national legislation on the sending of applicants to safe third countries or of its relevant administrative practice. A lack of communication on those points between the two States concerned does not impair the applicant's right to an effective remedy against the transfer decision and against the decision on the application for international protection, as ensured by EU law.

Lastly, the Court held that, in a situation such as that in the main proceedings, the right of the applicant for international protection to obtain a final decision on his application does not deprive the Member State responsible of the possibility of declaring the application inadmissible or require it to resume the examination of the application at a specific procedural stage.

In the cases giving rise to the judgments in ***Ghezelbash*** (C-63/15, EU:C:2016:409) and ***Karim*** (C-155/15, EU:C:2016:410), delivered by the Court sitting as the Grand Chamber on 7 June 2016, asylum applicants sought to challenge the decision of the competent authorities of a Member State to transfer them to another Member State which had agreed with the first Member State to take charge of the examination of their asylum applications. These cases raised, in particular, the question of the *arguments that may be relied on by asylum seekers in the context of the legal remedies provided for in Article 27(1) of the Dublin III Regulation in order to challenge a transfer decision.*

In the first case, an Iranian national had applied to the Netherlands authorities for a temporary residence permit. As a search in the EU Visa Information System (VIS) disclosed that the French Republic's diplomatic representation in Iran had granted the person concerned a visa covering a specific period, the Netherlands State Secretary requested the French authorities to take charge of him on the basis of the Dublin III Regulation. The French authorities agreed to that request. However, during a second hearing by the Netherlands authorities, the person concerned asked to be allowed to submit original documents proving that he had returned to Iran after visiting France, which meant, according to the applicant, that France was not the Member State responsible for examining his asylum application. The question therefore arose as to whether the person concerned was entitled to challenge the French Republic's responsibility for examining his asylum application after that Member State had accepted such responsibility.

Against that background, the Court held that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of that regulation, must be interpreted as meaning that an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in that regulation.

In the second case, a Syrian national had applied for international protection in Sweden. As a search in the Eurodac system revealed that the person concerned had already applied for such protection in Slovenia, the Swedish authorities (Swedish Migration Board) asked the Slovenian authorities to take the person concerned back on the basis of Article 18(1)(b) of the Dublin III Regulation. The Slovenian authorities agreed to that request. The Swedish Migration Board then informed those authorities that the person concerned had claimed that he had left the territory of the Member States for more than three months following his first asylum application and that his passport had an entry visa for Lebanon. Since the Slovenian authorities repeated their acceptance of the take-back request, the Swedish Migration Board rejected the application for international protection. However, the person concerned argued that Slovenia was not the Member State responsible for examining his asylum application.

In its judgment, the Court held, first of all, that Article 19(2) of the Dublin III Regulation, in particular its second subparagraph, is applicable to a third country national who, after having made a first asylum application in a Member State, provides evidence that he left the territory of the Member States for a period of at least three months before making a new asylum application in another Member State. The first subparagraph of Article 19(2) of the Dublin III Regulation provides that, in principle, the obligations to take charge of or take back an asylum applicant arising under Article 18(1) of that regulation cease if the Member State responsible can establish, when requested to take back an asylum applicant, that the person concerned left the territory of the Member States for a period of at least three months. However, the second subparagraph of Article 19(2) of that regulation states that an application lodged after such a period of absence is to be regarded as a new

application giving rise to a new procedure for determining the Member State responsible. It follows that, in a situation in which a third country national, having made a first asylum application in a Member State, has left the territory of the Member States for a period of at least three months before making a new asylum application in another Member State, Article 19(2) of the Dublin III Regulation requires the Member State in which the new asylum application has been made to complete, on the basis of the rules laid down in that regulation, the process for determining the Member State responsible for examining that new application.

The Court also found, as it did in the judgment in Ghezelbash, cited above, that Article 27(1) of the Dublin III Regulation must be interpreted as meaning that an asylum applicant may, in an appeal against a decision to transfer him, invoke an infringement of the rule set out in the second subparagraph of Article 19(2) of that regulation.

2. IMMIGRATION POLICY

In the case giving rise to the judgment in ***Affum*** (C-47/15, EU:C:2016:408), delivered by the Grand Chamber on 7 June 2016, the Court was asked whether *Directive 2008/115* [40] *precludes legislation of a Member State under which a third country national who has entered its territory illegally across an internal border in the Schengen area is liable to a sentence of imprisonment.* The case concerned a Ghanaian national who, without fulfilling the conditions for entry, stay or residence, had passed in transit through France as a passenger on a bus from Belgium bound for the United Kingdom.

First, the Court stated that, in so far as a third country national is present on the territory of a Member State, that person is staying illegally for the purpose of Article 3(2) of Directive 2008/115. The fact that such presence is merely temporary or by way of transit is irrelevant.

Secondly, after recalling the principles laid down in the judgment in *Achughbabian*, [41] the Court held that Directive 2008/115 precludes legislation of a Member State which permits a third country national in respect of whom the return procedure established by that directive has not yet been completed to be imprisoned merely on account of illegal entry across an internal border, resulting in an illegal stay. In that regard, the Court pointed out, in particular, that such imprisonment is liable to thwart the application of that procedure and delay return, thereby undermining the effectiveness of Directive 2008/115. Moreover, the Court stated that that interpretation also applies where the third country national may be taken back by a Member State other than the Member State where he was apprehended pursuant to an agreement or arrangement within the meaning of Article 6(3) of the directive. That article does not lay down an exception to the scope of Directive 2008/115, which would be additional to those set out in Article 2(2) and would, in that situation, enable the Member States to exclude illegally staying third-country nationals from the common return standards and procedures.

40| Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ 2008 L 348, p. 98).

41| Judgment of the Court of 6 December 2011, ***Achughbabian*** (C-329/11, EU:C:2011:807).

IX. JUDICIAL COOPERATION IN CIVIL MATTERS

In the area of judicial cooperation in civil matters, mention must be made of four judgments concerning the interpretation of Regulations No 44/2001 [42] (Brussels I Regulation), No 593/2008 [43] (Rome I Regulation) and No 864/2007 [44] (Rome II Regulation).

1. BRUSSELS I REGULATION

In its judgment of 20 April 2016, ***Profit Investment SIM*** (C-366/13, EU:C:2016:282), the Court ruled on *jurisdiction clauses inserted into a prospectus concerning a programme for the issue of bonds by a bank established in a Member State*. In the main proceedings, the prospectus had been unilaterally drawn up by the bond issuer and the programme had been implemented by contracts of subscription for those bonds. One of the subsequent purchasers of the bonds, which was established in Italy and had gone into judicial liquidation as a result of the non-payment of interest payable by an undertaking related to the issuer, brought legal proceedings against the issuer and other companies before the Italian courts, in the course of which the clause conferring jurisdiction on the courts of another Member State was relied on. It was against that background that the Italian Court of Cassation referred questions to the Court concerning the validity of such a clause as well as whether it could be relied on against a third party.

As regards the requirement, laid down in Article 23(1)(a) of Regulation No 44/2001, that jurisdiction clauses be in written form, the Court first of all noted that, in the circumstances of the case, that requirement is met only if the contract signed by the parties upon the first or a subsequent purchase expressly mentions the acceptance of that clause or contains an express reference to the prospectus. Where the subsequent purchaser of the bonds has not given his express consent, he may nevertheless be bound by such a clause if it is established that he succeeded to the transferor's rights and obligations attached to those bonds and had the opportunity to acquaint himself with the prospectus containing that clause.

Next, the Court addressed the question whether such a jurisdiction clause, if it does not satisfy the requirement that it be in written form, may nevertheless be considered to accord with usages in international trade or commerce within the meaning of Article 23(1)(c) of Regulation No 44/2001 and, in consequence, be regarded as valid and capable of being relied on against third parties. The Court held that such usage may be found to exist where it is established, in particular, that the course of conduct in question is generally and regularly followed by operators in the relevant branch of international trade or commerce when concluding contracts of that type and that the parties had to be aware of it. The actual or presumed awareness of that usage on the part of the parties may be made out, in particular, by showing either that the parties previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that the course of conduct at issue is sufficiently well known so that it may be regarded as being an established practice.

42| Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

43| Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

44| Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

Lastly, as regards the question of the application, in the case in point, of Article 6(1) of Regulation No 44/2001, which opens up the possibility of suing several defendants in the courts of the place where any one of them is domiciled where there is a risk of irreconcilable judgments, the Court stated that, where there are several actions which have different subject matters and bases and which are not connected by a link of subordination or incompatibility, the fact that the upholding of one of those actions is potentially capable of affecting the extent of the right in the other action does not suffice to give rise to a risk of irreconcilable judgments.

In the judgment of 14 July 2016, ***Granarolo*** (C-196/15, EU:C:2016:559), the Court ruled on the *determination of the court with jurisdiction in relation to abrupt termination of a long-standing business relationship*. The main proceedings arose from a decision by an Italian producer to terminate a distribution relationship which had lasted for approximately 25 years with an undertaking established in France. The distribution relationship was not the subject of a framework contract or exclusivity agreement. The undertaking established in France brought an action for damages against the Italian undertaking before the French courts. The Court was thus asked whether that action was a matter relating to tort or delict or a matter relating to a contract for the purpose of applying the rules of jurisdiction in Article 5 of Regulation No 44/2001.

The Court held that Article 5(3) of that regulation must be interpreted as meaning that an action for damages founded on an abrupt termination of a long-standing business relationship is not a matter relating to tort, delict or quasi-delict if a tacit contractual relationship existed between the parties — which was a matter for the referring court to ascertain — irrespective of how it is classified in national law. Demonstration of the existence of such a tacit contractual relationship must be based on a body of consistent evidence, which may include in particular the existence of a long-standing business relationship, the good faith between the parties, the regularity of the transactions and their development over time expressed in terms of quantity and value, any agreements as to prices charged and/or discounts granted, and the correspondence exchanged.

As regards the application of Article 5(1) of Regulation No 44/2001 to a long-standing business relationship, the Court stated that such a relationship must be classified as a 'contract for the sale of goods' or a 'contract for the provision of services', depending on the characteristic obligation at issue. A contract which has as its characteristic obligation the supply of goods must be classified as a contract for the 'sale of goods'. That classification may be applied to a long-standing business relationship between two economic operators where that relationship is limited to successive agreements each having the object of the delivery and collection of goods. On the other hand, it does not correspond to the general scheme of a typical distribution agreement, characterised by a framework agreement the subject matter of which is an undertaking for supply and provision concluded for the future by two economic operators.

As regards the classification of 'provision of services', the concept of 'services' within the meaning of that provision requires at least that the party who provides the services carries out a particular activity in return for remuneration. That is the case where the distributor is able to offer customers services and benefits that a mere reseller cannot and thereby acquire for the supplier's products a larger share of the local market. In addition, the fact that a distribution agreement is based on a selection of the distributors by the supplier may confer a competitive advantage on the distributors, which, together with the assistance that the agreement provides to those distributors regarding access to forms of advertising, training or payment facilities, satisfies the remuneration requirement which characterises contracts for the provision of services.

2. ROME I AND ROME II REGULATIONS

In its judgment in ***Verein für Konsumenteninformation*** (C-191/15, EU:C:2016:612) of 28 July 2016, the Court adjudicated on questions *concerning the relationship between the rules on consumer protection and those on the law applicable to contracts.* In the main proceedings, an Austrian consumer protection association had brought an action for an injunction, within the meaning of Directive 2009/22, [45] against the use of terms, considered to be unfair, determining the law applicable to contractual and non-contractual obligations. The terms appeared in the general terms and conditions of an undertaking established in Luxembourg which sells goods online to consumers established in various Member States.

According to the Court, the Rome I and Rome II Regulations must be interpreted as meaning that, without prejudice to Article 1(3) of each of those regulations, the law applicable to an action for an injunction within the meaning of Directive 2009/22 is to be determined in accordance with Article 6(1) of the Rome II Regulation, since the undermining of legal stability results from the use of unfair terms which it is the task of consumer protection associations to prevent. On the other hand, the law applicable to the assessment of the contractual term in question must always be determined pursuant to the Rome I Regulation, whether that assessment is made in an individual action or in a collective action.

Furthermore, it is apparent from Article 6(2) of the Rome I Regulation that, where in an action for an injunction an assessment is being made of whether a particular contractual term is unfair, the choice of the applicable law is without prejudice to the application of the mandatory provisions laid down by the law of the country of residence of the consumers whose interests are being defended by means of that action. Those provisions may include the provisions transposing Directive 93/13 [46] on unfair terms in consumer contracts, provided that they ensure a higher level of protection for the consumer, in accordance with Article 8 of that directive.

Thus, a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair within the meaning of Article 3(1) of Directive 93/13 in so far as it leads the consumer into error. This is particularly the case where the term gives the consumer the impression that only the law of that Member State applies to the contract, without informing him that he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.

The Court also held that the processing of personal data, within the meaning of Article 4(1)(a) of Directive 95/46, [47] carried out by an undertaking engaged in electronic commerce is governed by the law of the Member State to which that undertaking directs its activities, if it is shown that the undertaking carries out such data processing in the context of the activities of an establishment situated in that Member State.

Lastly, in the judgment of 18 October 2016 delivered in ***Nikiforidis*** (C-135/15, EU:C:2016:774), the Court, sitting as the Grand Chamber, ruled, *first, on the temporal scope of the Rome I Regulation and, secondly, on the conditions for the application of the overriding mandatory provisions of Member States other than those of the State of the forum*. The main proceedings concerned a reduction in pay, implemented between 2010 and 2012 as a result

45| Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30).

46| Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

47| Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

of measures to consolidate Greek public finances, affecting a teacher holding a private-law contract with the Greek State who had been employed in Germany since 1996. The law applicable to the contract was in issue in the case, as was the obligation on the German courts to apply Greek overriding mandatory provisions.

The Court first of all observed that under Article 28 of the Rome I Regulation, that regulation is to apply to contracts of all kinds, including employment contracts, concluded on or after 17 December 2009. By contrast, the future effects of contracts concluded before that date are excluded from its scope. It follows that any agreement by the contracting parties, after 16 December 2009, to continue performance of a contract concluded before that date cannot have the effect of making that regulation applicable to the ongoing contractual relationship. Furthermore, the choice of the legislature would be called into question if any, even minor, variation made on or after 17 December 2009 to a contract initially concluded before that date were sufficient to bring that contract within the scope of the Rome I Regulation, contrary to the principle of legal certainty. On the other hand, where, on or after the date of entry into force of the Rome I Regulation, the employment relationship has undergone, with the agreement of the parties, a variation of such magnitude that a new contract must be regarded as having been concluded on or after that date, the new employment contract must be regarded as having replaced the initial contract.

As regards the possibility of taking into account overriding mandatory provisions other than those, referred to in Article 9(2) and (3) of the Rome I Regulation, of the State of the forum or the State of performance of the contractual obligations, the Court held that the list in those provisions of the Rome I Regulation of the overriding mandatory provisions to which the court of the forum may give effect is exhaustive. According to the Court, extending that derogation from the principle that the applicable law is to be freely chosen by the parties to the contract, to permit the court of the forum to take account of overriding mandatory provisions of States other than those referred to in Article 9(2) and (3) of the Rome I Regulation, could jeopardise the achievement of legal certainty in the European area of justice and affect the objective of protection of the employee provided for in the law of the country where he carries out his work. However, those provisions do not preclude overriding mandatory provisions other than those of the State of the forum or the State of performance of the obligations from being taken into account as a matter of fact where such taking into account is provided for in the substantive rules of the law applicable to the contract, which have not been harmonised by the Rome I Regulation.

X. JUDICIAL COOPERATION IN CRIMINAL MATTERS

1. EUROPEAN ARREST WARRANT

The Court delivered seven noteworthy judgments in 2016 concerning the European arrest warrant established by Framework Decision 2002/584. [48]

First, in the judgment in ***Aranyosi and Căldăraru*** (C-404/15 and C-659/15 PPU, EU:C:2016:198) of 5 April 2016, the Court, sitting as the Grand Chamber, ruled — under the urgent preliminary ruling procedure — on the *possibility of deferring the execution of a European arrest warrant if there is a real risk of inhuman or degrading treatment because of the conditions of detention in the Member State where the warrant was issued*. After receiving requests for the execution of European arrest warrants from courts in Hungary and Romania, a German

48| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

executing authority had found that the conditions of detention to which the persons concerned might be subject in the prisons of those Member States infringed their fundamental rights, particularly Article 4 of the Charter of Fundamental Rights prohibiting inhuman or degrading treatment or punishment. In that connection, the German executing authority referred, in particular, to several judgments of the European Court of Human Rights in which that court had held that Romania and Hungary had infringed fundamental rights due to overcrowding in their prisons.

The Court first of all recalled that the prohibition on inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is an absolute prohibition in that it is closely linked to respect for human dignity referred to in Article 1 of the Charter. Accordingly, where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of such treatment of persons detained in the issuing Member State, it must assess that risk before deciding on the surrender of the individual concerned.

Where such a risk derives from the general detention conditions in the Member State concerned, the identification of that risk cannot, in itself, lead to the execution of the warrant being refused. The executing authority must make a specific and precise assessment of whether there are substantial grounds to believe that the individual concerned will in fact be exposed to that risk because of the *conditions in which it is envisaged he will be detained in the issuing Member State. To that end, the executing authority must ask the issuing authority to provide, as a matter of urgency, all the information necessary on the conditions of detention in the issuing Member State. If, in the light of the information provided or any other information available to it, the executing authority finds that there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until additional information has been obtained on the basis of which that risk can be discounted. If the* existence of that risk cannot be discounted within a reasonable period, the executing authority must decide whether the surrender procedure should be brought to an end.

Secondly, in its judgment in ***Dworzecki*** (C-108/16 PPU, EU:C:2016:346), delivered on 24 May 2016 under the urgent preliminary ruling procedure, the Court ruled on *the interpretation of Article 4a(1)(a)(i) of Framework Decision 2002/584 as amended by Framework Decision 2009/299,* [49] *providing for an optional ground for non-recognition of a European arrest warrant.* The main proceedings concerned the execution, in the Netherlands, of a European arrest warrant issued by a Polish court against a Polish national for the purpose of carrying out three custodial sentences in Poland. As regards one of those sentences, the arrest warrant stated, first, that the person concerned had not appeared in person at the trial leading to the judgment in which the sentence had been imposed and, secondly, that the summons sent to the address indicated by that person for service of process had been collected by his grandfather. Accordingly, since it was not clear from the European arrest warrant whether the summons had actually been handed to the person concerned, the Netherlands court sought to ascertain whether the conditions for the non-recognition of a European arrest warrant were satisfied.

The Court first of all recalled that the executing judicial authority is in principle required to execute a European arrest warrant, notwithstanding the failure of the person concerned to appear in person at the trial resulting in the adoption of the decision to issue the warrant. It is, in particular, under such an obligation where the person concerned was summoned in person and thereby informed of the scheduled date and place of the trial or, by other means, actually received official information to that effect, in such a manner that it was unequivocally established that he was aware of the scheduled trial. Compliance with the conditions for a summons is apt to ensure that the person concerned was informed in good time of the date and place of his

49| Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

trial and thus allows the executing authority to conclude that the rights of the defence were respected. That being so, even if it cannot, in principle, be precluded that handing a summons over to a third party satisfies those requirements, it must, however, be unequivocally established that that third party actually passed the summons on to the person concerned.

Consequently, the Court held that a summons which was handed over, at the address of the person concerned, to an individual belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the European arrest warrant whether and, if so, when that individual actually passed the summons on to the person concerned, does not satisfy the conditions set out in Article 4a(1)(a)(i) of the framework decision. However, the Court also pointed out that, as the scenarios described in that article were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may, in any event, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not entail a breach of his rights of defence.

Thirdly, in its judgment in ***Bob-Dogi*** (C-241/15, EU:C:2016:385), delivered on 1 June 2016, the Court had the opportunity to rule on Article 8(1)(c) of Framework Decision 2002/584 and, in particular, on the *consequences of the absence of a national arrest warrant issued prior to and separately from the European arrest warrant in the case of an application for surrender based on the latter.* In the case in point, a Romanian executing authority had received a request for surrender from a Hungarian authority based only on a European arrest warrant which itself was not based on a prior, separate national warrant.

According to the Court, where a European arrest warrant issued for the purposes of conducting a criminal prosecution does not contain any reference to the existence of a national arrest warrant, the executing judicial authority cannot give effect to it if, after asking the issuing authority to furnish all supplementary information as a matter of urgency, that authority concludes that the arrest warrant was in fact issued in the absence of any national arrest warrant. The Court explained that compliance with the requirement for there to be a national arrest warrant that is distinct from the European arrest warrant is of particular importance since it means that, where the European arrest warrant has been issued with a view to conducting a criminal prosecution, the person concerned should have already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the issuing authority to ensure, in accordance with the applicable national law. The Court pointed out that the European arrest warrant system entails a dual level of protection for the rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided when a national judicial decision is adopted, is the protection that must be afforded when the European arrest warrant is issued. That judicial protection is lacking, in principle, where the issue of a European arrest warrant is not preceded by a decision taken by a national judicial authority.

Fourthly, in the judgment in ***JZ*** (C-294/16 PPU, EU:C:2016:610), delivered on 28 July 2016 under the urgent preliminary ruling procedure, the Court was required to interpret Article 26 of Framework Decision 2002/584 concerning *the deduction of the period of detention served in the executing Member State.* In the case in point, a Polish court had imposed a custodial sentence of three years and two months on a Polish national. As the convicted person absconded, a European arrest warrant was issued for him. Following his arrest by the United Kingdom authorities in execution of that warrant, the person concerned was made subject to a nine-hour night-time curfew, in conjunction with monitoring by means of an electronic tag, an obligation to report to a police station at fixed times, initially on a daily basis and thereafter several times a week, and a ban on applying for foreign travel documents. After being surrendered to the Polish authorities, the person

concerned requested that the period during which he had been subject to a curfew in the United Kingdom and to electronic monitoring count towards the custodial sentence imposed on him in Poland.

The Court held that the concept of 'detention served in the executing Member State' within the meaning of Article 26(1) of the framework decision refers not to a measure that restricts liberty but to one that deprives a person of it, and covers not only imprisonment but also any measure or set of measures imposed on the person concerned which, on account of the type of measure, duration, effects and means of implementation, deprive that person of his liberty in a way that is comparable to imprisonment. Consequently, the judicial authority of the Member State that issued the European arrest warrant is required to consider whether the measures taken against the person concerned in the executing Member State must be treated in the same way as a deprivation of liberty. If, in carrying out that examination, the judicial authority comes to the conclusion that they do, the framework decision requires that the whole of the period during which those measures were applied in the executing Member State be deducted from the period of detention in the issuing Member State.

In the case in point, the Court found that measures such as those applied to the person concerned in the United Kingdom are not, in principle, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as 'detention' within the meaning of Article 26(1) of the framework decision. However, in so far as that provision merely imposes a minimum level of protection of the fundamental rights of the person subject to the European arrest warrant, the framework decision does not prevent the judicial authority of the issuing Member State from being able, on the basis of domestic law alone, to deduct from the total period of detention all or part of the period during which that person was subject to such measures.

Fifthly, on 10 November 2016, in the judgments in ***Poltorak*** (C-452/16 PPU, EU:C:2016:858), ***Özçelik*** (C-453/16 PPU, EU:C:2016:860) and ***Kovalkovas*** (C-477/16 PPU, EU:C:2016:861), delivered under the urgent preliminary ruling procedure, the Court had the opportunity to interpret Articles 6 and 8 of Framework Decision 2002/584, under which *a European arrest warrant must, inter alia, contain evidence of an arrest warrant or a judicial decision issued by an authority of a Member State.* These cases concerned references for a preliminary ruling submitted by the same Netherlands court which had received, as executing judicial authority, three European arrest warrants. In *Poltorak*, the European arrest warrant had been issued by the Swedish police board. The arrest warrant in question in *Özçelik* had also been issued by a police service, on this occasion Hungarian, but had later been confirmed by decision of the public prosecutor's office. By contrast, the European arrest warrant under consideration in *Kovalkovas* had been issued by the Lithuanian Ministry of Justice.

The referring court therefore asked the Court to clarify whether a police service (*Poltorak*) and an organ of the executive, such as the Lithuanian Ministry of Justice (*Kovalkovas*), could be regarded as being covered by the term 'issuing judicial authority' within the meaning of Article 6(1)(c) of the framework decision. It also asked the Court whether the confirmation by the public prosecutor's office of an arrest warrant previously issued, for the purposes of conducting a criminal prosecution, by a police service could be regarded as being covered by the term 'judicial decision' within the meaning of Article 8(1)(c) of the framework decision (*Özçelik).*

The Court held that the words 'judicial authority', contained in Article 6(1) of the framework decision, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned. However, it pointed out that the principle of mutual recognition, enshrined in Article 1(2) of the framework decision, pursuant to which the executing judicial authority is required to execute the arrest warrant issued by the issuing judicial authority, is founded on the premiss that a judicial authority has intervened prior to the execution of the European arrest warrant, for the purposes of exercising its review. The issue of an arrest warrant by a non-

judicial authority, such as a police service or an entity forming part of the executive, such as the Lithuanian Ministry of Justice, does not provide the executing judicial authority with an assurance that the issue of that European arrest warrant has undergone such judicial approval and cannot, therefore, suffice to justify the high level of confidence between the Member States which forms the very basis of the framework decision.

After finding that the term 'judicial authority' in Article 6(1) of Framework Decision 2002/584 is an autonomous concept of EU law, the Court went on to construe that term broadly as encompassing national authorities that administer criminal justice, but not police services (*Poltorak*). It thus concluded that the confirmation by the public prosecutor's office of a national arrest warrant issued, for the purposes of conducting a criminal prosecution, by the national police service is a legal act by which the public prosecutor's office verifies and validates that arrest warrant and therefore constitutes a 'judicial decision' within the meaning of Article 8(1)(c) of the framework decision (*Özçelik*). Conversely, the Court took the view that an organ of the executive, such as the Lithuanian Ministry of Justice, is not covered by the term 'judicial authority' (*Kovalkovas*).

2. RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

On 9 June 2016, in its judgment in ***Balogh*** (C-25/15, EU:C:2016:423), the Court ruled, first, on the *scope of the right to interpretation and translation in criminal proceedings, as provided for in Directive 2010/64*, [50] and, secondly, on *the application of Framework Decision 2009/315* [51] *and Decision 2009/316* [52] *concerning the exchange of information on criminal records*. In this case, an Austrian court had sentenced a Hungarian national to a term of imprisonment. The Austrian authorities notified the content of the judgment to the Hungarian authorities by means of the European Criminal Records Information System (ECRIS). The Hungarian authorities then forwarded the judgment to a Hungarian court, in accordance with a special domestic procedure the sole purpose of which was to accord to the judgment of the foreign court the same status it would have had if it had been delivered by a national court. This procedure necessitated the translation of the judgment into Hungarian. The question raised concerned payment of the translation costs.

Against that background, the Court held that, under Article 1(2) of Directive 2010/64, the right to interpretation and translation applies to suspected or accused persons until the 'conclusion of the proceedings', which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal. Consequently, it does not apply to a special domestic procedure for recognition of a final judicial decision handed down by a court of another Member State, since that procedure takes place, by definition, after the final determination of whether the suspected or accused person committed the offence and, where applicable, after the sentencing of that person.

The Court also found that Framework Decision 2009/315 and Decision 2009/316 preclude the implementation of national legislation establishing a special procedure for recognition such as that laid down by Hungarian law. The central authority of the Member State of nationality of the person concerned must enter in the

50| Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

51| Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ 2009 L 93, p. 23).

52| Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) (OJ 2009 L 93, p. 33).

criminal record convictions handed down by the courts of the convicting Member State directly on the basis of the transmission by the central authority of the convicting Member State, via ECRIS, of the information relating to those convictions. The entry of such convictions cannot therefore depend on the prior application of a procedure for judicial recognition of those convictions, still less on the communication to the Member State of the person's nationality of the decision convicting him for the purpose of such recognition. Such a procedure moreover conflicts with the principle of mutual recognition of judgments and judicial decisions in criminal matters laid down in Article 82(1) TFEU.

3. CRIMINAL PROCEEDINGS AND DECISIONS IN OTHER MEMBER STATES

In the judgment in ***Kossowski*** (C-486/14, EU:C:2016:483), delivered on 29 June 2016, the Court was required to provide clarification on *the scope of the ne bis in idem principle in the Schengen area*. In the case in point, criminal proceedings had been initiated in Germany against a Polish national accused of having committed, in that State, extortion with aggravating factors. However, the German court before which the case had been brought refused to open trial proceedings on the ground that it was prevented from doing so by the *ne bis in idem* principle, as applicable in the Schengen area. The Polish public prosecutor's office had also opened an investigation procedure in respect of the same acts but had definitively closed that procedure because the accused person had refused to give a statement and it had not been possible to interview the victim and a witness, living in Germany. Hearing an appeal brought by the German public prosecutor's office, the referring court asked the Court to clarify whether, having regard to the fact that the decision of the Polish public prosecutor's office had been taken without any detailed investigation, the accused should be regarded as a person whose trial has been 'finally disposed of' within the meaning of Article 54 of the Convention Implementing the Schengen Agreement, [53] or who has been 'finally acquitted' within the meaning of Article 50 of the Charter of Fundamental Rights, so that the *ne bis in idem* principle would preclude further prosecution for the same acts.

The Court, sitting as the Grand Chamber, observed that the ***ne bis in idem*** principle aims to ensure that a person, once he has been found guilty and served his sentence or been acquitted by a final judgment in a Schengen State, may travel within the Schengen area without fear of being prosecuted in another Schengen State for the same acts. However, that principle is not intended to protect a suspect from having to submit to investigations that may be undertaken successively, in respect of the same acts, in several Schengen States. Therefore, the Court held that a decision of the public prosecutor's office terminating criminal proceedings and definitively closing the investigation procedure against a person cannot be classified as a final decision for the purposes of the application of the *ne bis in idem* principle, when it is clear from the statement of reasons for that decision that the procedure has been closed without a detailed investigation having been carried out. The fact that neither the victim nor a potential witness was interviewed is an indication that no detailed investigation was undertaken.

Furthermore, in the judgment in ***Ognyano***v (C-554/14, EU:C:2016:835), delivered on 8 November 2016, the Grand Chamber of the Court ruled on *the scope of the principle of mutual recognition, provided for, in particular,*

53| Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990 (OJ 2000 L 239, p. 19).

in Framework Decision 2008/909, [54] *in order to determine the law applicable to the enforcement of a sentence*. The case concerned a Bulgarian national who had been sentenced by a Danish court to a total period of 15 years' imprisonment. He served part of his sentence in Denmark before being transferred to the Bulgarian authorities. While imprisoned in Denmark, he worked for over a year and a half. Bulgarian law, as interpreted by domestic case-law, provides that work done by prisoners, even in another Member State, is to be taken into account for the purposes of reducing the length of the sentence, in that two days of work equate to three days of deprivation of liberty. However, when the person concerned was transferred, the Danish authorities expressly informed the Bulgarian authorities that Danish legislation did not permit any reduction in custodial sentences on account of work done in the course of their enforcement.

Accordingly, in order to determine the length of the sentence that remained to be served in Bulgaria by the person concerned, the Bulgarian referring court asked the Court whether the framework decision precludes a national rule which permits the executing State to grant to a sentenced person a reduction in the sentence by reason of work which he carried out during his detention in another Member State, although the competent authorities of the latter State did not, in accordance with their national law, grant such a reduction in the sentence.

According to the Court, Article 17 of Framework Decision 2008/909 must be interpreted as meaning that only the law of the issuing State is applicable, not least on the question of any grant of a reduction in sentence, to the part of the sentence served by the person concerned on the territory of that State until his transfer to the executing State. The law of the executing State can apply only to the part of the sentence that remains to be served by that person, after his transfer, on the territory of the executing State. Consequently, the authority in the executing State that is competent as regards matters concerning enforcement of the sentence cannot, retroactively, substitute its law on the enforcement of sentences and, in particular, its rules on reductions in sentence, for the law of the issuing State with respect to that part of the sentence which has already been served by the person concerned on the territory of the issuing State.

XI. COMPETITION

1. AGREEMENTS, DECISIONS AND CONCERTED PRACTICES

In the area of agreements, decisions and concerted practices, six judgments merit special attention. In the first judgment, the Court was required to rule on passive participation in an infringement of competition law. In the second judgment, the Court had the opportunity to address certain aspects of the relationship between Article 101 TFEU and patent law. The following four judgments concern the application of Regulation No 1/2003 [55] in an administrative proceeding relating to a cartel.

In the judgment in ***Eturas and Others*** (C-74/14, EU:C:2016:42), delivered on 21 January 2016, the Court was called upon to provide clarification on *passive modes of participation in infringements of competition law.* The

54| Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

55| Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the [FEU] Treaty (OJ 2003 L 1, p. 1).

questions referred by the national court for a preliminary ruling arose from a dispute between, on the one hand, 30 travel agencies and, on the other, the Lithuanian Competition Council concerning, in particular, the participation of those agencies in an infringement of competition law by tacit assent. All of the travel agencies used a common computerised booking system enabling them to sell travel packages on their websites using a uniform booking method. In 2009, the administrator of the common system sent the subscriber agencies, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system would henceforth be capped. Following the dissemination of that message, the measure was implemented in the operation of the booking system. Against that background, the national court sought to ascertain whether it may be presumed that the subscriber agencies were aware or ought to have been aware of the message and, in the absence of any opposition on their part to such a practice, whether it may be considered that those operators participated in a concerted practice within the meaning of Article 101(1) TFEU.

As regards their possible participation in a concerted practice, the Court held that the travel agencies may — if they were aware of the message sent by the administrator of the common computerised booking system — be presumed to have participated in a concerted practice within the meaning of Article 101(1) TFEU, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduced other evidence to rebut that presumption.

As regards the evidence to be adduced in that respect by the various parties to the main proceedings, the Court observed that, although Article 2 of Regulation No 1/2003 expressly governs the allocation of the burden of proof for an infringement of Article 101(1) TFEU, that regulation does not contain any provisions on more specific procedural aspects. In the absence of EU rules on the matter, it is for the national court to examine — on the basis of the national rules governing the assessment of evidence and the standard of proof — whether, in view of all the circumstances before it, the dispatch of the message by the administrator of the common system may constitute sufficient evidence to establish that the addressees of that message were aware of its content. However, the Court stated that the presumption of innocence precludes the national court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.

In its judgment in ***Genentech*** (C-567/14, EU:C:2016:526), delivered on 7 July 2016, the Court ruled *on the compatibility with Article 101(1) TFEU of an obligation on the beneficiary of a patent licence to pay the agreed royalty for use of the patented technology notwithstanding the non-infringement or revocation of the patent or patents under licence.* The applicant in the main proceedings was a company active in the pharmaceutical sector which held a worldwide non-exclusive licence to use a patented enhancer. Since it used the enhancer without infringing the licensed patents, it refused to pay part of the royalty agreed to in the licence agreement with the patent holder. Nonetheless, the pharmaceutical company was ordered by an arbitration award to pay the contractual royalty. The national court hearing the action arising from that arbitration award asked the Court whether payment of the royalty imposes on the pharmaceutical company costs that cannot be justified under EU competition law.

Applying the case-law in ***Ottung***, [56] the Court took the view that competition law does not prohibit the obligation to pay a royalty for the use of the patented enhancer at issue, even where such use has not given rise to an infringement or the technology is deemed never to have been protected in the event of retroactive revocation of the patent. According to the Court, this solution can be explained by the fact that the royalty is the price to be paid for commercial exploitation of the patented technology with the guarantee that the licensor will not exercise its intellectual property rights. The fact that the agreement may be freely terminated

56| Judgment of the Court of 12 May 1989, ***Ottung*** v ***Klee & Weilbach and Others*** (320/87, EU:C:1989:195).

by the licensee makes it possible to reject the contention that payment of the royalty undermines competition by restricting the licensee's freedom of action or by giving rise to market foreclosure effects.

Lastly, the judgments in ***HeidelbergCement*** v ***Commission*** (C-247/14 P, EU:C:2016:149), ***Schwenk Zement*** v ***Commission*** (C-248/14 P, EU:C:2016:150), ***Buzzi Unicem*** v ***Commission*** (C-267/14 P, EU:C:2016:151) and ***Italmobiliare*** v ***Commission*** (C-268/14 P, EU:C:2016:152), delivered on 10 March 2016, gave the Court the opportunity to provide considerable guidance on *the scope of the Commission's obligation to state reasons when drawing up requests for information under Article 18(3) of Regulation No 1/2003*. The dispute concerned, in particular, decisions by which the *Commission had requested information from a number of companies relating to their alleged involvement in a cartel in the cement market and related product markets.* [57]

As regards the scope of the obligation to state the reasons for such a request, the Court first of all recalled the essential elements of that obligation that are set out in Article 18(3) of Regulation No 1/2003. Under that provision, the Commission must, inter alia, set out the legal basis and purpose of the request for information, specify what information is required and fix the time limit within which it is to be provided. That obligation to state specific reasons is a fundamental requirement designed not merely to show that the request for information is justified, but also to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence.

Consequently, where the Commission requests information under Article 18(3) of Regulation No 1/2003, it must indicate the subject of its investigation in its request and identify the alleged infringement of the competition rules. The Court explained that, since the necessity of the information must be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision; otherwise it will be impossible to determine whether the information is necessary and the Court will be prevented from exercising judicial review.

Referring to the factual background to the cases at issue, the Court also pointed out that, although a request for information is an investigative measure that is generally used in the investigation phase, the Commission cannot, however, simply give an excessively succinct, vague and generic statement of reasons when it has information that would allow it to present more precisely the suspicions of infringement by the companies involved. Thus, after finding that the General Court had erred in law in holding that the decisions of the Commission contained an adequate statement of reasons, it set aside the judgments of the General Court and annulled the decisions of the Commission.

2. STATE AID

In the area of State aid, mention should be made of four judgments: the first two concern communications adopted by the Commission concerning aid which may be granted in the context of the financial and economic crisis, while the second two provide guidance on the interpretation of the condition relating to selectivity.

In its judgment in ***Greece*** v ***Commission*** (C-431/14 P, EU:C:2016:145), delivered on 8 March 2016, the Court, sitting as the Grand Chamber, confirmed on appeal *the judgment of the General Court* [58] *dismissing the action for annulment brought by Greece against a decision of the Commission concerning compensation payments made*

57| Commission Decisions C(2011) 2356 final, C(2011) 2361 final, C(2011) 2364 final and C(2011) 2367 final of 30 March 2011 relating to a proceeding under Article 18(3) of Council Regulation (EC) No 1/2003 (Case COMP/39520 — cement and related products).

58| Judgment of the General Court of 16 July 2014, ***Greece*** v ***Commission*** (T-52/12, EU:T:2014:677).

by the Greek Agricultural Insurance Organisation ('ELGA'). 59 By that decision, certain compensation payments made by ELGA to Greek farmers for damage caused as a result of adverse weather conditions were classified by the Commission as unlawful State aid. The Commission had, in particular, referred to the rules of conduct set out in the Temporary Community Framework ('TCF') for State aid measures to support access to finance in the current financial and economic crisis. [60]

In its judgment, the Court pointed out, first, that the payments made by ELGA were financed by State resources. Since those payments were independent of the contributions paid by farmers in respect of the special insurance contribution, the Court took the view that they constituted an advantage that the beneficiaries could not have obtained under normal market conditions and therefore affected competition.

Next, the Court rejected Greece's argument that the General Court had erred in law in holding that the Commission could not depart from the rules of conduct laid down in the TCF and was, on the contrary, required to apply those rules. In that connection, the Court recalled that, in adopting rules of conduct such as those set out in the TCF, the Commission has itself limited its wide discretion concerning the compatibility with the internal market of aid to remedy a serious disturbance in the economy of a Member State, under Article 107(3)(b) TFEU. It is true that the Commission may be required to depart from those rules of conduct in particular where a Member State claims that there are exceptional circumstances which distinguish a given sector of the economy of a Member State and which are different from those envisaged in such guidelines. However, as the Court pointed out, Greece had not claimed before the General Court that such circumstances existed in the Greek agricultural sector which might have required the Commission to depart from the TCF.

In the case giving rise to the judgment in ***Kotnik and Others*** (C-526/14, EU:C:2016:570), delivered on 19 July 2016, the Grand Chamber of the Court was called upon to rule on the *validity and interpretation of the Commission Communication concerning the banking sector*, [61] particularly on the requirement for shareholders and subordinated creditors to share the burden of the costs of restructuring distressed banks as a prerequisite for considering aid to that sector to be compatible with the internal market. In the main proceedings, a number of applications for review of the constitutionality of the domestic law on the banking sector had been brought before the Constitutional Court of Slovenia. On the basis of that law, the Bank of Slovenia had, as a result of the global financial crisis, adopted a decision putting in place exceptional measures with a view to the recapitalisation, rescue or winding-up of five Slovenian banks. In accordance with the Banking Communication, the decision of the Bank of Slovenia provided for the writing-off of equity capital and subordinated debt. The referring court sought to ascertain whether the 'burden-sharing' condition laid down in the Banking Communication is compatible with EU law.

The Court pointed out, first, that the effect of the adoption of guidelines such as those contained in the Banking Communication is equivalent to the effect of a limitation imposed by the Commission on itself in the exercise of its discretion, so that, if a Member State notifies the Commission of proposed State aid which complies with those guidelines, the Commission must, as a general rule, authorise that proposed aid. Furthermore, the Member States retain the right to notify the Commission of proposed State aid which does not meet the criteria laid down by that communication and the Commission may authorise such proposed

59| Commission Decision 2012/157/EU of 7 December 2011 concerning compensation payments made by the Greek Agricultural Insurance Organisation (ELGA) in 2008 and 2009 (OJ 2012 L 78, p. 21).

60| Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis, as set out in the Communication from the European Commission of 17 December 2008 (OJ 2009 C 16, p. 1) and amended by the Communication from the Commission published on 31 October 2009 (OJ 2009 C 261, p. 2).

61| Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013 C 216, p. 1).

aid in exceptional circumstances. It follows that the Banking Communication is not capable of imposing independent obligations on the Member States and does no more than establish conditions designed to ensure that State aid granted to the banks in the context of the financial crisis is compatible with the internal market.

As regards the burden-sharing by shareholders and subordinated creditors as a prerequisite for the authorisation of State aid by the Commission, the Court stated that the Banking Communication was adopted on the basis of a provision of the FEU Treaty under which the Commission may hold compatible with the internal market aid designed to remedy a serious disturbance in the economy of a Member State. In that context, the burden-sharing measures are designed to ensure that, prior to the grant of any State aid, the banks which show a capital shortfall take steps, with their investors, to reduce that shortfall, specifically by raising equity capital and obtaining a contribution from subordinated creditors, since such measures are likely to limit the amount of the State aid granted. To act otherwise would be liable to cause distortions of competition, since banks whose shareholders and subordinated creditors had not contributed to the reduction of the capital shortfall would receive State aid of an amount greater than that which would have been sufficient to overcome the residual capital shortfall. In addition, in adopting that communication, the Commission did not encroach on the competences conferred on the Council of the European Union.

Next, according to the Court, the fact that subordinated creditors were not called upon to contribute to the rescue of credit institutions in the first phases of the international financial crisis does not put those creditors in a position to rely on the principle of protection of legitimate expectations. Moreover, since shareholders are liable for the debts of the bank up to the amount of its share capital, the fact that the Banking Communication requires that, in order to overcome the capital shortfall of the bank, those shareholders should, prior to the grant of State aid, contribute to the absorption of the losses suffered by the bank to the same extent as if there were no State aid cannot be regarded as adversely affecting their right to property. Furthermore, as regards the question of the validity of the Banking Communication in the light of the requirements of Directive 2012/30, [62] the Court observed that this directive provides, in essence, that any increase or reduction in the capital of a public limited liability company must be subject to a decision by the general meeting of the company. The Banking Communication contains no specific provision on the legal procedures whereby the burden-sharing measures are to be implemented. Consequently, while the Member States may possibly find it necessary, in a particular situation, to adopt such burden-sharing measures without the agreement of the general meeting of the company, that circumstance cannot, however, call into question the validity of the Banking Communication in the light of the provisions of Directive 2012/30.

As regards measures for conversion or write-down of subordinated debt, the Court stated that the Banking Communication does not require Member States to impose on banks in distress, prior to the grant of any State aid, an obligation to convert subordinated debt into equity or to effect a write-down of the principal of that debt, or an obligation to ensure that that debt contributes fully to the absorption of losses. In such circumstances, it will not, however, be possible for the envisaged State aid to be regarded as having been limited to what is strictly necessary. Therefore, the Member State, and the banks which are to be the recipients of that aid, take the risk that there will be a decision by the Commission declaring that aid to be incompatible with the internal market.

In the judgment in ***Commission*** v ***Hansestadt Lübeck*** (C-524/14 P, EU:C:2016:971), delivered on 21 December 2016, which confirmed the contested judgment of the General Court, the Court, sitting as the Grand Chamber,

62| Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 2012 L 315, p. 74).

provided guidance not only on its case-law concerning *the requirement to have a legal interest in bringing proceedings in the context of actions for annulment of State aid decisions*, but also on its case-law concerning *the criterion of the selectivity of aid*. This case had its origins in a dispute concerning a Commission decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU [63] in respect of, in particular, a schedule relating to charges at Lübeck Airport applicable to all airlines using that airport unless an agreement had been concluded between the airport operator and the airline. The schedule had been adopted by a company, owned by the City of Lübeck, that had operated the airport and subsequently sold it to a private company. By the contested decision, the Commission found that the schedule in question was capable of containing State aid and, therefore, decided to initiate the formal investigation procedure. Following an action for annulment brought by the City of Lübeck, the General Court annulled the contested decision in the judgment under appeal. [64]

As regards the City of Lübeck's legal interest in bringing proceedings, the Court confirmed that it retained its interest in seeking annulment of the decision initiating the procedure even after the sale of the airport to the private investor. The Court held that the City of Lübeck remained exposed, after privatisation of the airport, to the risk that a national court might order the recovery of any aid granted when it controlled the undertaking which owned the airport affected by the measures under investigation. Therefore, in the absence of a final decision of the Commission closing the formal investigation procedure, the effects of the decision initiating the procedure endured, so that the City of Lübeck retained an interest in bringing proceedings seeking annulment of the decision.

As regards the selectivity of the schedule of charges challenged by the Commission, the Court pointed out that a State measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. Thus, the fact that, in this instance, Lübeck Airport is in direct competition with Hamburg Airport or other German airports and that only airlines using Lübeck Airport benefit from any advantages conferred by the schedule at issue is not sufficient to establish that that schedule is selective. The Court stated that, since the operator of Lübeck Airport had adopted the schedule in the exercise of a power of its own, the relevant reference framework for assessing whether the airport charges in question are selective is the schedule itself and not more general rules applying to German airports as a whole. Since the schedule at issue applies to all airlines using Lübeck airport without distinction, the General Court was fully entitled to hold that the Commission wrongly considered the schedule to be a selective measure.

In its judgment of 21 December 2016, ***Commission*** v ***World Duty Free Group*** (C-20/15 and C-21/15, EU:C:2016:981), setting aside the contested judgments of the General Court, the Grand Chamber of the Court also ruled on the criterion relating to *the selectivity of an advantage for the purposes of classifying a measure as State aid, within the meaning of Article 107(1) TFEU.* The two judgments of the General Court 65 had annulled in part Commission Decisions 2011/5 66 and 2011/282, 67 which had declared incompatible with the common market a tax advantage allowing undertakings taxable in Spain to amortise the goodwill resulting

63| Commission Decision C(2012) 1012 final of 22 February 2012 on State aid No SA.27585 and No SA.31149 (2012/C) (ex NN/2012, ex CP 31/2009 and CP 162/2010) – Germany.

64| Judgment of the General Court of 9 September 2014, ***Hansestadt Lübeck*** v ***Commission*** (T-461/12, EU:T:2014:758).

65| Judgments of the General Court of 7 November 2014, ***Autogrill España*** v ***Commission*** (T-219/10, EU:T:2014:939) and ***Banco Santander and Santusa*** v ***Commission*** (T-399/11, EU:T:2014:938).

66| Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

67| Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1).

from acquisitions of shareholdings in foreign undertakings and had ordered the Kingdom of Spain to recover aid granted under that scheme.

The Court found that, in the contested judgments, the General Court had erred in law in the interpretation of the condition relating to selectivity, in that, first, it had declared the Commission's decisions unlawful on the ground that, as regards a measure that is a priori accessible to any undertaking — regardless of the nature of its activities — which wants to acquire a shareholding in a foreign undertaking, those decisions had failed to define a particular category of undertakings favoured by the tax measure at issue, and, secondly, it had, in consequence, omitted to determine whether the Commission had in fact analysed the question and established that that measure was discriminatory. The Court pointed out that the Commission cannot be required, in order to establish the selectivity of the measure in question, to identify certain specific features that are characteristic of and common to the undertakings in receipt of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage. All that matters in that regard is the fact that the measure, irrespective of its form or the legislative means used, should have the effect of placing the recipient undertakings in a position that is more favourable than that of other undertakings, although all those undertakings are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned and the distinction is not justified by the nature and general structure of that system.

The Court also considered that the General Court had further erred in law in holding that the category of recipient undertakings with respect to which the selectivity of the tax measure had to be examined was that constituted by export undertakings. Pursuant to the principles mentioned above, which are entirely applicable to tax aid for exports, a measure such as that at issue, designed to facilitate exports, may be regarded as selective if it benefits undertakings carrying out cross-border transactions, in particular investment transactions, and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, in the light of the objective pursued by the tax system concerned, carry out other transactions of the same kind within the national territory.

XII. FISCAL PROVISIONS

In the judgment in ***Ordre des barreaux francophones et germanophone and Others*** (C-543/14, EU:C:2016:605), delivered on 28 July 2016, the Court ruled on *the validity and interpretation of Directive 2006/112* [68] *in the light of the imposition of value added tax (VAT) on services supplied by lawyers.* The dispute in the main proceedings centred on a Belgian law ending the VAT exemption for such services. The referring court asked the Court whether the imposition of VAT on services supplied by lawyers as provided for in that directive, entailing an increase in the costs of those services for clients who are not subject to VAT and who do not qualify for legal aid, is compatible with the right to access to justice enshrined in Article 47 of the Charter of Fundamental Rights.

In the light, first of all, of the right to an effective remedy and the principle of equality of arms guaranteed by Article 47 of the Charter, the Court held that the examination of Article 1(2) and Article 2(1)(c) of Directive 2006/112 had not revealed anything which might affect their validity in so far as those provisions impose VAT on services supplied by lawyers to clients who do not qualify for legal aid. In the case of such clients, who are deemed to have sufficient resources to have access to justice by being represented by a lawyer, the right to an effective remedy does not, in principle, guarantee a right to exemption from VAT of the supply of services

68| Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

by lawyers. The imposition of costs linked to the charging of VAT can be challenged in the light of the right to an effective remedy only where those costs represent an insurmountable obstacle or make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order.

Furthermore, the principle of equality of arms does not entail the obligation to put the parties on an equal footing in terms of the financial costs incurred in connection with legal proceedings. Thus, according to the Court, although the imposition of VAT and the exercise of the right of deduction may confer, in respect of the same amount of fees, a financial benefit on an individual who has the status of taxable person as compared with a non-taxable individual, this pecuniary advantage is, however, not likely to affect the procedural balance of the parties or create a substantial disadvantage.

Next, the Court found that Article 9(4) and (5) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) cannot be relied on for the purposes of assessing the validity of the abovementioned provisions of Directive 2006/112. Article 9(4) and (5) of the Aarhus Convention, to which the European Union is a party, does not contain any unconditional and sufficiently precise obligation capable of regulating the legal position of individuals and cannot, therefore, be relied on in support of a plea based on the alleged illegality of an EU directive.

As regards, lastly, the question of a possible exemption for services supplied by lawyers to clients who qualify for legal aid, the Court held that Article 132(1)(g) of Directive 2006/112 had to be interpreted as meaning that the supply of such services is not exempt from VAT. The application of the exemption provided for in that provision is subject to the services in question being of a social nature, with the result that account must be taken of the objectives pursued by the service providers at issue viewed as a whole and whether they are engaged in welfare work on a permanent basis. The Court stated that the services concerned must therefore be closely linked to welfare and social security work and that the exemption is restricted to supplies of services by organisations recognised as devoted to social well-being. Thus, in the light of, inter alia, the fact that any engagement by lawyers in welfare work is not permanent, the professional category of lawyers as a whole cannot be regarded as devoted to social well-being for the purposes of Article 132(1)(g) of Directive 2006/112. Specifically, in the context of the national legal aid scheme at issue, pursuant to which services are provided not by all lawyers but only by those who volunteer and are placed on a list drawn up annually, the provision of those services is but one objective among many of the legal profession. Accordingly, these services cannot be exempted from VAT pursuant to Article 132(1)(g) of Directive 2006/112.

XIII. APPROXIMATION OF LAWS

1. INTELLECTUAL PROPERTY

In the area of intellectual property, five judgments deserve mention. The first four concern questions relating to copyright, especially in the context of electronic communications. The fifth relates to the reimbursement of legal costs by the unsuccessful party in proceedings concerning an infringement of an intellectual property right.

First, on 9 June 2016, in its judgment in ***EGEDA and Others*** (C-470/14, EU:C:2016:418), the Court ruled on a scheme for financing the fair compensation referred to in Article 5(2)(b) of Directive 2001/29 *69 that is payable*

69| Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

to authors in the case of reproductions of their works by natural persons for private use. The main proceedings concerned Spanish legislation implementing a fair compensation scheme for private copying which was financed from the general State budget. In that context, the budgetary item intended for payment of the fair compensation had to be regarded as being financed from all the budget resources and, therefore, from all taxpayers, including legal persons.

The Court held that, in view of the Member States' broad discretion to determine the various parameters of the fair compensation scheme in their national law, Article 5(2)(b) of Directive 2001/29 does not preclude, in principle, Member States which have decided to introduce the exception relating to the payment of reproduction charges for private copying from choosing to establish, in that context, a fair compensation scheme financed not by a levy but by their general budget. The Court recalled, however, that the private copying exception is intended exclusively for natural persons who make, or have the capacity to make, reproductions of protected works or subject matter for private use and for purposes neither directly nor indirectly commercial. Therefore, those are the persons who cause harm to the copyright holders and who are, in principle, required to finance, in return, the fair compensation. For their part, legal persons are excluded from benefiting from that exception. In that context, although Member States are indeed free to establish a fair compensation scheme financed by means of a levy for which legal persons are, under certain conditions, liable, such legal persons should not in any event be the persons ultimately actually liable for payment of the burden associated with that levy. According to the Court, this principle applies in all situations in which a Member State has introduced the private copying exception, regardless of the financing scheme in place. Consequently, the Court held that Article 5(2)(b) of Directive 2001/29 precludes a scheme for fair compensation for private copying which is financed from the general State budget in such a way that it is not possible to ensure that the cost of that compensation is ultimately borne by the users of private copies.

Secondly, in the judgment in ***GS Media*** (C-160/15, EU:C:2016:644), delivered on 8 September 2016, the Court considered *whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works freely available on another website without the consent of the copyright holder constitutes a 'communication to the public'* within the meaning of Article 3(1) of Directive 2001/29. This judgment was delivered in the context of proceedings between a company operating a news website and a magazine editor holding the copyright to certain photos. The company had published on its website an article and a hyperlink directing readers to another website where the photos at issue had been published without the author's consent.

Recalling that the concept of 'communication to the public' requires an individual assessment, the Court pointed out that it is necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know that the work had been published on the internet without the consent of the copyright holder. On the other hand, if such a person knew or ought to have known that the hyperlink provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, the provision of that link must be considered to constitute a 'communication to the public'. The same applies in the event that the hyperlink allows users of the website on which it is posted to circumvent the measures taken by the site where the protected work is posted in order to limit the public's access to its own subscribers.

Furthermore, the Court held that, when the posting of hyperlinks is carried out for profit, as in the case in point, the person who posts the hyperlinks can be expected to carry out the necessary checks to ensure that the work concerned is not illegally published on the website to which the hyperlinks lead. Thus, it must be presumed that that posting occurred with full knowledge of the protected nature of that work and of any lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a 'communication to the public'. However, there will be no communication to the

'public' in the event that the works to which those hyperlinks allow access have been made freely available on another website with the consent of the copyright holder.

Thirdly, on 10 November 2016, in its judgment in ***Vereniging Openbare Bibliotheken*** (C-174/15, EU:C:2016:856), the Court was required to rule on *whether the system for the lending of digital books by public libraries may be treated in the same way as the lending of traditional books, in the light of the provisions of Directive 2006/115.* [70] The main proceedings, between an association representing public libraries in the Netherlands and a foundation entrusted with collecting remuneration due to authors, involved a dispute concerning a possible infringement of authors' exclusive rights relating to the rental and lending of works.

The Court first of all stated that there is no decisive ground allowing for the exclusion, in all cases, of the lending of digital copies and intangible objects from the scope of Directive 2006/115. It then verified whether the public lending of a digital copy of a book, under the 'one copy, one user' model, is capable of coming within the scope of Article 6(1) of the directive, which provides for the possibility of a derogation from authors' exclusive rights in respect of public lending, provided that authors receive fair remuneration. In that respect, the Court stated that, given the importance of the public lending of digital books, and in order to safeguard both the effectiveness of the exception for public lending and the contribution of that exception to the promotion of culture, it cannot be ruled out that that article may apply where the operation carried out by a publicly accessible library has essentially similar characteristics to the lending of printed works. The Court therefore held that the concept of 'lending' within the meaning of Directive 2006/115 also covers the lending of digital copies of books under the 'one copy, one user' model.

The Member States may lay down additional conditions capable of improving the protection of authors' rights beyond what is expressly laid down in Directive 2006/115. In the case in point, the Netherlands legislation requires that a digital copy of a book made available by a public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution or with that holder's consent. According to the Court, such an additional condition must be considered to be in accordance with the directive.

Finally, concerning the case where an electronic copy of a book has been obtained from an unlawful source, the Court recalled that one of the objectives of Directive 2006/115 is to combat piracy and pointed out that allowing the lending of such a copy might unreasonably prejudice copyright holders. Consequently, according to the Court, the public lending exception does not apply to the making available by a public library of a digital copy of a book where that copy has been obtained from an unlawful source.

Fourthly, in its judgment in ***Soulier and Doke*** (C-301/15, EU:C:2016:878), delivered on 16 November 2016, the Court ruled on *the right of opposition of authors to the reproduction and* communication to the *public, in digital form, of out-of-print books*, in the light of the provisions of Directive 2001/29. [71] The main proceedings, between two French authors and the French Republic, concerned the lawfulness of a decree relating to the digital exploitation of books published before 2001 which are no longer distributed or published.

The Court held that Article 2(a) and Article 3(1) of Directive 2001/29 preclude national legislation that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of 'out-of-print' books, while allowing the authors of those books, or their successors in title, to

70| Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

71| Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

oppose or put an end to that practice within a time limit of six months after the registration of the books in a database established to that effect. Subject to the exceptions and limitations expressly provided for in that directive, authors have the exclusive right to authorise or prohibit the reproduction and communication to the public of their works. Accordingly, for the existence of the implicit prior consent of an author to the use of one of his works to be accepted, every author must actually be informed of the future use of his work by a third party and of the means at his disposal to prohibit it if he so wishes.

In the case in point, in the light of the formal and substantive conditions set out in French legislation for opposing or putting an end to the exercise of the right in question by the relevant approved collecting society, the Court held that such legislation does not ensure that authors are actually and individually informed, with the result that a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to the use of their works, especially since it cannot reasonably be presumed that, without opposition on their part, every author of 'forgotten' books is in favour of the 'resurrection' of their works in digital form. Furthermore, the author's right to put an end to the future exploitation of his work in digital form must be capable of being exercised without having to depend on the concurrent will of persons other than those authorised by the author to proceed with such a digital exploitation. In particular, the author of a work must be able to put an end to such exploitation without having to submit beforehand to a formality consisting of proving that other persons are not holders of other rights in that work, such as those concerning its exploitation in printed form.

Fifthly, the judgment in ***United Video Properties*** (C-57/15, EU:C:2016:611), delivered on 28 July 2016, gave the Court the opportunity to interpret *the concepts of 'reasonable and proportionate legal costs' and 'other expenses'* within the meaning of Article 14 of Directive 2004/48. [72] According to that article, such costs and expenses incurred by the successful party are, as a general rule, to be borne by the unsuccessful party, unless equity does not allow this. The main proceedings, which originally concerned a patent infringement, related only to the costs to be reimbursed to the successful party. The successful party challenged the consistency with that article of national legislation which, while offering the courts the possibility of taking into account features specific to the case, provides for a flat-rate scheme setting out an absolute reimbursement ceiling in respect of costs for the assistance of a lawyer and provides for the reimbursement of the costs of a technical adviser only in the case of fault on the part of the unsuccessful party.

As regards the flat-rate reimbursement of lawyers' fees, the Court took the view that legislation providing for such a flat rate could, in principle, be justified, provided that it is intended to ensure the reasonableness of the costs to be reimbursed, taking into account factors such as the subject matter of the proceedings, the sum involved or the work to be carried out to represent the client concerned. On the other hand, legislation imposing a flat rate significantly below the average rate actually charged for the services of a lawyer in the Member State concerned cannot be justified. Furthermore, in so far as Article 14 of Directive 2004/48 provides that legal costs must be 'proportionate', that article precludes national legislation providing for flat rates which, owing to the maximum amounts that they contain being too low, do not ensure, at the very least, that a significant and appropriate part of the reasonable costs incurred by the successful party are borne by the unsuccessful party.

As regards the reimbursement of the costs linked to a technical adviser, the Court held that Article 14 of Directive 2004/48 precludes national rules providing that reimbursement of the costs of a technical adviser is provided for only in the event of fault on the part of the unsuccessful party, where those services, regardless of their nature, are essential in order for a legal action to be usefully brought seeking to have an intellectual

72| Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

property right upheld. These costs fall within the category of 'other expenses' directly and closely linked to such an action which must, pursuant to that provision, be borne by the unsuccessful party.

2. PROTECTION OF PERSONAL DATA

In the case giving rise to the judgment in ***Breyer*** (C-582/14, EU:C:2016:779), delivered on 19 October 2016, the Court had the opportunity to provide guidance on *the definition of 'personal data' and on the legitimate interests of the controller within the meaning of, respectively, Article 2(a) and Article 7(f) of Directive 95/46/EC*, [73] in the context of the storage of internet protocol addresses ('IP addresses') by a provider of online media services. The applicant in the main proceedings had brought an action to prohibit the Federal Republic of Germany from storing, or arranging for third parties to store, computerised data transmitted at the end of each consultation of websites of the German federal institutions. The provider of online media services of the German federal institutions registered data consisting in a dynamic IP address [74] and the date and time when the website was accessed. Such data did not, in itself, give the service provider the possibility of identifying the user, while the internet services provider, for its part, had additional data which, if combined with the IP address, would enable the user to be identified.

First, the Court held that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of Article 2(a) of Directive 95/46, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.

Secondly, the Court examined the national legislation in question, under which an online media services provider may collect and use personal data relating to a user of those services, without his consent, only in so far as such collection and use are necessary to facilitate and charge for the specific use of those services by that user, and under which the objective of ensuring the general operability of those services cannot justify the use of such data after the services have been accessed. According to the Court, Article 7(f) of Directive 95/46 precludes such legislation. Under that provision, personal data within the meaning of the provision may be processed if processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. In the case in point, German legislation excluded, categorically and in general, the possibility of processing certain categories of personal data without allowing the opposing rights and interests at issue to be balanced against each other in a particular case. In doing so, it unlawfully reduced the scope of this principle laid down in Article 7(f) of Directive 95/46 by excluding the possibility of balancing the objective of ensuring the general operability of the online media against the interests or fundamental rights and freedoms of users.

On 21 December 2016, in its judgment in ***Tele2 Sverige and Watson and Others*** (C-203/15 and C-698/15, EU:C:2016:970), the Court, sitting as the Grand Chamber, ruled — under the expedited procedure — on *the interpretation of Article 15(1) of Directive 2002/58,* [75] *which allows Member States to introduce certain exceptions*

73| Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

74| Dynamic IP addresses are provisional addresses which are assigned for each internet connection and replaced when subsequent connections are made.

75| Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

to the obligation, laid down in that directive, to ensure the confidentiality of electronic communications and of related traffic data. The orders for reference had been submitted in the context of two disputes concerning Swedish legislation, on the one hand, and United Kingdom legislation, on the other, relating to the access of public authorities to users' data retained by providers of electronic communications services.

In its judgment, the Court first of all recalled the case-law to the effect that the protection of the right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should, in accordance with the principle of proportionality, apply only in so far as is strictly necessary. Next, it held that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, precludes national legislation, such as the Swedish legislation in question, which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. In the Court's view, such legislation exceeds the limits of what is strictly necessary and cannot be considered to be justified in a democratic society, as required by Article 15(1) of the directive read in the light of the abovementioned articles of the Charter. However, that provision does not preclude legislation which permits, as a preventive measure, for the purpose of fighting serious crime, the targeted retention of traffic and location data, provided that such retention is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary.

According to the Court, Article 15(1) of Directive 2002/58 also precludes national legislation, such as the United Kingdom legislation in question, which permits access of the competent national authorities to traffic and location data, without restricting that access to the objective of fighting serious crime, which is the only objective capable of justifying such access. It is for national law to lay down clear and precise rules indicating under which conditions providers of electronic communications services must grant access to those data. Furthermore, that access must, except in cases of validly established urgency, be subject to a prior review carried out either by a court or by an independent administrative body, and the decision of that court or body must be made following a reasoned request by the competent national authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime. Lastly, the Court emphasised that, in order to comply with the level of protection guaranteed by the Charter in relation to the processing of personal data, national legislation must make provision for the data at issue to be retained within the European Union and to be irreversibly destroyed at the end of the data retention period.

3. ELECTRONIC COMMERCE

In the judgment in ***Mc Fadden*** (C-484/14, EU:C:2016:689), delivered on 15 September 2016, the Court provided clarification *on the application of Article 12(1) of Directive 2000/31* on electronic commerce. [76] The main proceedings were between a producer of a musical work and the manager of a shop providing the general public with free access to a Wi-Fi network that enabled the public to download the musical work without the producer's consent. The Court was required to determine *whether the exemption from liability of intermediary service providers for the 'mere conduit' of the information referred to in that provision precludes a finding of indirect liability against the operator of the network based on copyright infringements committed by a user of his network.*

The Court pointed out, first of all, that making a communications network available to the general public free of charge constitutes an 'information society service', within the meaning of Article 12(1) of Directive 2000/31,

76| Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ 2000 L 178, p. 1).

where the activity is performed by the service provider in question not for remuneration but for the purposes of advertising the goods sold or services supplied by him. That provision precludes providers of such a service from being held liable for information transmitted to them by the recipients of that service provided that three conditions are met: (i) the providers must not have initiated the transmission of information; (ii) they must not have selected the receiver of that transmission; and (iii) they must not have selected or modified the information contained in the transmission. It follows that, where those conditions are satisfied, a copyright holder is precluded from claiming compensation from the service provider on the ground that the connection to the network was used by third parties to infringe his rights. Since such a compensation claim cannot be successful, the copyright holder is also precluded from claiming reimbursement of the costs of giving formal notice or court costs incurred in relation to the claim for compensation. Nevertheless, *Article 12(3) of Directive 2000/31 does not affect the possibility for the copyright holder from seeking an order from a national authority or court requiring the service provider to terminate or prevent any infringement of copyright committed by the users of his network.*

Lastly, the Court found that an injunction ordering the service provider to make the internet connection secure, for example by means of a password, is capable of ensuring a fair balance between, on the one hand, the fundamental right to the protection of intellectual property and, on the other hand, the freedom to conduct a business enjoyed by providers supplying access to a communications network and the freedom of information of the users of that network. Such a measure may dissuade the users of a network from infringing intellectual property rights, provided that they are required to reveal their identity in order to obtain the required password. By contrast, a measure consisting in terminating the internet connection completely without considering the adoption of measures less restrictive of the connection provider's freedom to conduct a business would not be capable of reconciling the conflicting rights at issue.

4. TELECOMMUNICATIONS

The judgment in ***Ormaetxea Garai and Lorenzo Almendros*** (C-424/15, EU:C:2016:780), delivered on 19 October 2016, afforded the Court the opportunity to interpret Directive 2002/21 [77] by *defining the scope of the requirements of impartiality and independence for national regulatory authorities ('NRAs') in the field of electronic communications networks and services.* In the case in point, the Spanish Government had undertaken a reform whereby various regulatory bodies were merged into a single multisectoral body. This had the direct consequence of terminating the terms of office of both the president of the NRA at issue in the main proceedings and of one of the NRA's board members, before they had expired and in the absence of any lawful ground for dismissal as laid down in the national law governing that authority.

The Court found, first, that, as regards the lawfulness of the restructuring of the NRAs, Directive 2002/21 does not preclude, in principle, national legislation which entails the merger of one NRA with other NRAs, such as those responsible for competition, the postal sector and the energy sector, in order to create a multisectoral regulatory body. However this applies only provided that, in performing its tasks, that body meets the requirements of competence, independence, impartiality and transparency laid down by that directive and that an effective right of appeal is available against its decisions to a body independent of the parties involved, which is a matter to be determined by the national court.

77| Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37, and corrigendum OJ 2013 L 241, p. 8).

Secondly, the Court noted that, in circumstances such as those of this case, in order to comply with the requirements laid down in Article 3(3a) of Directive 2002/21, it is for the Member State to lay down rules which guarantee that the dismissal of members of the collegiate body running a NRA before the expiry of their terms of office does not jeopardise the independence and impartiality of the persons concerned. According to the Court, the risk of immediate dismissal on grounds other than those laid down in advance by national law, which may be faced by even a single member of such a collegiate body, may give rise to reasonable doubt as to the neutrality of the NRA concerned and its imperviousness to external factors and jeopardise its independence, impartiality and authority. The Court therefore held that Article 3(3a) of Directive 2002/21 precludes — on the sole ground that an institutional reform has taken place involving the merger of certain NRAs — the premature dismissal of officials of those bodies in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of such members.

5. TOBACCO PRODUCTS

By three judgments [78] delivered on 4 May 2016, the Court ruled on the validity of a number of provisions of Directive 2014/40 [79] relating to the manufacture, presentation and sale of tobacco products.

Among those decisions, mention should be made of the judgment in ***Poland*** v ***Parliament and Council*** (C-358/14, EU:C:2016:323). By this judgment, the Court dismissed the action for annulment challenging *the validity of certain provisions of Directive 2014/40, including Article 7(1), which provides for the prohibition on the placing on the market of tobacco products with a characterising flavour, such as menthol*. In support of that action, Poland relied on three pleas in law alleging infringement of, respectively, Article 114 TFEU, the principle of proportionality and the principle of subsidiarity.

First, as regards the plea alleging that Article 114 TFEU is not an adequate legal basis for the adoption of the contested provisions, the Court first of all pointed out that, by using the words 'measures for the approximation', as referred to in Article 114 TFEU, the authors of the Treaty conferred on the EU legislature a discretion as to the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features. Such measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products. The Court then held that the elimination of the divergences between the national rules, in particular by prohibiting, at EU level, the use of certain additives in tobacco products, seeks to facilitate the smooth functioning of the internal market in those products. Therefore, there is nothing to indicate that, in introducing dynamic mechanisms enabling the Commission to determine which tobacco products have characterising flavours, the EU legislature failed to observe the discretion conferred on it by Article 114 TFEU.

Secondly, the Court took the view that the prohibition at issue is also appropriate for ensuring achievement of the twofold objective of facilitating the smooth functioning of the internal market for tobacco, while taking as a base a high level of protection of human health, especially for young people. Certain flavourings are particularly attractive to young people and facilitate the initiation of tobacco consumption. As regards the necessity of the prohibition on all characterising flavours, the Court held that the EU legislature could

78| Judgments of the Court of 4 May 2016, ***Poland*** v ***Parliament and Council***, (C-358/14, EU:C:2016:323); ***Pillbox 38*** (C-477/14, EU:C:2016:324); and ***Philip Morris Brands and Others*** (C-547/14, EU:C:2016:325).

79| Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

legitimately impose such a prohibition, in the exercise of its discretion, since the less restrictive measures advocated by the Republic of Poland do not appear to be equally suitable for achieving the objective pursued. By weighing up, on the one hand, the economic consequences of that prohibition for all Member States and, on the other, the requirement to ensure a high level of health protection, the legislature made sure that the negative consequences of the prohibition on the use of menthol as a characterising flavour are limited. Accordingly, the Court stated that this measure cannot be regarded as being contrary to the principle of proportionality.

Lastly, as regards the plea alleging infringement of the principle of subsidiarity, the Court held that, due to the interdependence of the two objectives pursued by Directive 2014/40, they could best be achieved at EU level rather than at the level of the Member States. It was not demonstrated to the Court that the consumption of mentholated tobacco products is essentially limited to certain Member States.

6. COSMETIC PRODUCTS

In the judgment in ***European Federation for Cosmetic Ingredients*** (C-592/14, EU:C:2016:703), delivered on 21 September 2016, the Court was called upon to clarify *the scope, for the purposes of Article 18(1)(b) of Regulation No 1223/2009,* [80] *of the prohibition on the placing on the market of cosmetic products containing ingredients which, in order to meet the requirements of that regulation, have been the subject of animal testing*. The main proceedings involved a trade association representing manufacturers of ingredients used in cosmetic products within the European Union, several of whose members had conducted animal testing outside the European Union so that their products could be sold in third countries.

First, in the light of the context and the objectives pursued by Regulation No 1223/2009, the Court observed that the aim of the regulation is to establish the conditions for access to the EU market for cosmetic products and to ensure a high level of protection of human health, whilst also ensuring the well-being of animals by prohibiting animal testing. Only the results of animal testing relied on in the cosmetic product safety report may be considered to concern testing conducted in order to meet the requirements of the regulation. It is irrelevant in that regard that the animal testing was required in order to market the product in third countries.

Secondly, the Court explained that EU law makes no distinction depending on where the animal testing was carried out. Regulation No 1223/2009 seeks to promote the use of non-animal alternative methods to ensure the safety of cosmetic products. The attainment of that objective would be seriously compromised if the prohibitions laid down in EU law could be circumvented by carrying out the animal testing in third countries. Consequently, the Court concluded that the placing on the EU market of cosmetic products containing some ingredients that have been tested on animals outside the European Union in order to market those products in third countries may be prohibited if the data resulting from that testing are also used to prove the safety of the products concerned for the purposes of placing them on the EU market.

80 | Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (OJ 2009 L 342, p. 59).

XIV. PUBLIC PROCUREMENT

In 2016, the Court delivered a number of important decisions covering matters such as the concept of public contract, the technical and/or professional abilities of economic operators, and a number of the procedural requirements deriving from Directive 89/665. [81]

In its judgment in ***Falk Pharma*** (C-410/14, EU:C:2016:399), delivered on 2 June 2016, the Court clarified *the concept of public contract within the meaning of Article 1(2)(a) of Directive 2004/18*. [82] The main proceedings involved a dispute between an undertaking that distributed medicinal products and a statutory health insurance fund concerning a procedure carried out by the latter in order to conclude a number of agreements containing identical terms with undertakings marketing a specific medicinal product. The applicant argued that public procurement law had to apply to that procedure.

The Court held that a contract scheme through which a public entity intends to acquire goods on the market by contracting throughout the period of validity of that scheme with any economic operator which undertakes to provide the goods concerned in accordance with predetermined conditions, without choosing between the interested operators, and allows them to accede to that scheme throughout its validity, does not constitute a public contract within the meaning of that provision. The fact that the contracting authority does not designate an economic operator to which contractual exclusivity is to be awarded means that there is no need to control through the detailed rules of Directive 2004/18 the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators. Nonetheless, such an authorisation procedure, where its subject matter is of certain cross-border interest, must be conceived and organised in accordance with the fundamental rules of the FEU Treaty, in particular the principles of non-discrimination and equal treatment between economic operators. Although Member States have some latitude in that situation, the obligation of transparency requires that there be adequate publicity allowing potentially interested economic operators to apprise themselves properly of the conduct and the essential characteristics of such an authorisation procedure.

By the judgments *in* ***Partner Apelski Dariusz*** (C-324/14, EU:C:2016:214) of 7 April 2016, and ***Wrocław — Miasto na prawach powiatu*** (C-406/14, EU:C:2016:562) of 14 July 2016, the Court interpreted the concept of *technical and/or professional abilities of economic operators, within the meaning of Directive 2004/18*. In the first case, the Court also revisited the *principles of equal treatment and non-discrimination between economic operators*.

In *Partner Apelski Dariusz*, the main proceedings involved a dispute between a company which submitted a tender and the Warsaw municipal cleansing authority concerning the former's exclusion from a procedure for the award of a public contract for the cleansing of roadways in Warsaw, on the ground that the cleansing authority, in its capacity as contracting authority, was not persuaded that the company would properly perform the contract since part of its bid included services to be provided by a third party located in another city some distance from Warsaw. First of all, the Court recalled that Article 47(2) and Article 48(3) of Directive 2004/18, read in conjunction with Article 44(2) thereof, recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the

81| Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007.

82| Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

resources necessary for the performance of the contract. However, the exercise of that right may be limited in exceptional circumstances. It is conceivable, first, that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate, and, secondly, that in specific circumstances, having regard to the nature and objectives of a particular contract, the capacities of a third party entity, which are necessary for the performance of a particular contract, cannot be transferred to the tenderer. Accordingly, in such circumstances, the tenderer may rely on those capacities only if the third party entity directly and personally participates in the performance of the contract concerned.

In addition, under Article 48(2) and (3) of Directive 2004/18, the contracting authority may, in specific circumstances, for the purposes of the proper performance of a particular contract, expressly set out, in the tender notice or the tender specifications, the specific rules in accordance with which an economic operator may rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of that contract.

In *Wrocław — Miasto na prawach powiatu*, the main proceedings involved a dispute between the City of Wrocław (Poland) and the Minister for Infrastructure and Development concerning a decision imposing on the former a financial correction on account of an infringement of Directive 2004/18. The subject of the decision was an obligation, appearing in the tender specifications at issue, relating to a procedure for the award of a public works contract co-financed by EU funds. Under that obligation the tenderer was required to perform at least 25% of the relevant works using its own resources. The Court held that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public contract, that the future contractor perform with its own resources a certain percentage of the works covered by that contract. Article 48(3) of Directive 2004/18 enshrines the right, subject to no limitation whatsoever, to use subcontractors for the performance of a contract. Where the procurement documents require tenderers to state in their tenders the share of the contract that they intend to subcontract, the contracting authority is indeed entitled to prohibit the use of subcontractors whose capacities could not be verified at the stage of examination of tenders and selection of the contractor, for the performance of essential parts of the contract. However, that is not the effect of a stipulation which imposes limitations on the use of subcontractors for a share of the contract that is fixed in abstract terms as a certain percentage of that contract, irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned.

Lastly, in the judgment in ***PFE*** (C-689/13, EU:C:2016:199), [83] the Court had the opportunity to define *the procedural requirements flowing from Directive 89/665 in a situation in which, following a public procurement procedure, an unsuccessful tenderer and the successful tenderer bring actions for review, each seeking the exclusion of the other.* The Court pointed out, first of all, that each of the parties has a legitimate interest in the exclusion of the bids submitted by the other competitors. Thus, a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for annulment brought by an unsuccessful tenderer against the award decision where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings. Furthermore, neither the number of participants in the public procurement procedure concerned, nor the number of participants who have instigated review procedures, nor the differing legal grounds relied on by them are relevant to the question of the applicability of that case-law principle.

83| For the presentation of the part of the judgment relating to the type of proceedings, see Section V 'Proceedings of the European Union'.

XV. ECONOMIC AND MONETARY POLICY

In the field of economic and monetary policy, 2016 was marked by three judgments delivered by the Court: the first two concern the programme to support the Cypriot banking sector while the third relates to an increase in the share capital of an Irish bank in a situation of serious disturbance of the economy and the financial system.

On 20 September 2016, the Court, sitting as the Grand Chamber, delivered judgments in ***Mallis and Others*** v ***Commission and ECB*** (C-105/15 P to C-109/15 P, EU:C:2016:702) and ***Ledra Advertising and Others*** v ***Commission and ECB*** (C-8/15 P to C-10/15 P, EU:C:2016:701).

In the first judgment, the Court dismissed the appeals brought against five orders of the General Court [84] by which the General Court had dismissed as inadmissible *actions for annulment of the Eurogroup statement of 25 March 2013 concerning the restructuring of the banking sector in Cyprus.* The Court confirmed the General Court's judgment to the effect that the Eurogroup statement at issue cannot be regarded as a joint decision of the Commission and the European Central Bank ('the ECB') producing binding legal effects. The duties conferred on the Commission and the ECB within the Treaty establishing the European Stability Mechanism (ESM Treaty) do not entail the exercise of any power to make decisions of their own and the activities pursued by those two institutions within the ESM Treaty commit the ESM alone. The fact that the Commission and the ECB participate in the meetings of the Eurogroup does not alter the nature of the latter's statements. Nor is there anything in the Eurogroup statement reflecting a decision of the Commission and the ECB to create a legal obligation on Cyprus to implement the measures which it contains; it is of a purely informative nature and is intended to inform the general public of the existence of a political agreement between the Eurogroup and the Cypriot authorities reflecting a common intention to pursue the negotiations in accordance with the statement's terms.

On the other hand, in the second judgment, the Court upheld the appeals brought against three orders of the General Court [85] by which the General Court had dismissed, as in part inadmissible and in part unfounded, *actions for annulment and actions for compensation relating to the adoption of the Memorandum of Understanding on Specific Economic Policy Conditionality concluded between the Republic of Cyprus and the European Stability Mechanism.* The Court held that the fact that the activities entrusted to the Commission and the ECB within the ESM Treaty do not entail the exercise of any power to make decisions of their own and commit the ESM alone does not prevent damages from being claimed from those two institutions on account of their allegedly unlawful conduct in connection with the adoption of a memorandum of understanding on behalf of the ESM. The tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties. Thus, the Commission retains, within the framework of the ESM Treaty, its role of guardian of the Treaties, so that it must refrain from signing a memorandum of understanding whose consistency with EU law it doubts. Therefore, according to the Court, the General Court erred in law in holding that it did not have jurisdiction to consider the actions for compensation based on the illegality of certain provisions of the memorandum of understanding at issue on the basis merely of the finding that the adoption of the disputed provisions could not formally be imputed to the Commission or the ECB.

84| Orders of the General Court of 16 October 2014, ***Mallis and Malli*** v ***Commission and ECB*** (T-327/13, EU:T:2014:909); ***Tameio Pronoias Prosopikou Trapezis Kyprou*** v ***Commission and ECB*** (T-328/13, EU:T:2014:906); ***Chatzithoma*** v ***Commission and ECB*** (T-329/13, EU:T:2014:908); ***Chatziioannou*** v ***Commission and ECB*** (T-330/13, EU:T:2014:904); and ***Nikolaou*** v ***Commission and ECB*** (T-331/13, EU:T:2014:905).

85| Orders of the General Court of 10 November 2014, ***Ledra Advertising*** v ***Commission and ECB*** (T-289/13, EU:T:2014:981); ***Eleftheriou and Others*** v ***Commission and ECB*** (T-291/13, EU:T:2014:978); and T***heophilou*** v ***Commission and ECB*** (T-293/13, EU:T:2014:979).

Furthermore, since the state of the proceedings permitted a final judgment in the case, the Court decided to give judgment itself on the actions for compensation. In that connection, it pointed out that the European Union may incur non-contractual liability only if a number of conditions are fulfilled, including unlawfulness of the conduct alleged against the EU institution, a finding of which requires establishment of a sufficiently serious breach of a rule of law intended to confer rights on individuals. As regards that condition, the Court observed that the relevant rule of law intended to confer rights on individuals was, in the case in point, Article 17(1) of the Charter of Fundamental Rights, which states that everyone has the right to own his lawfully acquired possessions. Whilst the Charter is not addressed to the Member States when they are not implementing EU law, it is, on the other hand, addressed without limitation to the EU institutions, including when they act outside the EU legal framework, as is the case within the framework of the ESM. The Commission is therefore bound to ensure that a memorandum of understanding such as that in dispute is consistent with the fundamental rights guaranteed by the Charter. Nonetheless, the Court took the view that this condition for establishing the non-contractual liability of the European Union was not satisfied in this instance. The adoption of the memorandum of understanding at issue corresponds to an objective of general interest pursued by the European Union, namely to ensure the stability of the banking system of the euro area. In view of that objective and of the nature of the measures under examination, and having regard to the imminent risk of financial losses to which depositors would have been exposed if the two banks concerned had failed, those measures do not constitute a disproportionate and intolerable interference impairing the very substance of the depositors' right to property and cannot, therefore, be regarded as unjustified restrictions.

Secondly, in its judgment in ***Dowling and Others*** (C-41/15, EU:C:2016:836), delivered on 8 November 2016, the Court, sitting as the Grand Chamber, ruled on *the compatibility with EU law of an increase in the share capital of a bank imposed by the Irish public authorities without the agreement of the general meeting of that bank, in a situation of serious disturbance of the economy and the financial system of a Member State*. In the main proceedings, members and shareholders of a company that owned a credit institution had brought an action against the Irish Minister for Finance seeking the setting aside of a direction order made by the High Court, upon application by the minister, requiring the company to increase its share capital and to issue, in favour of the minister, new shares at a price lower than their nominal value. This measure designed to recapitalise the credit institution had been adopted, within the framework of the recapitalisation of national banks, in accordance with the commitments arising from Implementing Decision 2011/77 on granting Union financial assistance to Ireland. [86]

The Court pointed out that the aim of Directive 77/91 [87] is to achieve minimum equivalent protection for both shareholders and creditors of public limited liability companies. The measures provided for by that directive relating to the formation of public limited liability companies and to the maintenance, increase or reduction of their capital guarantee such protection against acts taken by the governing bodies of those companies and relate, therefore, to their normal operation.

However, the direction order at issue in the main proceedings is an exceptional measure that is taken in a situation where there is a serious disturbance of the economy and financial system of a Member State, and is designed to overcome a systemic threat to the financial stability of the European Union. Consequently, Directive 77/91 does not preclude such an exceptional measure which, where there is a serious economic

86| Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland (OJ 2011 L 30, p. 34).

87| Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1).

situation as in the case in point, is adopted by the national authorities without the approval of the general meeting of a company, with the objective of preventing a systemic threat to the European Union. According to the Court, although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by the EU Treaties.

XVI. SOCIAL POLICY

In the area of social policy, mention should be made of two judgments concerning the prohibition on discrimination on grounds of age.

First, in the judgment in ***DI*** (C-441/14, EU:C:2016:278), delivered on 19 April 2016, the Court, sitting as the Grand Chamber, accepted that *the general principle of non-discrimination on grounds of age, as given concrete expression by Directive 2000/78,* [88] *may be relied on including in disputes between private persons, and clarified the obligations of the national courts where domestic case-law is inconsistent with EU law*. The main proceedings concerned the validity of national legislation depriving an employee of the right to a severance allowance where he was entitled to claim an old-age pension under a pension scheme which he had joined before reaching the age of 50, regardless of whether the employee chose to remain on the employment market or take his retirement.

The Court stated at the outset that Directive 2000/78 simply gives concrete expression to the principle of non-discrimination on grounds of age in relation to employment and occupation and that, therefore, this principle may also be relied on in disputes between private persons in order to challenge national legislation such as the legislation in the case in point.

The Court then pointed out that the Member States' obligation to achieve a certain result as regards the application of directives also extends to the courts. In that context, the Court stated that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for a private person to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.

Secondly, in the judgment in ***Salaberria Sorondo*** (C-258/15, EU:C:2016:873), delivered on 15 November 2016, the Grand Chamber of the Court ruled on the existence of *discrimination on grounds of age in connection with the restriction of the recruitment of police officers to candidates under a certain age*. This case concerned a competition to recruit police officers of the Autonomous Community of the Basque Country that required candidates to be under the age of 35. The person concerned, who was over the age of 35, had argued that this requirement infringed, inter alia, Directive 2000/78. [89]

The Court held that Article 2(2) of Directive 2000/78, read in conjunction with Article 4(1) thereof, does not preclude national legislation which provides that candidates for posts as police officers who are to perform all the operational duties incumbent on police officers must be under 35 years of age. The possession of

88| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

89| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

particular physical capacities in order to be able to perform the three essential duties of the police of the Autonomous Community of the Basque Country, namely ensuring the protection of people and property, ensuring that each individual can freely exercise his rights and freedoms, and ensuring the safety of citizens, may be considered to be a genuine and determining occupational requirement, within the meaning of Article 4(1) of Directive 2000/78, for the pursuit of that profession. Accordingly, legislation such as that at issue may be regarded, first, as being appropriate to the objective of ensuring the operational capacity and proper functioning of the police service concerned and, secondly, as not going beyond what is necessary for the attainment of that objective. That objective requires that, with a view to re-establishing a satisfactory age pyramid, the possession of particular physical capacities should be envisaged not statically, at the time of recruitment competition tests, but dynamically, taking into consideration the years of service that can be accomplished by a police officer after he has been recruited.

XVII. CONSUMER PROTECTION

In the field of consumer protection, five judgments merit special attention. The first concerns credit agreements for consumers, the next three deal with unfair terms, in particular national courts' power of review, and the last relates to nutrition and health claims concerning food.

First, in the joined cases giving rise to the judgment in ***Gutiérrez Naranjo and Others*** (C-154/15, C-307/15 and C-308/15, EU:C:2016:980), delivered on 21 December 2016, the Grand Chamber of the Court adjudicated on *domestic case-law placing a temporal limitation on the right of consumers to repayment of sums overpaid pursuant to an unfair term within the meaning of Directive 93/13 on unfair terms.* [90] The main actions concerned clauses inserted in mortgage loan agreements establishing a minimum rate below which the variable rate of interest could not fall. Although these 'floor clauses' had been held to be unfair by an earlier judgment of the Spanish Supreme Court in the light of the Court's case-law on the interpretation of Directive 93/13, the fact remained that the Supreme Court had limited, in a general manner, the restitutory effects of the declaration of invalidity of those clauses to the sums overpaid after the date of delivery of its fundamental judgment. Against that background, the national courts — before which consumers affected by the application of those 'floor clauses' had brought proceedings — sought to ascertain whether such a temporal limitation of the effects of the declaration of invalidity was compatible with Directive 93/13.

In its judgment, the Court made clear that a finding that a term is unfair within the meaning of Directive 93/13 must have the effect of restoring the consumer to the situation he would have been in if that term had not existed. Consequently, in this instance, the finding that 'floor clauses' are unfair had to allow the restitution of advantages wrongly obtained to the detriment of consumers. In that connection, the Court stated that, although a national court is entitled to hold that its judgment is not, in the interests of legal certainty, to affect situations in which judgments with the force of *res judicata* have been given, it is for the Court and the Court alone to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of an EU rule. Furthermore, in so far as the temporal limitation of the effects of the invalidity of 'floor clauses', as decided by the Spanish Supreme Court, deprives consumers of the right to obtain repayment in full of the amounts overpaid, it ensures only incomplete and insufficient protection for consumers. Accordingly, such a limitation is neither an adequate nor an effective means of preventing the use of terms of this kind, as required by the directive. The Court therefore held that EU law precludes this temporal limitation of the restitutory effects of the invalidity of an unfair term.

90| Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

Secondly, in its judgment in ***Radlinger and Radlingerová*** (C-377/14, EU:C:2016:283), delivered on 21 April 2016, the Court provided clarification, *in the context of insolvency proceedings, on the power of national courts to examine of their own motion whether sellers and suppliers have complied with the rules of EU consumer protection law.* The main proceedings concerned Czech legislation which did not accord national courts such a power in respect of contractual terms contained in a consumer credit agreement.

The Court found, first of all, that Article 7(1) of Directive 93/13 on unfair terms [91] precludes national legislation which does not permit that examination in respect of such contracts, even where the court has available to it the matters of law and fact necessary to that end, and permits the court to examine only certain claims, and solely in respect of a restricted number of grounds. The Court also pointed out that, under Article 10(2) of Directive 2008/48 on credit agreements for consumers, [92] a national court hearing a dispute concerning claims arising from such an agreement must also ascertain of its own motion whether the information relating to the credit (such as the Annual Percentage Rate (APR)) which must be set out therein has been stated clearly and concisely. It is therefore required to establish all the consequences under its national law arising from any infringement of that obligation. The penalties imposed in that regard must, however, be effective, proportionate and dissuasive, within the meaning of Article 23 of Directive 2008/48.

The Court further stated that, under that directive, the 'total amount of the credit', which must be mentioned in the credit agreement, cannot include any of the sums which make up the 'total cost of the credit', such as the administrative costs, interest, commissions and any other type of cost which the consumer is required to pay. The improper inclusion of those sums in the total amount of the credit has the effect of undervaluing the APR and, in consequence, affects the accuracy of the information which the lender must set out in the credit agreement. Lastly, with regard to the examination of whether the penalties imposed on a consumer who fails to fulfil his *obligations are unfair, the Court noted that the national court is required to assess the cumulative effect of all terms of the agreement and, where it finds that a number of those terms are unfair, to exclude all unfair terms and not merely some of them.*

Thirdly, in the case giving rise to the judgment in ***Finanmadrid EFC*** (C-49/14, EU:C:2016:98), delivered on 18 February 2016, the Court provided guidance on *the scope of the power of national courts to rule on the invalidity of an unfair term in a contract concluded with a consumer in enforcement proceedings concerning an order for payment.* This case concerned Spanish legislation which (i) did not provide for intervention by the *national courts in the order for payment procedure, subject to certain* exceptions, and (ii) did not permit them to review any possible unfair terms of their own motion in enforcement proceedings concerning an order for payment.

In that connection, the Court held that the consumer might be faced with an enforcement order without having the benefit, at any time during the proceedings, of a guarantee that an assessment will be made of whether the terms at issue are unfair, where the course and particular features of the order for payment proceedings are such that, in the absence of specific facts requiring the intervention of the court, those proceedings are closed without it being possible for there to be a check as to whether there are unfair terms in a contract concluded between a supplier or seller and a consumer, and the court hearing the enforcement of the order for payment does not have the power to assess of its own motion whether such terms are present. Such a procedural arrangement is liable to undermine the effectiveness of the protection of the rights under Directive 93/13. Effective protection of those rights can be guaranteed only provided that the procedural system allows the court, during order for payment proceedings or enforcement proceedings

91 | Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

92 | Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66, and corrigenda OJ 2009 L 207, p. 14; OJ 2010 L 199, p. 40; and OJ 2011 L 234, p. 46).

concerning an order for payment, to check of its own motion whether terms of the contract concerned are unfair.

According to the Court, that consideration cannot be called into question where the national procedural law confers on the decision issued by the authority hearing the application for an order for payment the force of *res judicata* and endows it with effects analogous to those of a decision of the court. Such legislation appears to run counter to the principle of effectiveness, in so far as it makes it impossible or excessively difficult, in proceedings brought by suppliers or sellers and in which consumers are the defendants, to ensure the protection conferred on consumers by Directive 93/13.

Fourthly, on 8 December 2016, in the judgment in ***Verein für Konsumenteninformation*** (C-127/15, EU:C:2016:934), the Court had the opportunity to clarify, *first, the scope of Directive 2008/48* [93] *and, secondly, the derogations from the obligation to provide consumers with pre-contractual information which that directive lays down.* The main proceedings involved a dispute between a consumer information association and a debt collection agency concerning the latter's practice of concluding with consumers debt rescheduling agreements relating to the grant of deferred payments without making pre-contractual information known to them.

Since Directive 2008/48 does not apply to credit agreements where the credit is granted free of interest and without any other charges, the Court pointed out, first of all, that a credit rescheduling agreement concluded between the consumer and the lender through a debt collection agency is not agreed to 'free of charge' where, by that agreement, the consumer undertakes not only to repay the total amount of that credit, but also to pay interest and costs that were not provided for by the initial contract under which the credit was granted. Such a statement cannot be called into question by the fact that the cumulative amounts of interest and costs provided for by such an agreement do not exceed those which would be payable under national law in the absence of that agreement.

The Court also held that a debt collection agency which concludes, on behalf of a lender, a rescheduling agreement for an unpaid credit, but which acts as an intermediary only in an ancillary capacity, must be regarded as being a credit intermediary within the meaning of Directive 2008/48 and is therefore not subject to the obligation to provide the consumer with pre-contractual information set out in Articles 5 and 6 of that directive. The Court, however, made clear that this exception to the obligation to provide pre-contractual information does not affect the level of consumer protection provided for by Directive 2008/48 and does not limit the lender's obligation to ensure that the consumer receives the pre-contractual information referred to in Articles 5 and 6 thereof.

Fifthly and finally, in its judgment in ***Verband Sozialer Wettbewerb*** (C-19/15, EU:C:2016:563), delivered on 14 July 2016, the Court was required to determine *whether nutrition or health claims concerning a food that are made in a commercial communication addressed exclusively to health professionals fall within the scope of Regulation No 1924/2006.* [94] The main proceedings involved a dispute between an association safeguarding competition and a company selling a nutritional supplement concerning an advertising document which the latter had sent only to doctors. The association argued, in particular, that the document contained health claims of the kind prohibited by Regulation No 1924/2006.

93| Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

94| Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ 2006 L 404, p. 9).

In its judgment, the Court found that such nutrition or health claims constitute a commercial communication falling within the scope of Regulation No 1924/2006, even if the communication is addressed not to final consumers, but exclusively to health professionals. The concept of a 'commercial communication' within the meaning of that regulation covers, inter alia, a communication made in the form of advertising of foods, designed to promote, directly or indirectly, those foods. Such a communication may also take the form of an advertising document which food business operators send to health professionals, in order that those professionals recommend, if appropriate, that their patients purchase and/or consume that food.

Furthermore, it cannot be ruled out that the health professionals themselves may be misled by nutrition or health claims which are false, ambiguous or misleading, and that they may forward, in all good faith, incorrect information to final consumers. Consequently, according to the Court, the application of Regulation No 1924/2006 to the nutrition or health claims made in a commercial communication addressed to health professionals contributes to a high level of consumer protection in the context of the internal market.

XVIII. ENVIRONMENT

On 8 November 2016, in the judgment in ***Lesoochranárske zoskupenie VLK*** (C-243/15, EU:C:2016:838), the Court, sitting as the Grand Chamber, examined *whether Article 47 of the Charter of Fundamental Rights, read in conjunction with Article 9 of the Aarhus Convention,* [95] *precludes certain detailed national procedural rules relating to the effect of an environmental association bringing an action against a decision to authorise a project.* The main proceedings centred on the refusal to give an environmental association the status of party to an administrative procedure concerning the authorisation, under Article 6(3) of Directive 92/43, [96] of a project to be executed on a protected site. Since the action brought by the environmental association against that refusal had been dismissed on the ground that the administrative authorisation procedure had been concluded as to the substance before the adoption of a definitive judicial decision on possession of the status of 'party to the procedure', the referring court asked whether EU law precludes such an interpretation of the procedural rules, while referring to the existence of another action that the association could have brought as to the substance after the adoption of the administrative decision on authorisation.

The Court recalled that an environmental organisation which meets the conditions specified in Article 2(5) of the Aarhus Convention has the right, as provided for in Article 6 thereof, to participate in a procedure for the adoption of a decision relating to an application for authorisation of a project likely to have a significant effect on the environment in so far as, within the framework of that procedure, one of the decisions envisaged in Article 6(3) of Directive 92/43 is to be adopted. As regards the right to an effective remedy enshrined in Article 47 of the Charter, the Court observed that decisions adopted by national authorities within the framework of Article 6(3) of Directive 92/43 fall within the scope of Article 9(2) of the Aarhus Convention. That provision limits the discretion available to the Member States when determining the detailed rules for legal actions, with the aim of ensuring 'wide access to justice' to the public concerned.

Therefore, the Court concluded that, inasmuch as Article 47 of the Charter, read in conjunction with Article 9(2) and (4) of the Aarhus Convention, enshrines the right to effective judicial protection in conditions

95| Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

96| Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as last amended by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 193).

ensuring wide access to justice, it precluded the rejection of the environmental association's application to be granted the status of party to the procedure on the ground that the administrative procedure in question has been concluded. The Court pointed out that, had the association been granted the status of party to the administrative procedure, it would have been able to participate more actively in the decision-making process by setting out more appositely its arguments relating to the risks of adverse effects of the planned project on the integrity of the protected site, arguments which would have had to be taken into account by the national authorities before that project was authorised and executed. The Court also observed that since possession of the status of 'party to the procedure' is necessary in order to be able to bring an action for annulment of the decision to authorise a project to be carried out on a protected site, the conclusion of the administrative authorisation procedure before a decision has been taken on the association's application infringes the abovementioned provisions of the Charter and the Aarhus Convention.

In its judgment in ***Borealis Polyolefine and Others*** (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), delivered on 28 April 2016, the Court ruled on *the validity of Article 15(3) of Decision 2011/278* [97] *and of Article 4 of and Annex II to Decision 2013/448*. [98] In the main proceedings, a number of undertakings had challenged the validity of national decisions on the allocation of greenhouse gas emission allowances for the period from 2013 to 2020. Those national decisions implemented the uniform cross-sectoral correction factor provided for in Article 10a(5) of Directive 2003/87, [99] namely the correction factor applied where the quantity of free allowances allocated provisionally by the Member States is greater than the maximum amount of free allowances determined by the Commission. In support of their action, the applicants argued, inter alia, that Decisions 2011/278 and 2013/448, containing implementation measures relating to Directive 2003/87, were in part invalid.

First of all, the Court found that Decision 2011/278, which precludes the taking into account of emissions from electricity generators in the determination of the maximum annual amount of free allowances, is valid. It is apparent from Directive 2003/87 that, unlike emissions generated by industrial installations, emissions from electricity generators are never taken into account for those purposes. The asymmetrical treatment of the emissions in question, which limits the number of allowances available, is, according to the Court, consistent with the main objective of Directive 2003/87 to reduce greenhouse gas emissions.

Secondly, as regards the validity of the provisions of Directive 2013/448 determining the uniform cross-sectoral correction factor from 2013 to 2020, the Court concluded from the context of and aim pursued by Directive 2003/87 that the Commission, when drawing up the maximum annual amount of allowances, is required to refer only to the emissions of the installations included in the EU system from 2013 onwards. Since the Commission had taken account of data from some Member States on emissions generated by new activities carried on by installations already subject to the allowance trading scheme before 2013, the Court held that the inclusion of such data in the calculation of the maximum annual amount of allowances was not in accordance with the requirements stemming from Article 10a of Directive 2003/87 and that the correction factor, established by Article 4 of and Annex II to Decision 2013/448, was also contrary to the directive. Consequently, it held that Article 4 of and Annex II to Decision 2013/448 were invalid.

97| Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1).

98| Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2013 L 240, p. 27).

99| Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63).

However, the Court imposed a temporal limitation on the effects of its declaration of invalidity in order to take account of the risk of serious repercussions on a large number of legal relations established in good faith and of the objectives pursued by Directive 2003/87.

XIX. INTERNATIONAL AGREEMENTS

As regards international agreements, reference should be made to three judgments concerning various association agreements.

In the judgment in ***Genc*** (C-561/14, EU:C:2016:247) of 12 April 2016, the Grand Chamber of the Court was called upon to interpret *the standstill clause set out in Article 13 of Decision No 1/80 of the EEC-Turkey Association Council* [100] preventing the Member States and Turkey from introducing new restrictions on the conditions of access to employment applicable to workers and members of their families legally present in their respective territories. In the main proceedings, a minor child of Turkish nationality residing in Turkey, whose father, also a Turkish citizen, held a permanent residence permit in Denmark where he resided as an employee, had applied for a residence permit. That application was refused by the Danish authorities on the basis of a national provision introduced after the entry into force of Decision No 1/80 in Denmark. [101] Under that provision, for the purposes of family reunification, a minor child must have sufficient ties with the State, which is not the case if the application is made more than two years from the date on which the parent obtained a residence permit.

Referring to the approach taken in the judgment in ***Dogan***, [102] the Court held that national legislation of a Member State which makes family reunification more difficult by tightening the conditions for the first admission of minor children of Turkish nationals residing in that Member State as employees, compared with the conditions applicable at the date of the entry into force of Decision No 1/80, and which, therefore, is likely to affect the exercise by those Turkish nationals of an economic activity in that Member State constitutes a new restriction on the exercise by those nationals of the freedom of movement for workers.

The Court took the view that the objective of successful integration of minor children may admittedly constitute an overriding reason in the public interest justifying the adoption of such a measure. However, the fact that the requirement relating to the existence of sufficient ties to the host country is assessed not on the basis of the personal situation of the children but according to a criterion which is unconnected to the likelihood of achieving such integration in the Member State concerned, such as the period separating the grant to the parent of a definitive residence permit and the date on which the application for family reunification is made, results in the risk of discrimination that cannot be justified under EU law.

By its judgment in ***SECIL*** (C-464/14, EU:C:2016:896), delivered on 24 November 2016, the Court had the opportunity to rule on *the concurrent applicability of the provisions of the FEU Treaty and of the Euro-*

100| Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, annexed to the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1).

101| Paragraph 9(13) of the Danish Law on aliens, which was inserted by Law No 427 of 9 June 2004.

102| Judgment of the Court of 10 July 2014, ***Dogan*** (C-138/13, EU:C:2014:2066).

Mediterranean association agreements, namely the EC-Tunisia [103] *and EC-Lebanon* [104] *agreements, designed, inter alia, to establish the conditions for the gradual liberalisation of capital.* In the context of proceedings between a company resident in Portugal and the Portuguese tax authorities, the Court was invited to answer, inter alia, the question whether tax legislation according to which such a company may, under certain conditions, deduct from its taxable amount dividends received from a company which is a resident of that Member State, but may not deduct dividends distributed by a company resident in Tunisia or Lebanon, infringed the two abovementioned agreements as well as Articles 63 to 65 TFEU.

After examining the object and purpose of those agreements, the Court held that Article 34 of the EC-Tunisia agreement and Article 31 of the EC-Lebanon agreement, concerning the free movement of capital, have direct effect. Next, the Court found that the national legislation in question is liable to discourage companies resident in Portugal from investing their capital in companies established in non-member States such as the Republic of Tunisia and the Republic of Lebanon and, in consequence, constitutes a restriction on the free movement of capital of the kind, in principle, prohibited not only under Article 63 TFEU, but also under the abovementioned provisions of those agreements.

However, the Court pointed out that such a restriction may be justified by overriding reasons in the public interest based on the need to ensure the effectiveness of fiscal supervision. That may be the case where it proves to be impossible for the tax authorities of the Member State concerned to obtain information from the non-member State in order to allow it to be verified that all the conditions for the deduction of dividends received from a company resident in that Member State are satisfied. Nonetheless, the Court stated that the refusal to grant a partial deduction, which in principle applies when the income comes from profits that have not actually been taxed, cannot be justified by the need to ensure the effectiveness of fiscal supervision where that partial deduction may be applied to situations in which the tax liability of the distributing company in the State in which it is resident cannot be verified.

As regards the power enshrined in Article 64(1) TFEU enabling a Member State to continue to apply, in its relations with non-member States, restrictions on certain capital movements contrary to Article 63 TFEU in so far as they already existed on 31 December 1993, the Court made clear that this temporal condition requires that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-member States which existed as part of the national legal order on 31 December 1993 but had not been maintained. The Court held that a Member State waives the power provided for in Article 64(1) TFEU where, without formally repealing or amending the existing rules, it concludes an international agreement, such as an association agreement, which provides, in a provision with direct effect, for a liberalisation of a category of capital referred to in Article 64(1). Such a change in the legal framework must, therefore, be deemed to amount, in its effects on the possibility of invoking Article 64(1) TFEU, to the introduction of new legislation, since it is based on a logic different from that of the existing legislation.

In its judgment in ***Council*** v ***Front Polisario*** (C-104/16 P, EU:C:2016:973), delivered on 21 December 2016, the Court, sitting as the Grand Chamber, upheld the appeal lodged by the Council against the judgment of the

103| Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC, ECSC of the Council and of the Commission of 26 January 1998 (OJ 1998 L 97, p. 1).

104| Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, signed in Luxembourg on 17 June 2002 and approved on behalf of the European Community by Council Decision 2006/356/EC of 14 February 2006 (OJ 2006 L 143, p. 1).

General Court [105] which had annulled in part *Decision 2012/497* [106] *approving, on behalf of the European Union, the EU-Morocco liberalisation agreement which amends the earlier association agreement* [107] *and, more specifically, the provisions on the liberalisation of trade in agricultural and fisheries products*. The applicant was the Polisario Front, an organisation which seeks independence for Western Sahara and controls a small, very sparsely populated part of that area. The largest part of Western Sahara is currently controlled by Morocco.

As regards the admissibility of the action for annulment, the Court found that the General Court was wrong to hold that the liberalisation agreement applied to Western Sahara, and that the Polisario Front could not be regarded as having standing to bring proceedings. Accordingly, its action for annulment had to be dismissed as inadmissible.

First, so far as concerns the interpretation of the association agreement, the Court took the view that the General Court was required to take into account not only the rule of good faith interpretation laid down in Article 31(1) of the Vienna Convention, [108] but also, in this instance, the principle of self-determination, the customary rule codified in Article 29 of the Vienna Convention (under which an agreement is binding upon each party only in respect of its 'territory', unless there is an express intention to the contrary) and the principle of the relative effect of treaties. According to the Court, those rules and principles precluded Western Sahara from being regarded as coming within the territorial scope of the association agreement because its implementation in that territory had to receive the consent of the people of Western Sahara as 'third party' to the agreement. The judgment under appeal does not demonstrate that any such consent was given.

Secondly, the Court stated that the association and liberalisation agreements constitute successive treaties and that the latter must be regarded as subordinate to the former, for the purposes of Article 30(2) of the Vienna Convention. In the light of this connection, the provisions of the association agreement which have not been explicitly amended by the liberalisation agreement must prevail for the purpose of applying the latter agreement, in order to prevent any incompatibility between them. Therefore, the liberalisation agreement could not be understood at the time of its conclusion as including the territory of Western Sahara within its scope. Moreover, that assessment is not called into question by the existence of a practice subsequent to the conclusion of the association agreement, whereby the Moroccan authorities had applied the provisions of the association agreement to Western Sahara for many years.

105| Judgment of the General Court of 10 December 2015, ***Front Polisario*** v ***Council*** (T-512/12, EU:T:2015:953).

106| Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2012 L 241, p. 2).

107| Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one hand, and the Kingdom of Morocco, on the other hand, signed in Brussels on 26 February 1996 and approved on behalf the Communities by Council and Commission Decision 2000/204/EC, ECSC of 24 January 2000 (OJ 2000 L 70, p. 1).

108| Vienna Convention on the Law of Treaties of 23 May 1969 (***United Nations Treaty Series***, Vol. 1155, p. 331).

XX. COMMON FOREIGN AND SECURITY POLICY

In its judgment in ***National Iranian Oil Company*** v ***Council*** (C-440/14, EU:C:2016:128), delivered on 1 March 2016, the Court, sitting as the Grand Chamber, confirmed on appeal the judgment of the General Court [109] dismissing the action for annulment brought by an Iranian public undertaking operating in the oil and gas sector against *several Council decisions on the freezing of funds that had been applied because the undertaking in question was owned and managed by the Iranian State and provided financial resources to the Government of Iran*. In its appeal, the Iranian undertaking argued, inter alia, that the General Court had erred in law in accepting that the Council was properly entitled to reserve for itself, in its regulation concerning the adoption of restrictive measures against Iran, the power to adopt the implementing regulation imposing the freezing of funds at issue. The appellant also challenged the judgment of the General Court in so far as it had confirmed that the Council was entitled to impose the freezing of funds pursuant to the legal criterion of the provision of support to the Iranian Government.

The Court dismissed the appellant's appeal, pointing out that, while it is usually the Commission's responsibility to implement Council regulations, the Council may reserve the implementation of its regulations to itself in duly justified specific cases. In the case in point, the Council had reserved to itself the power to adopt the most sensitive restrictive measures, namely the lists of persons or entities whose funds are frozen. Since such freezing of funds has a significant negative impact on the lives and economic activities of the persons concerned and must be adopted as soon as possible and in accordance with procedures the consistency and coordination of which the Council is best placed to ensure, the Court concluded that the Council could reasonably consider that the restrictive measures at issue were of a specific nature which justified it reserving the power to implement them to itself.

As regards the criterion for the designation of persons subject to the freezing of funds, the Court held that the General Court had correctly interpreted the changes in that criterion. It noted that, as the General Court had rightly held, the Council was entitled to expand, from 2012, the designation criterion to include natural or legal persons who, even though they have no direct or indirect link with nuclear proliferation, could encourage it by providing the Iranian Government with resources or facilities allowing it to pursue proliferation activities.

In the judgment in ***H*** v ***Council and Commission*** (C-455/14, EU:C:2016:569) of 19 July 2016, the Court set aside the order of the General Court [110] by which it had declared *that it lacked jurisdiction to hear and determine an action brought by an Italian magistrate seconded to the European Union Police Mission (EUPM) in Sarajevo for the annulment of two decisions of the EUPM redeploying her to a regional office of that mission*. In support of her appeal, the appellant argued, inter alia, that the General Court had erred in law when it declared that it lacked jurisdiction to hear and determine the action.

At the outset, after recalling that it does not, in principle, have jurisdiction with respect to the provisions relating to the CFSP, the Court stated that the contested decisions relate to an operational action of the European Union decided upon and carried out under the CFSP. However, such a circumstance does not necessarily lead to the jurisdiction of the EU judicature being excluded in the case in point.

109| Judgment of the General Court of 16 July 2014, ***National Iranian Oil Company*** v ***Council*** (T-578/12, EU:T:2014:678).

110| Order of the General Court of 10 July 2014, ***H*** v ***Council and Others*** (T-271/10, EU:T:2014:702).

First, the EU judicature has jurisdiction, in accordance with Article 270 TFEU, to rule on all actions brought by EU staff members having been seconded to the EUPM. Secondly, it is apparent from Decision 2009/906 [111] that staff members seconded by the Member States and those seconded by the EU institutions are subject to the same rules so far as concerns the performance of their duties 'at theatre level'. Accordingly, the limitation, by way of derogation, on the EU judicature's jurisdiction with respect to the provisions relating to the CFSP cannot exclude its jurisdiction to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of a mission at theatre level. Consequently, the General Court and, in the event of an appeal, the Court of Justice have jurisdiction to review such acts.

111| Council Decision 2009/906/CFSP of 8 December 2009 on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (OJ 2009 L 322, p. 22).

C | ACTIVITY OF THE REGISTRY OF THE COURT OF JUSTICE IN 2016

By Mr **Timothy MILLETT**, Deputy Registrar

The main activities of the Registry of the Court of Justice are those which are involved in performance of the three fundamental tasks entrusted to the Registry by the provisions governing it.

Responsible under the Rules of Procedure for the acceptance, transmission and custody of all documents, the Registry attends, above all, to the proper conduct of proceedings and to maintaining the files for the cases brought before the Court, from the moment when an application initiating proceedings is entered in the register until the decision closing the proceedings is served on the parties concerned.

In the course of carrying out this first task, and as an extension of it, the Registry also maintains the necessary contact with the representatives of the parties, and with other persons, concerning pending or completed cases, in all the official languages of the European Union.

Finally, the Registry is at the service of the Court's members, whom it assists in all their official functions. This assistance takes the form, of course, of dealing with the numerous procedural questions that arise throughout a case and of active participation of the members of the Registry at the hearings of the Court and the administrative meetings of its chambers, but also of involvement in the work of various committees, in particular the committee responsible for examining amendments made to the Statute of the Court of Justice and to its Rules of Procedure.

The following paragraphs are intended to provide a brief statistical overview of judicial activity during the past year and, accordingly, also to inform the reader about the Registry's activity in the light of the three abovementioned tasks.

I. A BRIEF STATISTICAL OVERVIEW OF JUDICIAL ACTIVITY IN 2016

As is apparent from the foregoing, the Registry's activity is directly affected by the number of cases brought before the Court — a number over which the Registry has no control — and, to a lesser extent, by the number of cases completed by the Court. Like 2015, the past year was one of sustained activity, which bears witness both to the vitality of EU law and to the importance that the Court attaches to settling rapidly the cases brought before it.

New cases

In 2016, 692 new cases were brought before the Court. The number of new cases is therefore at a level slightly below that of the previous year, when the record figure of 713 new cases was reached, but what is striking, above all, when reading the following tables is the breakdown of those cases according to the nature of the proceedings. Of the 692 new cases in 2016, no fewer than 470 were in fact requests for a preliminary ruling, representing almost 70% of all the cases brought before the Court in the year. Never before in the history of the Court has the number of references for a preliminary ruling been so high. With 35 cases, the number of direct actions (for annulment, for failure to act or for failure to fulfil obligations) was, by contrast, at a historically low level, whilst, at 175 cases, the number of appeals (all categories taken together) went down

slightly, a reduction which is attributable, in part, to the reduction in the number of cases completed by the General Court as a result of the particular situation in which it was placed in 2016 (the departure and arrival of numerous members, in connection in particular with the transformation of the judicial structure of the European Union).

In addition to the particularly high number of requests for a preliminary ruling submitted to the Court in 2016, it is interesting where those requests came from. In 2016, courts of all the Member States except for one submitted questions to the Court on the interpretation or validity of EU law. This trend reflects the increasing importance of the preliminary ruling procedure not only in the States which have been members of the European Union for a long time (indeed a high number of references in 2016 came from Germany, Italy and Spain), but also in States which have joined it more recently, in 2004, 2007 or 2013. No fewer than 18 requests for a preliminary ruling were thus made by Bulgarian courts in 2016, whilst Polish courts sent 19 such requests to the Court, which constitutes the highest number of requests from Poland in one year since its accession to the European Union in 2004. Furthermore, it is interesting that, despite the numerous uncertainties connected with the result of the referendum on 23 June 2016, United Kingdom courts made 23 requests to the Court for a preliminary ruling in the past year, which constitutes the highest number of requests from the United Kingdom since 2011.

Finally, so far as concerns the subject matter to be appraised by the Court in the cases brought in 2016, once again its great diversity may be noted. As in 2015, the area of freedom, security and justice, taxation, and intellectual and industrial property occupy the first three places, but with a marked increase in cases falling within the first category (76 cases falling within the area of freedom, security and justice, as against 52 the previous year), an increase to which the migration crisis and the measures taken by national authorities to meet it are in no way unrelated. With no fewer than 39 new cases brought in 2016, State aid also accounted for a sizeable part of the Court's work, as did competition law, social policy, the environment and transport.

Completed cases

Whilst the number of cases brought went down slightly in 2016, the number of cases completed, on the other hand, increased markedly as the Court settled no fewer than 704 cases in 2016, which amounts to an increase of more than 14% compared with 2015 (during which 616 cases were completed). The bulk of those cases is made up of references for a preliminary ruling and appeals, which, together, form more than 90% of the cases settled by the Court in 2016.

So far as concerns the way in which cases were brought to a close, two matters deserve specific attention: first, the number of cases determined after an Opinion and, secondly, the significant increase in the number of orders involving a judicial determination.

In the course of 2016, the Court delivered 412 judgments, of which no fewer than 271 (that is to say, 66% of the total number of judgments) were preceded by an Opinion of the Advocate General. By way of comparison, the number of judgments in cases determined after an Opinion amounted in 2015 to 'only' 57% of the number of judgments delivered in the course of that year.

Orders too increased markedly since in 2016 the Court made, in addition to 4 orders concerning interim measures, no fewer than 232 orders closing the proceedings. By way of comparison, there were 171 such orders in 2015. This increase can be explained, for the most part, by increased use of the instruments provided for in the Rules of Procedure to expedite the handling of cases, in particular the possibility, provided for in Article 99 thereof, of ruling by reasoned order on questions referred for a preliminary ruling where the questions are identical to questions on which the Court has already ruled, where the reply to the questions

may be clearly deduced from existing case-law or where the answer admits of no reasonable doubt. In 2016, a total of 55 cases (compared with 37 in 2015) were brought to a close on the basis of this provision.

Likewise, as regards appeals, no fewer than 89 cases — that it to say, almost half of the total number of appeals completed in 2016 (189) — were brought to a close on the basis of Article 181 of the Rules of Procedure, a provision which enables the Court to rule by reasoned order where the appeal or cross-appeal brought before it is, in whole or in part, manifestly inadmissible or manifestly unfounded. In 2015 such cases were only 57 in number.

Duration of proceedings

The foregoing factors combine to explain, in part, the very positive result of the past year regarding the duration of proceedings. The average duration of cases concerning requests for a preliminary ruling was 15 months, a figure which had already been achieved in 2014 and which amounts to the shortest duration recorded for more than 30 years. The duration of proceedings increased slightly in respect of direct actions (19.3 months), but came down as regards appeals. Indeed, in 2016 the duration for appeals was 12.9 months, which, likewise, constitutes the shortest duration ever recorded since the General Court's creation.

This decrease in the period for dealing with appeals can be explained, to a large extent, by the new approach adopted by the Court in 2016 in dealing with appeals brought in the areas of access to documents, public procurement and intellectual and industrial property. Where the Court takes the view that an appeal brought in one of those three areas must be dismissed pursuant to Article 181 of the Rules of Procedure, it now incorporates in its order the analysis set out by the Advocate General responsible for the case and does not respond to the parties' pleas in law and arguments with fresh reasoning, an approach which contributes to a significant shortening of the case's duration.

For the sake of completeness, it is to be noted, finally, that in 2016 a large number of requests were made to the Court for application of the expedited procedure or the urgent preliminary ruling procedure and that it granted those requests in a significant number of cases. Of the 12 requests for the urgent preliminary ruling procedure which were submitted to it in 2016, the designated chamber granted 8, whilst the expedited procedure was applied on 4 occasions (three times to a request for a preliminary ruling and once to an appeal). The time taken to deal with those cases remained very satisfactory, particularly in the light of the fact that Opinions are now delivered in this category of cases too: 2.7 months on average for dealing with the cases subject to the urgent preliminary ruling procedure, and 4 months for dealing with the references for a preliminary ruling subject to the expedited procedure. As in 2015, the Court also accorded priority treatment to seven cases.

Cases pending

On 31 December 2016, there were 872 cases (824 after joinder) pending before the Court, that is to say, a number slightly lower than the number of cases pending at the end of 2015 (884 cases).

II. COMMUNICATION WITH THE PARTIES AND OTHER PERSONS

Mirroring the intense judicial activity over the past year, the Registry's contact with representatives of the parties, and, as the case may be, other persons, concerning pending or completed cases intensified further in 2016 and is reflected, in particular, in the increasing number of pleadings entered in the register kept by the Registry and the number of hearings and sittings. The number of hearings increased from 256 in 2015 to 270 in 2016, whilst the number of sittings for the delivery of Opinions in 2016 was 319, which represents an increase of 33% compared with the previous year.

The organisation of each of those hearings and sittings involves a not insignificant amount of work for the Registry as it does for the institution's interpretation service, a burden which is offset, fortunately, by increasingly extensive recourse to IT applications.

In this connection, mention should be made of the particularly positive evaluation of the fifth full year of operation of the e-Curia application, a joint application of the institutions' two Courts that enables procedural documents to be lodged and served electronically. In addition to the EU institutions and an increasing number of agents and lawyers, all the Member States of the European Union now have an account giving access to this application, through which more than 75% of documents were lodged at the Court of Justice in 2016. Thus, against the backdrop of a constantly increasing workload, this application constitutes an important factor for improving the Courts' productivity, at the same time as contributing to the reduction of periods in the procedure (and of postal costs) and to environmental protection.

As regards information technology, 2016 also brought accelerated publication of the case-law and an improvement in the features available to users. Whilst the digital Court Reports were previously published in the form of monthly fascicles, containing all the decisions of the EU judicature in a given month, they henceforth have documents added to them, and are published, continuously, as and when decisions are handed down by the Court of Justice and the General Court. This change in the rate of publication — which began on 1 November 2016 and required considerable effort in terms of organisation and coordination on the part of all of those involved in the process of publishing the case-law, both within and outside the institution — affords considerable advantages to the public as a whole since it not only enables the case-law to be made available very rapidly, in all available languages, but also provides enhanced search possibilities as decisions published in the Court Reports contain hypertext links leading directly to the relevant paragraphs of the decisions or legislative measures that they cite.

Finally, as in the past, the Registry continued in 2016 to receive numerous applications and requests of all kinds, not connected with court cases, which had to be dealt with directly or in cooperation with the Communication Directorate. The workload connected with dealing with these applications and requests, which arrive in their thousands at the Court Registry, in all the official languages of the European Union and in the most diverse forms (mail, emails or telephone calls), must not be underestimated. A detailed analysis is required of each request submitted to the Court, behind which an actual case is sometimes hidden.

III. ASSISTANCE TO THE MEMBERS OF THE COURT

As has been pointed out in the introduction to the present contribution, the Registry, finally, lends assistance to the members of the Court, whom it assists in all their official functions.

This assistance takes the form, first of all, of the actual transmission of all the procedural documents — and the translations thereof — to the judges and Advocates General responsible for the cases brought before the Court, and of dealing with the numerous procedural questions that may arise in the course of those cases. Although this task represented a considerable part of the work carried out by the Registry in 2016, it too, however, underwent a significant change in the course of the year because, at the instigation of the President, paperless methods were brought into general use by the Court for the internal transmission of documents of a procedural nature. Replacing the paper-based system with an entirely electronic one based on existing applications, the 'electronic transmission sheets' have enabled the functioning of the Court to be modernised, while reducing the time needed for the adoption of procedural decisions.

The assistance provided by the Registry also involves active participation both in the preparation and implementation of decisions adopted at the general meeting of the Court and in the hearings organised by the Court, the Registry having the task, inter alia, of drawing up the minutes of those hearings, which form part of the original file of the cases.

Finally, the Registry is called upon to provide assistance for the work of various committees, in particular the Court's Statute and Rules of Procedure Committee. This committee met a number of times in the past year and its work led to the adoption of several important instruments and documents during the year.

First, one should note the discussions connected with the reform of the judicial structure of the European Union, which led to the adoption on 6 July 2016 of Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants. [1]

Next, in the area of security, it is appropriate to note the work carried out in order to supplement the mechanism established by the General Court to ensure appropriate protection of information or material submitted to it that pertains to the security of the European Union or of its Member States or to the conduct of their international relations. In parallel with the amendment of Article 105 of the Rules of Procedure of the General Court, a new Article 190a was inserted in the Rules of Procedure of the Court of Justice for the purpose of ensuring, in the event of an appeal being brought against a decision of the General Court, a level of protection equivalent to that guaranteed by the General Court. Those provisions were supplemented by the adoption, both by the Court of Justice and by the General Court, of decisions implementing Articles 105 and 190a, which specify the nature and the scope of the measures envisaged in order to achieve that result. [2] As provided by those decisions, they both entered into force on the day following their publication in the *Official Journal of the European Union*, that is to say, on 25 December 2016.

Finally, mention will be made of the adoption by the Court of a new version of its 'Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings'. Those recommendations — which were published, in all the official languages, in the *Official Journal of the European*

1 | This regulation was published in the *Official Journal of the European Union* L 200 of 26 July 2016, p. 137.

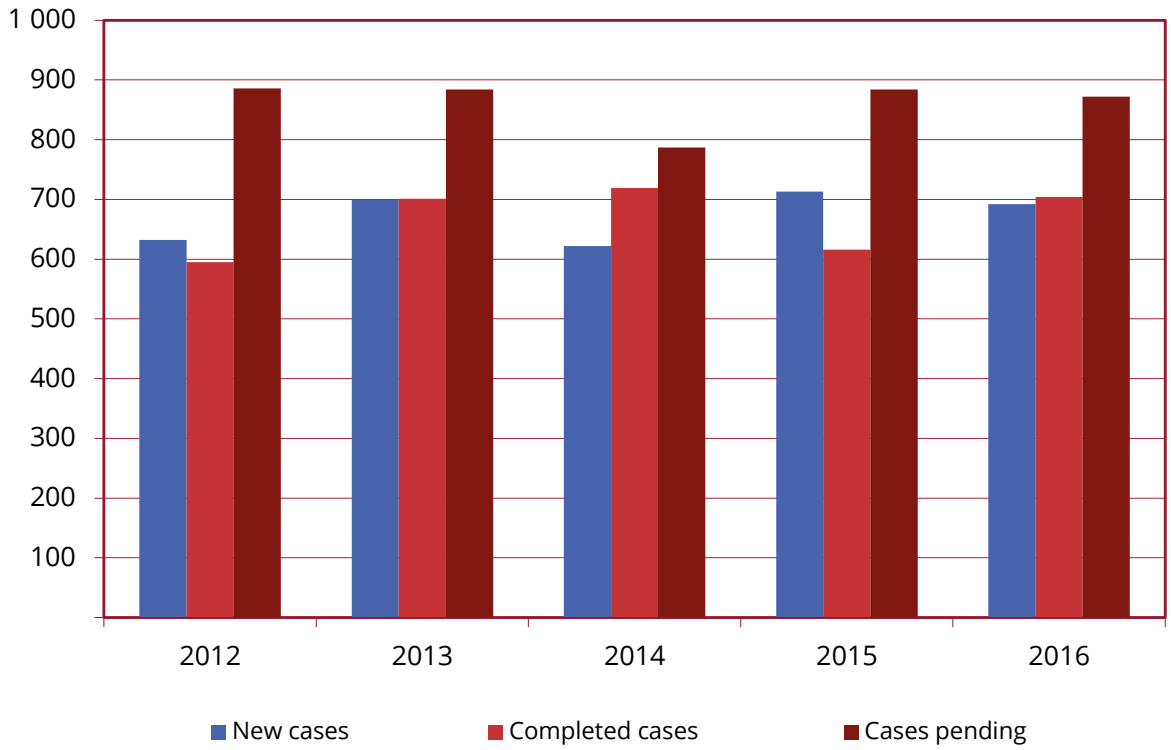
2 | Those articles and decisions were published, respectively, in the *Official Journal of the European Union*, L 217 of 12 August 2016, pp. 69 and 72, and L 355 of 24 December 2016, pp. 5 and 18.

Union C 439 of 25 November 2016 — constitute an important instrument for the dialogue engaged in by the Court with the courts and tribunals of the Member States. The recommendations contain a reminder of the fundamental characteristics of the preliminary ruling procedure and valuable information relating to the subject matter and scope of a request for a preliminary ruling and to its form and content. For the first time in the history of the Court, a very practical annex also recapitulates for national courts and tribunals all the matters to be taken into account when they submit a request for a preliminary ruling to the Court.

D | STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE COURT OF JUSTICE

I. GENERAL ACTIVITY OF THE COURT OF JUSTICE

1. NEW CASES, COMPLETED CASES, CASES PENDING (2012–16) [1]

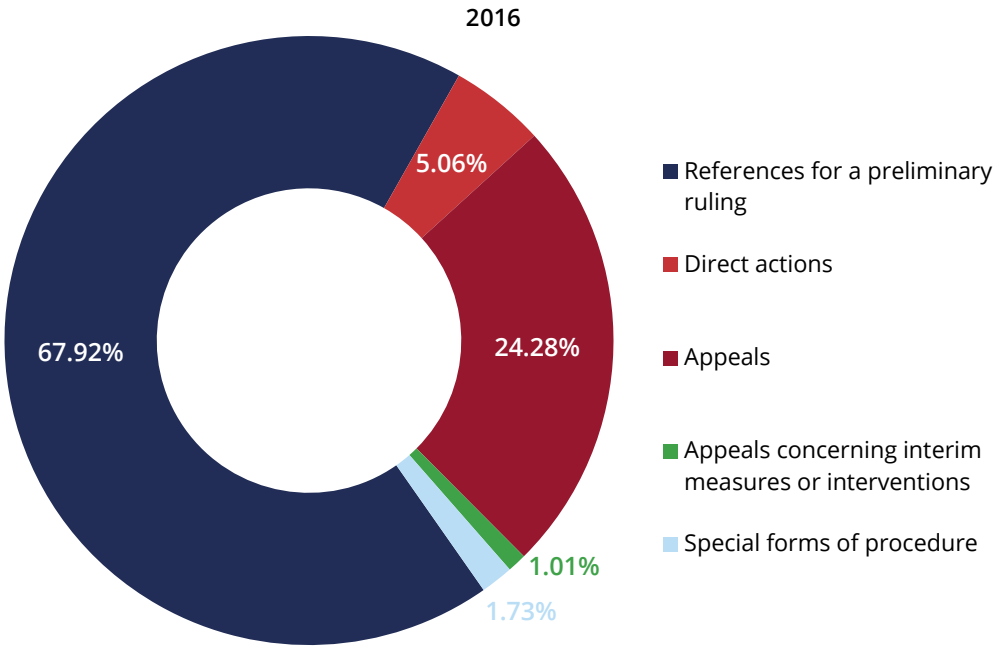


	2012	2013	2014	2015	2016
New cases	632	699	622	713	692
Completed cases	595	701	719	616	704
Cases pending	886	884	787	884	872

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

II. NEW CASES

2. NATURE OF PROCEEDINGS (2012–16) [1]



	2012	2013	2014	2015	2016
References for a preliminary ruling	404	450	428	436	470
Direct actions	73	72	74	48	35
Appeals	136	161	111	206	168
Appeals concerning interim measures or interventions	3	5		9	7
Requests for an opinion	1	2	1	3	
Special forms of procedure [2]	15	9	8	11	12
Total	**632**	**699**	**622**	**713**	**692**
Applications for interim measures		1	3	2	3

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

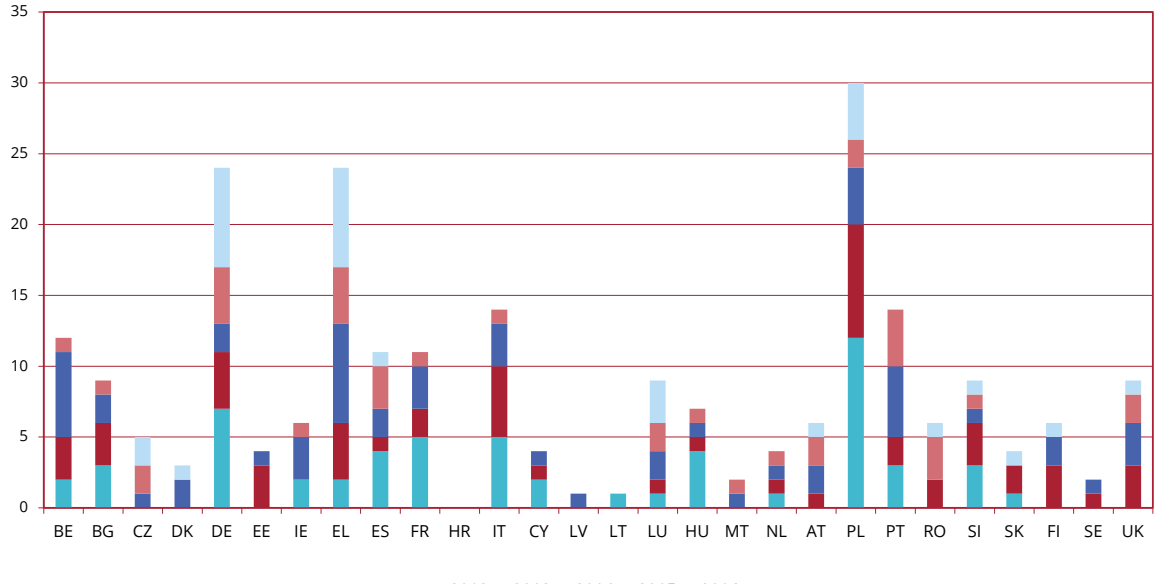
2 | The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

3. SUBJECT MATTER OF THE ACTION (2016)[1]

	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Total	Special forms of procedure
Access to documents			3	3	6	
Agriculture	14		12	1	27	
Approximation of laws	32	2			34	
Area of freedom, security and justice	76				76	
Citizenship of the Union	6				6	
Commercial policy	6		14		20	
Common fisheries policy	2		1		3	
Common foreign and security policy			7		7	
Company law	7				7	
Competition	12		23		35	
Consumer protection	21		2		23	
Customs union and Common Customs Tariff	13				13	
Economic and monetary policy			1		1	
Energy	2		1		3	
Environment	18	11		1	30	
External action by the European Union	3		1		4	
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	2		1		3	
Free movement of capital	4				4	
Free movement of goods	3				3	
Freedom of establishment	15	1			16	
Freedom of movement for persons	27	1			28	
Freedom to provide services	15				15	
Industrial policy	3				3	
Intellectual and industrial property	18		48		66	
Law governing the institutions	2	3	15	1	21	1
Principles of EU law	9	1	1		11	
Public health			1		1	
Public procurement	15	1	3		19	
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)			2		2	
Research and technological development and space			3		3	
Social policy	33				33	
Social security for migrant workers	10				10	
State aid	10	2	26	1	39	
Taxation	68	3			71	
Transport	23	9			32	
EC Treaty/TFEU	**469**	**34**	**165**	**7**	**675**	**1**
Privileges and immunities	1				1	1
Procedure			3		3	10
Staff Regulations		1			1	
Others	**1**	**1**	**3**		**5**	**11**
OVERALL TOTAL	**470**	**35**	**168**	**7**	**680**	**12**

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

4. ACTIONS FOR FAILURE OF A MEMBER STATE TO FULFIL ITS OBLIGATIONS (2012–16) [1]

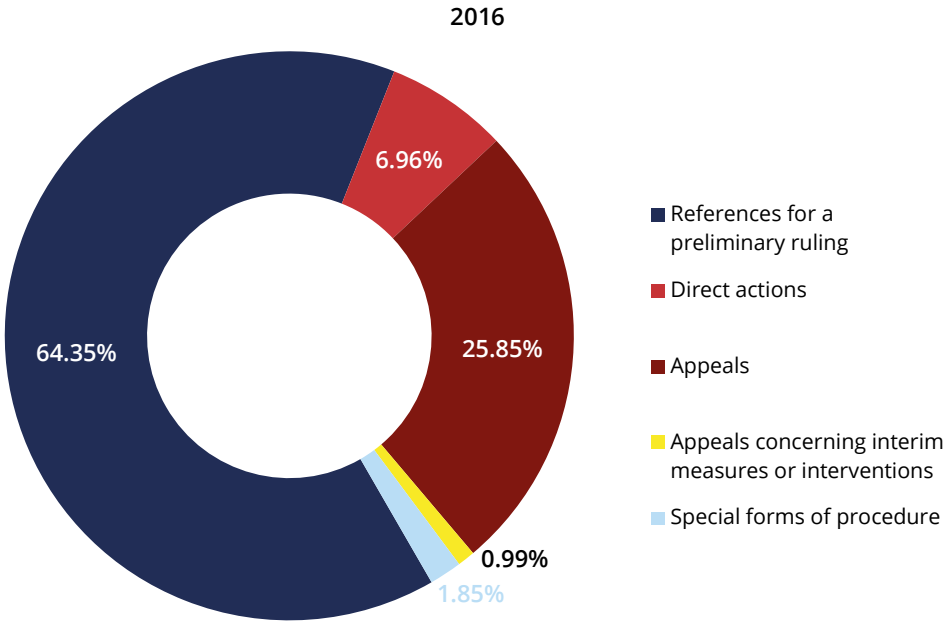


	2012	2013	2014	2015	2016
Belgium	2	3	6	1	
Bulgaria	3	3	2	1	
Czech Republic			1	2	2
Denmark			2		1
Germany	7	4	2	4	7
Estonia		3	1		
Ireland	2		3	1	
Greece	2	4	7	4	7
Spain	4	1	2	3	1
France	5	2	3	1	
Croatia					
Italy	5	5	3	1	
Cyprus	2	1	1		
Latvia			1		
Lithuania	1				
Luxembourg	1	1	2	2	3
Hungary	4	1	1	1	
Malta			1	1	
Netherlands	1	1	1	1	
Austria		1	2	2	1
Poland	12	8	4	2	4
Portugal	3	2	5	4	
Romania		2		3	1
Slovenia	3	3	1	1	1
Slovakia	1	2			1
Finland		3	2		1
Sweden		1	1		
United Kingdom		3	3	2	1
Total	58	54	57	37	31

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

III. COMPLETED CASES

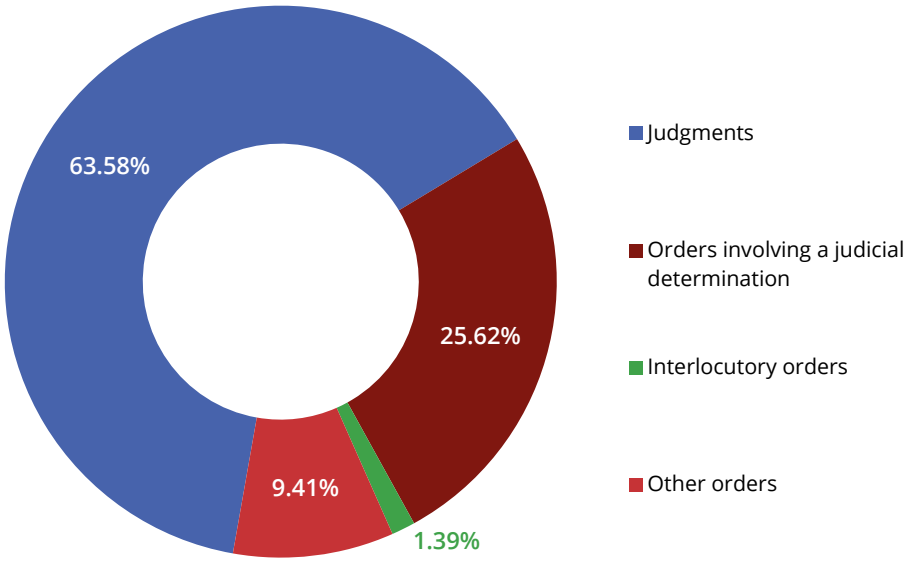
5. NATURE OF PROCEEDINGS (2012–16) [1]



	2012	2013	2014	2015	2016
References for a preliminary ruling	386	413	476	404	453
Direct actions	70	110	76	70	49
Appeals	117	155	157	127	182
Appeals concerning interim measures or interventions	12	5	1	7	7
Requests for an opinion		1	2	1	
Special forms of procedure	10	17	7	7	13
Total	**595**	**701**	**719**	**616**	**704**

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

6. JUDGMENTS, ORDERS, OPINIONS (2016) [1]



	Judgments	Orders involving a judicial determination [2]	Interlocutory orders [3]	Other orders [4]	Requests for an opinion	Total
References for a preliminary ruling	302	67		39		408
Direct actions	37	1		10		48
Appeals	73	87	4	9		173
Appeals concerning interim measures or interventions			5	2		7
Requests for an opinion						
Special forms of procedure		11		1		12
Total	**412**	**166**	**9**	**61**		**648**

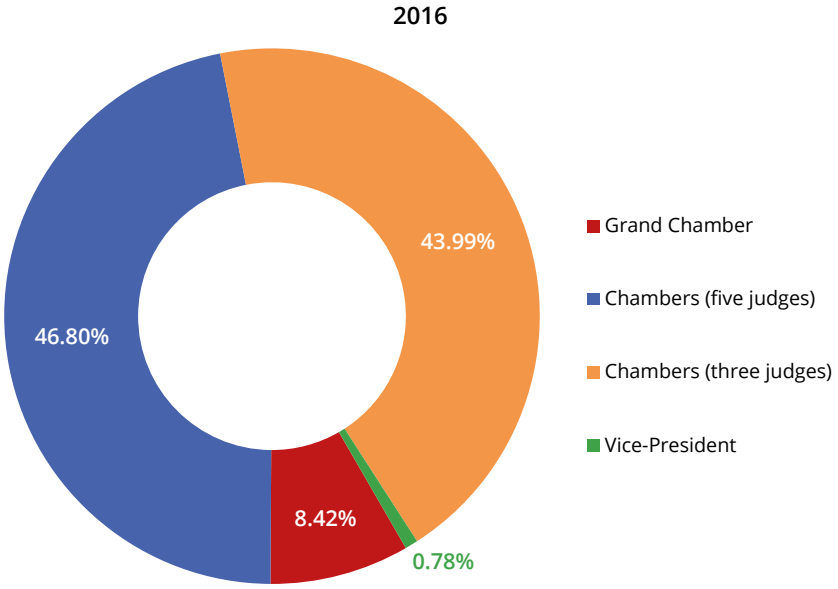
1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

3| Orders made following an application on the basis of Articles 278 TFEU and 279 TFEU (former Articles 242 EC and 243 EC), Article 280 TFEU (former Article 244 EC) or the corresponding provisions of the EAEC Treaty, or following an appeal against an order concerning interim measures or intervention.

4| Orders terminating the case by removal from the register, declaration that there is no need to give a decision or referral to the General Court.

7. BENCH HEARING ACTION (2012–16) [1]

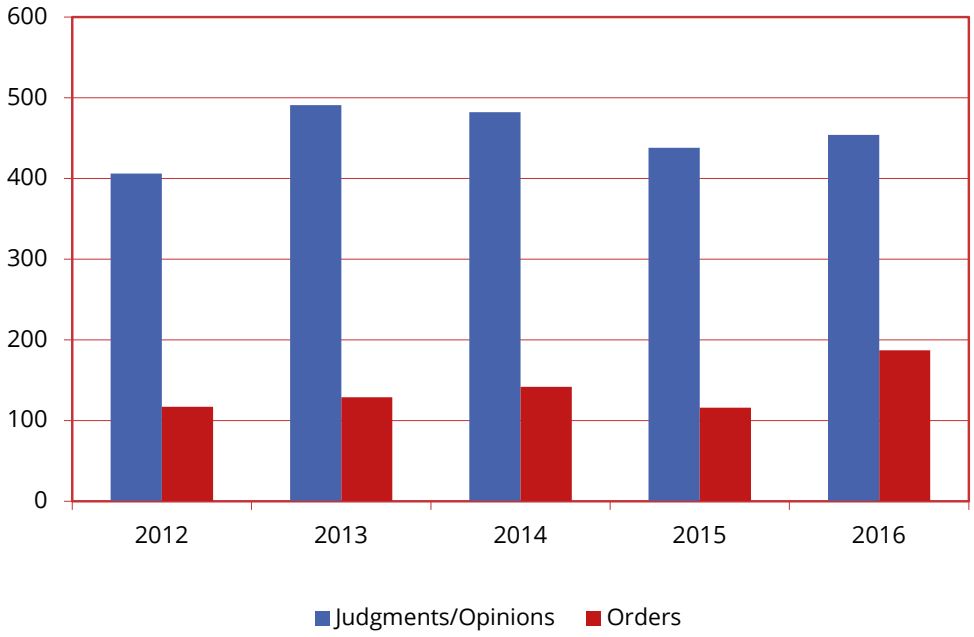


	2012			2013			2014			2015			2016		
	Judgments/ opinions	Orders [2]	Total	Judgments/ opinions	Orders [2]	Total	Judgments/ opinions	Orders [2]	Total	Judgments/ opinions	Orders [2]	Total	Judgments/ opinions	Orders [2]	Total
Full Court	1		1				1		1						
Grand Chamber	47		47	52		52	51	3	54	47		47	54		54
Chambers (five judges)	275	8	283	348	18	366	320	20	340	298	20	318	280	20	300
Chambers (three judges)	83	97	180	91	106	197	110	118	228	93	89	182	120	162	282
President		12	12												
Vice-President					5	5		1	1		7	7		5	5
Total	**406**	**117**	**523**	**491**	**129**	**620**	**482**	**142**	**624**	**438**	**116**	**554**	**454**	**187**	**641**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

8. CASES COMPLETED BY JUDGMENTS, BY OPINIONS OR BY ORDERS INVOLVING A JUDICIAL DETERMINATION (2012–16) [1] [2]



	2012	2013	2014	2015	2016
Judgments/opinions	406	491	482	438	454
Orders	117	129	142	116	187
Total	**523**	**620**	**624**	**554**	**641**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

9. CASES COMPLETED BY JUDGMENTS, BY OPINIONS OR BY ORDERS INVOLVING A JUDICIAL DETERMINATION — SUBJECT MATTER OF THE ACTION (2012–16) [1]

	2012	2013	2014	2015	2016
Access to documents	5	6	4	3	4
Accession of new States	2				1
Agriculture	22	33	29	20	13
Approximation of laws	12	24	25	24	16
Area of freedom, security and justice	37	46	51	49	51
Citizenship of the Union	8	12	9	4	8
Commercial policy	8	6	7	4	14
Common fisheries policy			5	3	1
Common foreign and security policy	9	12	3	6	11
Company law	1	4	3	1	1
Competition	30	42	28	23	30
Consumer protection [3]	9	19	20	29	33
Customs union and Common Customs Tariff [4]	19	11	21	20	27
Economic and monetary policy	3		1	3	10
Economic, social and territorial cohesion	3	6	8	4	2
Education, vocational training, youth and sport	1		1	1	
Employment				1	
Energy		1	3	2	
Environment [3]	27	35	30	27	53
Environment and consumers [3]	1				
External action by the European Union	5	4	6	1	5
Financial provisions (budget, financial framework, own resources, combating fraud and so forth) [2]	3	2	5	1	2
Free movement of capital	21	8	6	8	7
Free movement of goods	7	1	10	9	5
Freedom of establishment	6	13	9	17	27
Freedom of movement for persons	18	15	20	13	12

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1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| The headings 'Budget of the Communities' and 'Community own resources' have been combined under the heading 'Financial provisions' for cases brought after 1 December 2009.

3| The heading 'Environment and consumers' has been divided into two separate headings for cases brought after 1 December 2009.

4| The headings 'Common Customs Tariff' and 'Customs union' have been combined under a single heading for cases brought after 1 December 2009.

Freedom to provide services	29	16	11	17	14
Industrial policy	8	15	3	9	10
Intellectual and industrial property	46	43	69	51	80
Judicial cooperation in civil matters					1
Law governing the institutions	27	31	18	27	20
Principles of EU law	7	17	23	12	13
Public health	1	2	3	5	4
Public procurement	12	12	13	14	31
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)			5	1	1
Research and technological development and space	1	1		1	3
Social policy	28	27	51	30	23
Social security for migrant workers	8	12	6	14	5
State aid	10	34	41	26	26
Taxation	64	74	52	55	41
Tourism	1				
Trans-European networks					1
Transport	14	17	18	9	20
EC Treaty/TFEU	**513**	**601**	**617**	**544**	**626**
Euratom Treaty				1	
Privileges and immunities	3			2	1
Procedure	7	14	6	4	14
Staff Regulations		5	1	3	
Others	**10**	**19**	**7**	**9**	**15**
OVERALL TOTAL	**523**	**620**	**624**	**554**	**641**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| The headings 'Budget of the Communities' and 'Community own resources' have been combined under the heading 'Financial provisions' for cases brought after 1 December 2009.

3| The heading 'Environment and consumers' has been divided into two separate headings for cases brought after 1 December 2009.

4| The headings 'Common Customs Tariff' and 'Customs union' have been combined under a single heading for cases brought after 1 December 2009.

10. CASES COMPLETED BY JUDGMENTS, BY OPINIONS OR BY ORDERS INVOLVING A JUDICIAL DETERMINATION — SUBJECT MATTER OF THE ACTION (2016) [1]

	Judgments/ Opinions	Orders [2]	Total
Access to documents	2	2	4
Accession of new States	1		1
Agriculture	11	2	13
Approximation of laws	15	1	16
Area of freedom, security and justice	45	6	51
Citizenship of the Union	7	1	8
Commercial policy	10	4	14
Common fisheries policy	1		1
Common foreign and security policy	11		11
Company law	1		1
Competition	23	7	30
Consumer protection [4]	22	11	33
Customs union and Common Customs Tariff [5]	25	2	27
Economic and monetary policy	10		10
Economic, social and territorial cohesion	2		2
Environment [4]	42	11	53
External action by the European Union	5		5
Financial provisions (budget, financial framework, own resources, combating fraud and so forth) [3]	2		2
Free movement of capital	6	1	7
Free movement of goods	5		5
Freedom of establishment	5	22	27
Freedom of movement for persons	11	1	12
Freedom to provide services	11	3	14

>>>

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

3| The headings 'Budget of the Communities' and 'Community own resources' have been combined under the heading 'Financial provisions' for cases brought after 1 December 2009.

4| The heading 'Environment and consumers' has been divided into two separate headings for cases brought after 1 December 2009.

5| The headings 'Common Customs Tariff' and 'Customs union' have been combined under a single heading for cases brought after 1 December 2009.

Industrial policy	10		10
Intellectual and industrial property	29	51	80
Judicial cooperation in civil matters	1		1
Law governing the institutions	11	9	20
Principles of EU law	10	3	13
Public health	2	2	4
Public procurement	20	11	31
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)	1		1
Research and technological development and space	1	2	3
Social policy	19	4	23
Social security for migrant workers	5		5
State aid	19	7	26
Taxation	37	4	41
Trans-European networks	1		1
Transport	14	6	20
EC Treaty/TFEU	**453**	**173**	**626**
Privileges and immunities	1		1
Procedure		14	14
Others	**1**	**14**	**15**
OVERALL TOTAL	**454**	**187**	**641**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

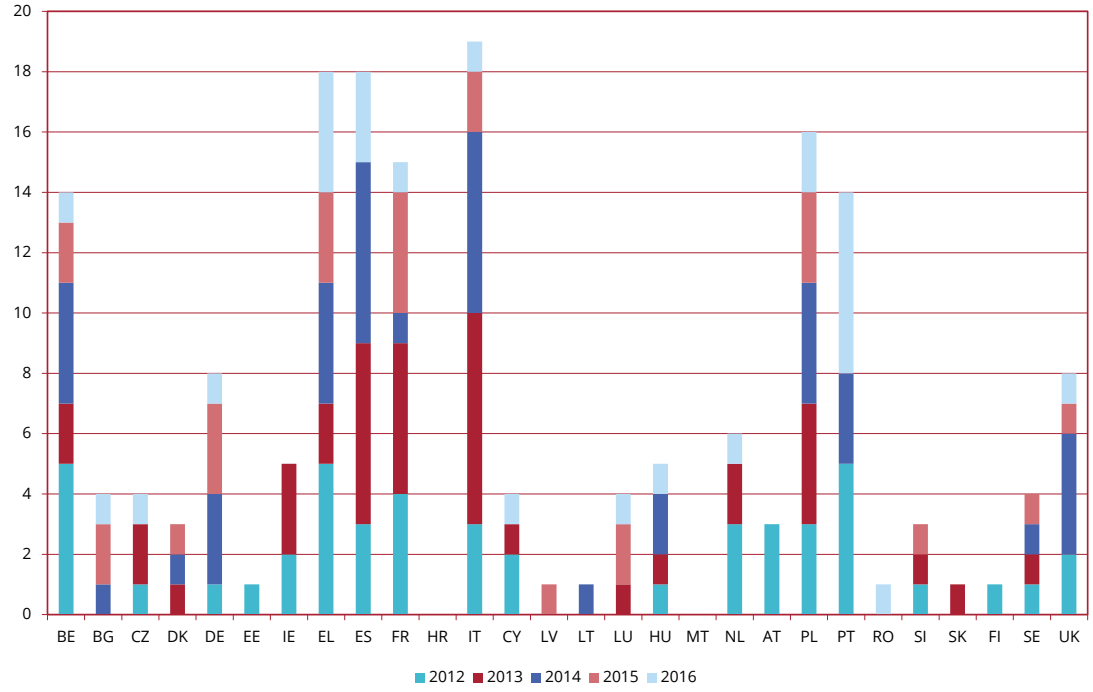
2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

3| The headings 'Budget of the Communities' and 'Community own resources' have been combined under the heading 'Financial provisions' for cases brought after 1 December 2009.

4| The heading 'Environment and consumers' has been divided into two separate headings for cases brought after 1 December 2009.

5| The headings 'Common Customs Tariff' and 'Customs union' have been combined under a single heading for cases brought after 1 December 2009.

11. JUDGMENTS CONCERNING FAILURE OF A MEMBER STATE TO FULFIL ITS OBLIGATIONS: OUTCOME (2012–16) [1]

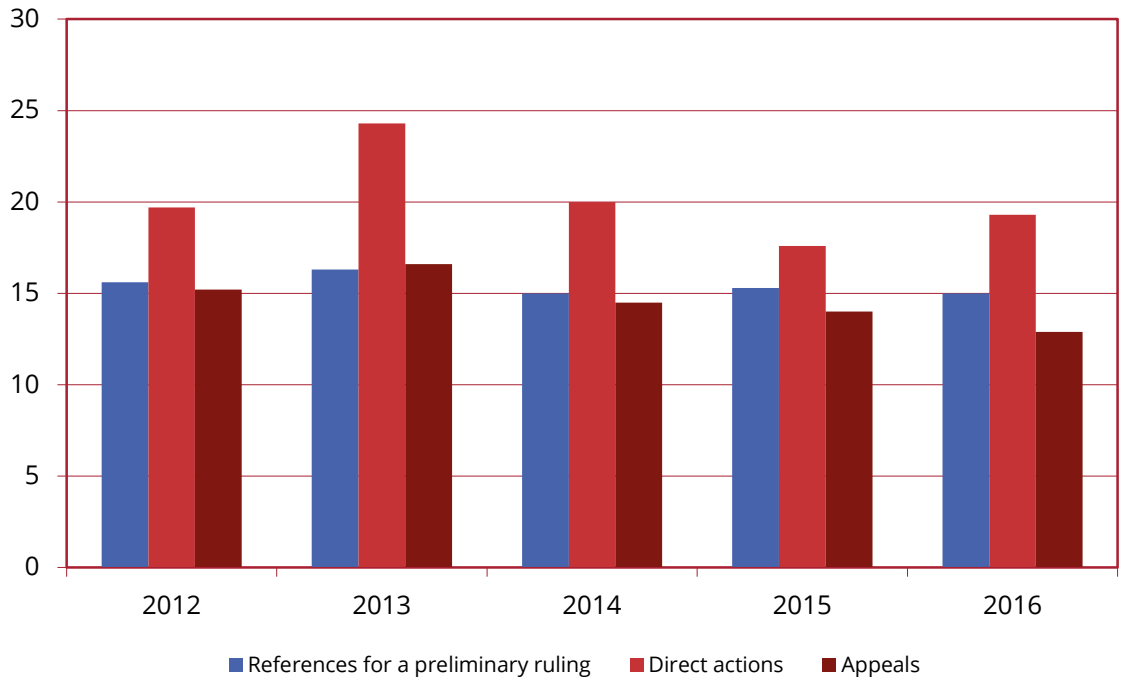


	2012		2013		2014		2015		2016	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	5	**1**	2	**1**	4		2		1	
Bulgaria					1	**1**	2		1	
Czech Republic	1		2	**2**					1	
Denmark			1	**1**	1		1			
Germany	1	**2**		**2**	3	**1**	3		1	
Estonia	1									
Ireland	2		3	**1**				**1**		
Greece	5		2	**1**	4		3		4	
Spain	3		6		6				3	
France	4		5	**3**	1		4		1	
Croatia										
Italy	3		7	**1**	6		2		1	
Cyprus	2		1						1	
Latvia							1			
Lithuania					1					
Luxembourg			1	**1**			2		1	
Hungary	1		1		2				1	
Malta										**1**
Netherlands	3	**1**	2	**2**		**1**			1	**1**
Austria	3			**1**						**1**
Poland	3		4	**2**	4		3	**1**	2	
Portugal	5			**1**	3				6	
Romania									1	
Slovenia	1		1				1			
Slovakia		**1**	1					**2**		
Finland	1			**2**						
Sweden	1		1	**1**	1		1			
United Kingdom	2			**1**	4		1	**1**	1	**1**
Total	**47**	**5**	**40**	**23**	**41**	**3**	**26**	**5**	**27**	**4**

1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

12. DURATION OF PROCEEDINGS IN MONTHS (2012–16) [1]

(JUDGMENTS AND ORDERS INVOLVING A JUDICIAL DETERMINATION)

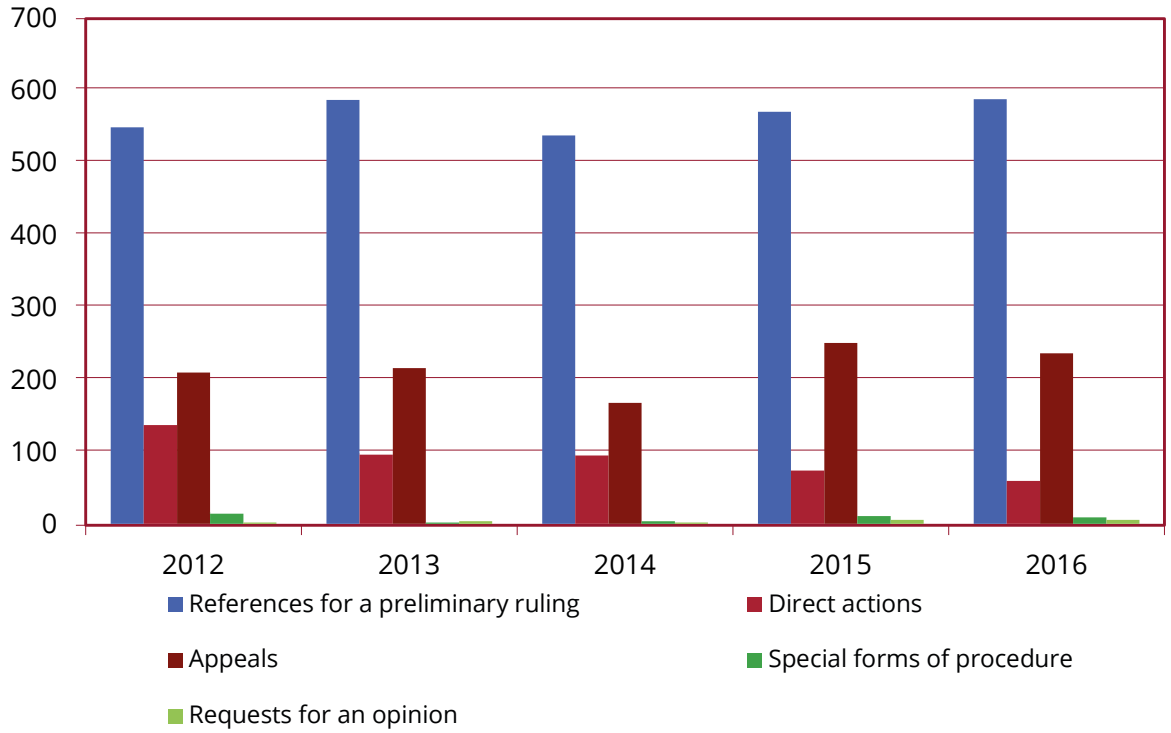


	2012	2013	2014	2015	2016
References for a preliminary ruling	15.6	16.3	15.0	15.3	15.0
Urgent preliminary ruling procedure	1.9	2.2	2.2	1.9	2.7
Direct actions	19.7	24.3	20.0	17.6	19.3
Appeals	15.2	16.6	14.5	14.0	12.9

1| The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions; special forms of procedure (namely legal aid, taxation of costs, rectification, application to set aside a judgment delivered by default, third-party proceedings, interpretation, revision, examination of a proposal by the First Advocate General to review a decision of the General Court, attachment procedure and cases concerning immunity); cases terminated by an order removing the case from the register, declaring that there is no need to give a decision or referring the case to the General Court; proceedings for interim measures and appeals concerning interim measures and interventions.

IV. CASES PENDING AS AT 31 DECEMBER

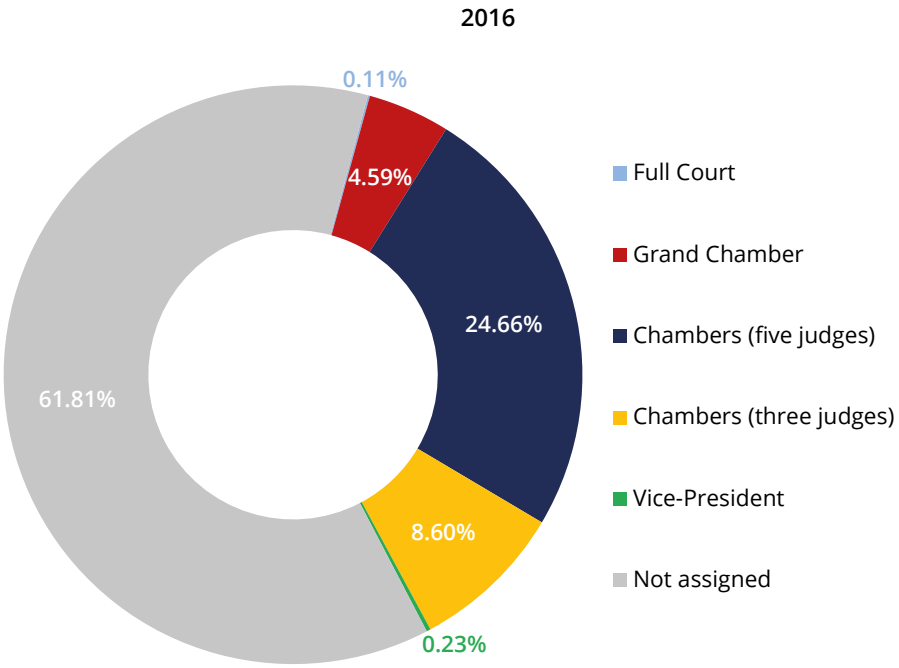
13. NATURE OF PROCEEDINGS (2012–16) [1]



	2012	2013	2014	2015	2016
References for a preliminary ruling	537	574	526	558	575
Direct actions	134	96	94	72	58
Appeals	205	211	164	245	231
Special forms of procedure	9	1	2	6	5
Requests for an opinion	1	2	1	3	3
Total	**886**	**884**	**787**	**884**	**872**

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

14. BENCH HEARING ACTION (2012–16) [1]



	2012	2013	2014	2015	2016
Full Court					1
Grand Chamber	44	37	33	38	40
Chambers (five judges)	239	190	176	203	215
Chambers (three judges)	42	51	44	54	75
Vice-President	1	1		2	2
Not assigned	560	605	534	587	539
Total	**886**	**884**	**787**	**884**	**872**

1 | The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

V. MISCELLANEOUS

15. EXPEDITED PROCEDURES (2012–16) [1]

	2012		2013		2014		2015		2016	
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted
Direct actions	1			1						
References for a preliminary ruling	1	5		16	2	10	1	14	2	13
Appeals		1							1	
Total	**2**	**6**		**17**	**2**	**10**	**1**	**14**	**3**	**13**

1 | Cases in which a decision or order granting or refusing a request for the expedited procedure to be applied was made during the year concerned.

16. MISCELLANEOUS — URGENT PRELIMINARY RULING PROCEDURE (2012–16) [1]

	2012		2013		2014		2015		2016	
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted
Area of freedom, security and justice	4	1	2	3	4	1	5	5	8	4
Approximation of laws						1				
Total	**4**	**1**	**2**	**3**	**4**	**2**	**5**	**5**	**8**	**4**

1 | Cases in which the decision was taken, during the year concerned, to grant or refuse a request for the urgent procedure to be applied.

17. PROCEEDINGS FOR INTERIM MEASURES (2016) [1]

	New applications for interim measures	Appeals concerning interim measures or interventions	Outcome		
			Not granted	Granted	Removed from the register or no need to give a decision
Access to documents		3	1	1	
Agriculture	1	1	2		
State aid		1	1		
Competition			2	1	
Law governing the institutions		1			1
Environment	1	1	2		
Research and technological development and space	1				1
OVERALL TOTAL	**3**	**7**	**8**	**2**	**2**

1 | The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

VI. GENERAL TREND IN THE WORK OF THE COURT (1952–2016)

18. NEW CASES AND JUDGMENTS

Year	New cases [1]							Judgments/ opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1953		4				4		
1954		10				10		2
1955		9				9	2	4
1956		11				11	2	6
1957		19				19	2	4
1958		43				43		10
1959		46			1	47	5	13
1960		22			1	23	2	18
1961	1	24			1	26	1	11
1962	5	30				35	2	20
1963	6	99				105	7	17
1964	6	49				55	4	31
1965	7	55				62	4	52
1966	1	30				31	2	24
1967	23	14				37		24
1968	9	24				33	1	27
1969	17	60				77	2	30
1970	32	47				79		64
1971	37	59				96	1	60
1972	40	42				82	2	61
1973	61	131				192	6	80
1974	39	63				102	8	63
1975	69	61			1	131	5	78
1976	75	51			1	127	6	88
1977	84	74				158	6	100
1978	123	146			1	270	7	97
1979	106	1 218				1 324	6	138
1980	99	180				279	14	132
1981	108	214				322	17	128
1982	129	217				346	16	185
1983	98	199				297	11	151
1984	129	183				312	17	165
1985	139	294				433	23	211
1986	91	238				329	23	174
								>>>

1| Gross figures; special forms of procedure are not included.

2| Net figures.

Year	New cases [1]							Judgments/ opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1987	144	251				395	21	208
1988	179	193				372	17	238
1989	139	244				383	19	188
1990	141	221	15	1		378	12	193
1991	186	140	13	1	2	342	9	204
1992	162	251	24	1	2	440	5	210
1993	204	265	17			486	13	203
1994	203	125	12	1	3	344	4	188
1995	251	109	46	2		408	3	172
1996	256	132	25	3		416	4	193
1997	239	169	30	5		443	1	242
1998	264	147	66	4		481	2	254
1999	255	214	68	4		541	4	235
2000	224	197	66	13	2	502	4	273
2001	237	187	72	7		503	6	244
2002	216	204	46	4		470	1	269
2003	210	277	63	5	1	556	7	308
2004	249	219	52	6	1	527	3	375
2005	221	179	66	1		467	2	362
2006	251	201	80	3		535	1	351
2007	265	221	79	8		573	3	379
2008	288	210	77	8	1	584	3	333
2009	302	143	105	2	1	553	1	376
2010	385	136	97	6		624	3	370
2011	423	81	162	13		679	3	370
2012	404	73	136	3	1	617		357
2013	450	72	161	5	2	690	1	434
2014	428	74	111		1	614	3	416
2015	436	48	206	9	3	702	2	399
2016	470	35	168	7		680	3	412
Total	**9 616**	**8 984**	**2 063**	**122**	**26**	**20 811**	**364**	**11 024**

1| Gross figures; special forms of procedure are not included.

2| Net figures.

19. NEW REFERENCES FOR A PRELIMINARY RULING (BY MEMBER STATE PER YEAR)

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1961																			1											**1**
1962																			5											**5**
1963																1			5											**6**
1964												2							4											**6**
1965					4					2									1											**7**
1966																			1											**1**
1967	5				11					3						1			3											**23**
1968	1				4					1		1							2											**9**
1969	4				11					1						1														**17**
1970	4				21					2		2							3											**32**
1971	1				18					6		5				1			6											**37**
1972	5				20					1		4							10											**40**
1973	8				37					4		5				1			6											**61**
1974	5				15					6		5							7									1		**39**
1975	7			1	26					15		14				1			4									1		**69**
1976	11				28		1			8		12							14									1		**75**
1977	16			1	30		2			14		7							9									5		**84**
1978	7			3	46		1			12		11							38									5		**123**
1979	13			1	33		2			18		19				1			11									8		**106**
1980	14			2	24		3			14		19							17									6		**99**
1981	12			1	41					17		11				4			17									5		**108**
1982	10			1	36					39		18							21									4		**129**
1983	9			4	36		2			15		7							19									6		**98**
1984	13			2	38		1			34		10							22									9		**129**
1985	13				40		2			45		11				6			14									8		**139**
1986	13			4	18		4	2	1	19		5				1			16									8		**91**
																														>>>

1| Case C-265/00, ***Campina Melkunie*** (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09, ***Miles and Others*** (Complaints Board of the European Schools).
Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1987	15			5	32		2	17	1	36		5				3			19									9		**144**
1988	30			4	34				1	38		28				2			26									16		**179**
1989	13			2	47		1	2	2	28		10				1			18			1						14		**139**
1990	17			5	34		4	2	6	21		25				4			9			2						12		**141**
1991	19			2	54		2	3	5	29		36				2			17			3						14		**186**
1992	16			3	62			1	5	15		22				1			18			1						18		**162**
1993	22			7	57		1	5	7	22		24				1			43			3						12		**204**
1994	19			4	44		2		13	36		46				1			13			1						24		**203**
1995	14			8	51		3	10	10	43		58				2			19	2		5					6	20		**251**
1996	30			4	66			4	6	24		70				2			10	6		6				3	4	21		**256**
1997	19			7	46		1	2	9	10		50				3			24	35		2				6	7	18		**239**
1998	12			7	49		3	5	55	16		39				2			21	16		7				2	6	24		**264**
1999	13			3	49		2	3	4	17		43				4			23	56		7				4	5	22		**255**
2000	15			3	47		2	3	5	12		50							12	31		8				5	4	26	1	**224**
2001	10			5	53		1	4	4	15		40				2			14	57		4				3	4	21		**237**
2002	18			8	59			7	3	8		37				4			12	31		3				7	5	14		**216**
2003	18			3	43		2	4	8	9		45				4			28	15		1				4	4	22		**210**
2004	24			4	50		1	18	8	21		48				1	2		28	12		1				4	5	22		**249**
2005	21		1	4	51		2	11	10	17		18				2	3		36	15	1	2				4	11	12		**221**
2006	17		3	3	77		1	14	17	24		34			1	1	4		20	12	2	3			1	5	2	10		**251**
2007	22	1	2	5	59	2	2	8	14	26		43			1		2		19	20	7	3	1		1	5	6	16		**265**
2008	24		1	6	71	2	1	9	17	12		39	1	3	3	4	6		34	25	4	1				4	7	14		**288**
2009	35	8	5	3	59	2		11	11	28		29	1	4	3		10	1	24	15	10	3	1	2	1	2	5	28	1	**302**
2010	37	9	3	10	71		4	6	22	33		49		3	2	9	6		24	15	8	10	17	1	5	6	6	29		**385**
2011	34	22	5	6	83	1	7	9	27	31		44		10	1	2	13		22	24	11	11	14	1	3	12	4	26		**423**
2012	28	15	7	8	68	5	6	1	16	15		65		5	2	8	18	1	44	23	6	14	13		9	3	8	16		**404**
2013	26	10	7	6	97	3	4	5	26	24		62	3	5	10		20		46	19	11	14	17	1	4	4	12	14		**450**
2014	23	13	6	10	87		5	4	41	20	1	52	2	7	6		23		30	18	14	8	28	4	3	8	3	12		**428**
2015	32	5	8	7	79	2	8	2	36	25	5	47		9	8	7	14		40	23	15	8	18	5	5	4	7	16	1	**436**
2016	26	18	5	12	84	1	6	6	47	23	2	62		9	8	1	15	1	26	20	19	21	14	3	6	7	5	23		**470**
Total	**820**	**101**	**53**	**184**	**2 300**	**18**	**91**	**178**	**437**	**954**	**8**	**1 388**	**7**	**55**	**45**	**91**	**136**	**3**	**975**	**490**	**108**	**153**	**123**	**17**	**38**	**102**	**126**	**612**	**3**	**9 616**

1| Case C-265/00, ***Campina Melkunie*** (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09, ***Miles and Others*** (Complaints Board of the European Schools).
Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

20. NEW REFERENCES FOR A PRELIMINARY RULING (BY MEMBER STATE AND BY COURT OR TRIBUNAL)

			Total
Belgium	Cour constitutionnelle	32	
	Cour de cassation	94	
	Conseil d'État	80	
	Other courts or tribunals	614	**820**
Bulgaria	Върховен касационен съд	2	
	Върховен административен съд	17	
	Other courts or tribunals	82	**101**
Czech Republic	Ústavní soud		
	Nejvyšší soud	8	
	Nejvyšší správní soud	26	
	Other courts or tribunals	19	**53**
Denmark	Højesteret	36	
	Other courts or tribunals	148	**184**
Germany	Bundesverfassungsgericht	1	
	Bundesgerichtshof	213	
	Bundesverwaltungsgericht	120	
	Bundesfinanzhof	313	
	Bundesarbeitsgericht	37	
	Bundessozialgericht	76	
	Other courts or tribunals	1 540	**2 300**
Estonia	Riigikohus	7	
	Other courts or tribunals	11	**18**
Ireland	Supreme Court	30	
	High Court	28	
	Other courts or tribunals	33	**91**
Greece	Άρειος Πάγος	11	
	Συμβούλιο της Επικρατείας	57	
	Other courts or tribunals	110	**178**
Spain	Tribunal Constitucional	1	
	Tribunal Supremo	71	
	Other courts or tribunals	365	**437**
France	Conseil constitutionnel	1	
	Cour de cassation	122	
	Conseil d'État	110	
	Other courts or tribunals	721	**954**

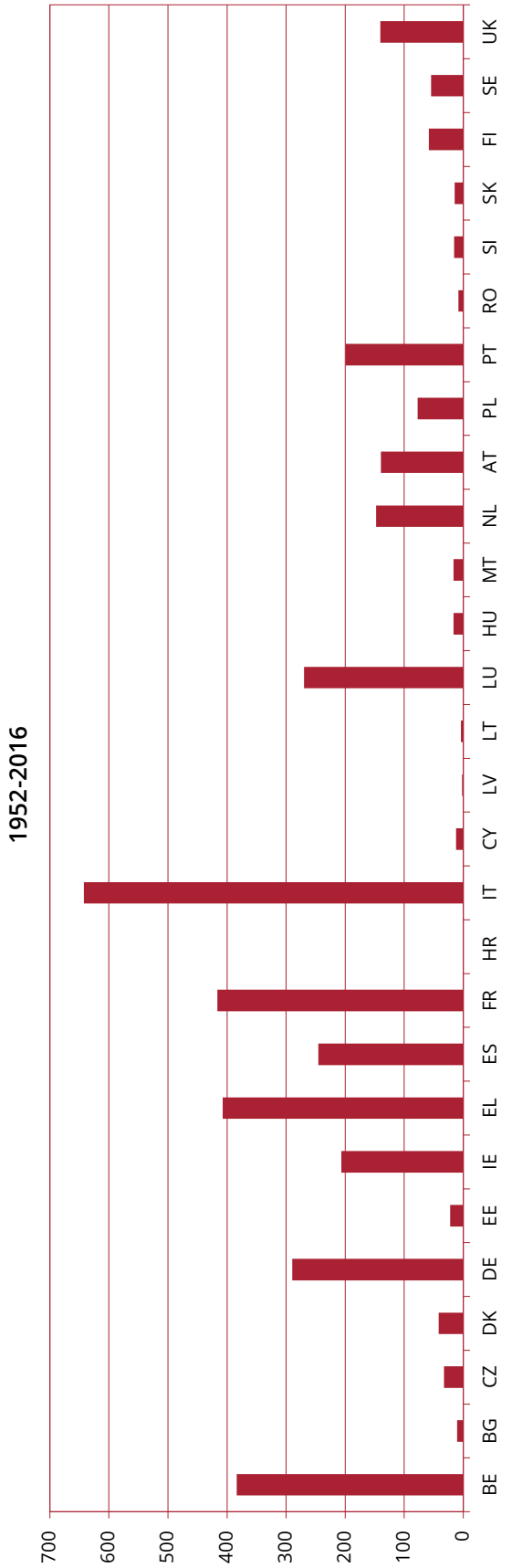
Croatia	Ustavni sud		
	Vrhovni sud		
	Visoki upravni sud		
	Visoki prekršajni sud		
	Other courts or tribunals	8	**8**
Italy	Corte Costituzionale	2	
	Corte suprema di Cassazione	141	
	Consiglio di Stato	134	
	Other courts or tribunals	1 111	**1 388**
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	3	**7**
Latvia	Augstākā tiesa	21	
	Satversmes tiesa		
	Other courts or tribunals	34	**55**
Lithuania	Konstitucinis Teismas	1	
	Aukščiausiasis Teismas	16	
	Vyriausiasis administracinis teismas	17	
	Other courts or tribunals	11	**45**
Luxembourg	Cour constitutionnelle	1	
	Cour de cassation	27	
	Cour administrative	28	
	Other courts or tribunals	35	**91**
Hungary	Kúria	23	
	Fővárosi Ítélőtábla	6	
	Szegedi Ítélötáblá	2	
	Other courts or tribunals	105	**136**
Malta	Constitutional Court		
	Qorti ta' l- Appel		
	Other courts or tribunals	3	**3**
Netherlands	Hoge Raad	278	
	Raad van State	109	
	Centrale Raad van Beroep	63	
	College van Beroep voor het Bedrijfsleven	156	
	Tariefcommissie	35	
	Other courts or tribunals	334	**975**
Austria	Verfassungsgerichtshof	5	
	Oberster Gerichtshof	115	
	Verwaltungsgerichtshof	96	
	Other courts or tribunals	274	**490**

Poland	Trybunał Konstytucyjny	1	
	Sąd Najwyższy	15	
	Naczelny Sąd Administracyjny	40	
	Other courts or tribunals	52	**108**
Portugal	Supremo Tribunal de Justiça	8	
	Supremo Tribunal Administrativo	59	
	Other courts or tribunals	86	**153**
Romania	Înalta Curte de Casație și Justiție	11	
	Curtea de Apel	64	
	Other courts or tribunals	48	**123**
Slovenia	Ustavno sodišče	1	
	Vrhovno sodišče	11	
	Other courts or tribunals	5	**17**
Slovakia	Ústavný Súd		
	Najvyšší súd	15	
	Other courts or tribunals	23	**38**
Finland	Korkein oikeus	19	
	Korkein hallinto-oikeus	50	
	Työtuomioistuin	3	
	Other courts or tribunals	30	**102**
Sweden	Högsta Domstolen	21	
	Högsta förvaltningsdomstolen	8	
	Marknadsdomstolen	5	
	Arbetsdomstolen	4	
	Other courts or tribunals	88	**126**
United Kingdom	House of Lords	40	
	Supreme Court	10	
	Court of Appeal	83	
	Other courts or tribunals	479	**612**
Others	Cour de justice Benelux/Benelux Gerechtshof [1]	2	
	Complaints Board of the European Schools [2]	1	**3**
Total			**9 616**

1| Case C-265/00, ***Campina Melkunie***.
Case C-169/15, ***Montis Design***.

2| Case C-196/09, ***Miles and Others.***

21. ACTIONS FOR FAILURE TO FULFIL OBLIGATIONS BROUGHT AGAINST THE MEMBER STATES



BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Total
383	9	32	41	289	22	206	407	245	416	0	642	12	1	3	269	16	16	147	139	77	199	7	15	14	58	54	140	**3 859**

VII. ACTIVITY OF THE REGISTRY OF THE COURT OF JUSTICE (2015–16)

Type of intervention	2015	2016
Number of documents entered in the register of the Registry	89 328	93 215
Percentage of procedural documents lodged by e-Curia	69%	75%
Number of hearings convened and organised	256	270
Number of sittings for the delivery of Opinions convened and organised	239	319
Number of judgments, opinions and orders terminating the proceedings served on the parties	570	645
Number of minutes of hearings drawn up (oral submissions, Opinions and judgments)	894	1 001
Number of notices in the OJ concerning new cases	639	660
Number of notices in the OJ concerning completed cases	546	522

E | COMPOSITION OF THE COURT OF JUSTICE

(order of precedence as at 31 December 2016)

First row, from left to right:

M. Wathelet, First Advocate General; T. von Danwitz, President of Chamber; M. Ilešič, President of Chamber; A. Tizzano, Vice-President of the Court; K. Lenaerts, President of the Court; R. Silva de Lapuerta, President of Chamber; L. Bay Larsen, President of Chamber; J.L. da Cruz Vilaça, President of Chamber.

Second row, from left to right:

A. Borg Barthet, Judge; A. Rosas, Judge; M. Vilaras, President of Chamber; M. Berger, President of Chamber; E. Juhász, President of Chamber; A. Prechal, President of Chamber; E. Regan, President of Chamber; J. Kokott, Advocate General.

Third row, from left to right:

C. Toader, Judge; J.-C. Bonichot, Judge; P. Mengozzi, Advocate General; E. Levits, Judge; J. Malenovský, Judge; E. Sharpston, Advocate General; Y. Bot, Advocate General; A. Arabadjiev, Judge.

Fourth row, from left to right:

F. Biltgen, Judge; N. Wahl, Advocate General; C.G. Fernlund, Judge; D. Šváby, Judge; M. Safjan, Judge; E. Jarašiūnas, Judge; C. Vajda, Judge; S. Rodin, Judge.

Fifth row, from left to right:

M. Bobek, Advocate General; M. Campos Sánchez-Bordona, Advocate General; M. Szpunar, Advocate General; K. Jürimäe, Judge; C. Lycourgos, Judge; H. Saugmandsgaard Øe, Advocate General; E. Tanchev, Advocate General; A. Calot Escobar, Registrar.

1. CHANGE IN THE COMPOSITION OF THE COURT OF JUSTICE IN 2016

By decision of 7 September 2016, the representatives of the Governments of the Member States of the European Union appointed Mr Evgeni Tanchev [1] as Advocate General at the Court of Justice for the period from 16 September 2016 to 6 October 2021.

1 | In accordance with the principle of rotation, Mr Tanchev, a Bulgarian national, replaces Mr Jääskinen, a Finnish national, who completed his term of office on 7 October 2015.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2016 TO 6 OCTOBER 2016

K. LENAERTS, President
A. TIZZANO, Vice-President
R. SILVA DE LAPUERTA, President of the First Chamber
M. ILEŠIČ, President of the Second Chamber
L. BAY LARSEN, President of the Third Chamber
T. von DANWITZ, President of the Fourth Chamber
J.L. da CRUZ VILAÇA, President of the Fifth Chamber
M. WATHELET, First Advocate General
A. ARABADJIEV, President of the Sixth Chamber
C. TOADER, President of the Seventh Chamber
D. ŠVÁBY, President of the Eighth Chamber
F. BILTGEN, President of the Tenth Chamber
C. LYCOURGOS, President of the Ninth Chamber
A. ROSAS, Judge
J. KOKOTT, Advocate General
E. JUHÁSZ Judge
A. BORG BARTHET, Judge
J. MALENOVSKÝ, Judge
E. LEVITS, Judge
E. SHARPSTON, Advocate General
P. MENGOZZI, Advocate General
Y. BOT, Advocate General
J.-C. BONICHOT, Judge
M. SAFJAN, Judge
M. BERGER, Judge
A. PRECHAL, Judge
E. JARAŠIŪNAS, Judge
C.G. FERNLUND, Judge
C. VAJDA, Judge
N. WAHL, Advocate General
S. RODIN, Judge
K. JÜRIMÄE, Judge
M. SZPUNAR, Advocate General
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
M. VILARAS, Judge
E. REGAN, Judge
H. SAUGMANDSGAARD ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General

A. CALOT ESCOBAR, Registrar

FROM 7 OCTOBER 2016 TO 31 DECEMBER 2016

K. LENAERTS, President
A. TIZZANO, Vice-President
R. SILVA de LAPUERTA, President of the First Chamber
M. ILEŠIČ, President of the Second Chamber
L. BAY LARSEN, President of the Third Chamber
T. von DANWITZ, President of the Fourth Chamber
J.L. da CRUZ VILAÇA, President of the Fifth Chamber
M. WATHELET, First Advocate General
E. JUHÁSZ, President of the Ninth Chamber
M. BERGER, President of the Tenth Chamber
A. PRECHAL, President of the Seventh Chamber
M. VILARAS, President of the Eighth Chamber
E. REGAN, President of the Sixth Chamber
A. ROSAS, Judge
J. KOKOTT, Advocate General
A. BORG BARTHET, Judge
J. MALENOVSKÝ, Judge
E. LEVITS, Judge
E. SHARPSTON, Advocate General
P. MENGOZZI, Advocate General
Y. BOT, Advocate General
J.-C. BONICHOT, Judge
A. ARABADJIEV, Judge
C. TOADER, Judge
M. SAFJAN, Judge
D. ŠVÁBY, Judge
E. JARAŠIŪNAS, Judge
C.G. FERNLUND, Judge
C. VAJDA, Judge
N. WAHL, Advocate General
S. RODIN, Judge
F. BILTGEN, Judge
K. JÜRIMÄE, Judge
M. SZPUNAR, Advocate General
C. LYCOURGOS, Judge
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
H. SAUGMANDSGAARD ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General

A. CALOT ESCOBAR, Registrar

3. FORMER MEMBERS OF THE COURT OF JUSTICE

(in order of their entry into office)

MEMBERS

Massimo PILOTTI, Judge (1952–58), President from 1952 to 1958
Petrus SERRARENS, Judge (1952–58)
Otto RIESE, Judge (1952–63)
Louis DELVAUX, Judge (1952–67)
Jacques RUEFF, Judge (1952–59 and 1960–62)
Charles Léon HAMMES, Judge (1952–67), President from 1964 to 1967
Adrianus VAN KLEFFENS, Judge (1952–58)
Maurice LAGRANGE, Advocate General (1952–64)
Karl ROEMER, Advocate General (1953–73)
Rino ROSSI, Judge (1958–64)
Nicola CATALANO, Judge (1958–62)
Andreas Matthias DONNER, Judge (1958–79), President from 1958 to 1964
Alberto TRABUCCHI, Judge (1962–72), then Advocate General (1973–76)
Robert LECOURT, Judge (1962–76), President from 1967 to 1976
Walter STRAUSS, Judge (1963–70)
Riccardo MONACO, Judge (1964–76)
Joseph GAND, Advocate General (1964–70)
Josse J. MERTENS de WILMARS, Judge (1967–84), President from 1980 to 1984
Pierre PESCATORE, Judge (1967–85)
Hans KUTSCHER, Judge (1970–80), President from 1976 to 1980
Alain Louis DUTHEILLET DE LAMOTHE, Advocate General (1970–72)
Henri MAYRAS, Advocate General (1972–81)
Cearbhall O'DALAIGH, Judge (1973–74)
Max SØRENSEN, Judge (1973–79)
Jean-Pierre WARNER, Advocate General (1973–81)
Alexander J. MACKENZIE STUART, Judge (1973–88), President from 1984 to 1988
Gerhard REISCHL, Advocate General (1973–81)
Aindrias O'KEEFFE, Judge (1974–85)
Francesco CAPOTORTI, Judge (1976), then Advocate General (1976–82)
Giacinto BOSCO, Judge (1976–88)
Adolphe TOUFFAIT, Judge (1976–82)
Thijmen KOOPMANS, Judge (1979–90)
Ole DUE, Judge (1979–94), President from 1988 to 1994
Ulrich EVERLING, Judge (1980–88)
Alexandros CHLOROS, Judge (1981–82)
Sir Gordon SLYNN, Advocate General (1981–88), then Judge (1988–92)
Pieter VERLOREN van THEMAAT, Advocate General (1981–86)
Simone ROZÈS, Advocate General (1981–84)
Fernand GRÉVISSE, Judge (1981–82 and 1988–94)
Kai BAHLMANN, Judge (1982–88)
G. Federico MANCINI, Advocate General (1982–88), then Judge (1988–99)
Yves GALMOT, Judge (1982–88)

Constantinos KAKOURIS, Judge (1983–97)
Carl Otto LENZ, Advocate General (1984–97)
Marco DARMON, Advocate General (1984–94)
René JOLIET, Judge (1984–95)
Thomas Francis O'HIGGINS, Judge (1985–91)
Fernand SCHOCKWEILER, Judge (1985–96)
Jean MISCHO, Advocate General (1986–91 and 1997–2003)
José Carlos de CARVALHO MOITINHO de ALMEIDA, Judge (1986–2000)
José Luís da CRUZ VILAÇA, Advocate General (1986–88)
Gil Carlos RODRÍGUEZ IGLÉSIAS, Judge (1986–2003), President from 1994 to 2003
Manuel DIEZ de VELASCO, Judge (1988–94)
Manfred ZULEEG, Judge (1988–94)
Walter VAN GERVEN, Advocate General (1988–94)
Francis Geoffrey JACOBS, Advocate General (1988–2006)
Giuseppe TESAURO, Advocate General (1988–98)
Paul Joan George KAPTEYN, Judge (1990–2000)
Claus Christian GULMANN, Advocate General (1991–94), then Judge (1994–2006)
John L. MURRAY, Judge (1991–99)
David Alexander Ogilvy EDWARD, Judge (1992–2004)
Antonio Mario LA PERGOLA, Judge (1994 and 1999–2006), Advocate General (1995–99)
Georges COSMAS, Advocate General (1994–2000)
Jean-Pierre PUISSOCHET, Judge (1994–2006)
Philippe LÉGER, Advocate General (1994–2006)
Günter HIRSCH, Judge (1994–2000)
Michael Bendik ELMER, Advocate General (1994–97)
Peter JANN, Judge (1995–2009)
Hans RAGNEMALM, Judge (1995–2000)
Leif SEVÓN, Judge (1995–2002)
Nial FENNELLY, Advocate General (1995–2000)
Melchior WATHELET, Judge (1995–2003)
Dámaso RUIZ-JARABO COLOMER, Advocate General (1995–2009)
Romain SCHINTGEN, Judge (1996–2008)
Krateros IOANNOU, Judge (1997–99)
Siegbert ALBER, Advocate General (1997–2003)
Antonio SAGGIO, Advocate General (1998–2000)
Vassilios SKOURIS, Judge (1999–2015), President from 2003 to 2015
Fidelma O'KELLY MACKEN, Judge (1999–2004)
Ninon COLNERIC, Judge (2000–06)
Stig von BAHR, Judge (2000–06)
José Narciso da CUNHA RODRIGUES, Judge (2000–12)
Christiaan Willem Anton TIMMERMANS, Judge (2000–10)
Leendert A. GEELHOED, Advocate General (2000–06)
Christine STIX-HACKL, Advocate General (2000–06)
Luís Miguel POIARES PESSOA MADURO, Advocate General (2003–09)
Konrad Hermann Theodor SCHIEMANN, Judge (2004–12)
Jerzy MAKARCZYK, Judge (2004–09)
Pranas KŪRIS, Judge (2004–10)
Georges ARESTIS, Judge (2004–14)
Ján KLUČKA, Judge (2004–09)

Uno LÕHMUS, Judge (2004–13)
Aindrias Ó CAOIMH, Judge (2004–15)
Pernilla LINDH, Judge (2006–11)
Ján MAZÁK, Advocate General (2006–12)
Verica TRSTENJAK, Advocate General (2006–12)
Jean-Jacques KASEL, Judge (2008–13)
Niilo JÄÄSKINEN, Advocate General (2009–15)
Pedro CRUZ VILLALÓN, Advocate General (2009–15)

PRESIDENTS

Massimo PILOTTI (1952–58)
Andreas Matthias DONNER (1958–64)
Charles Léon HAMMES (1964–67)
Robert LECOURT (1967–76)
Hans KUTSCHER (1976–80)
Josse J. MERTENS de WILMARS (1980–84)
Alexander John MACKENZIE STUART (1984–88)
Ole DUE (1988–94)
Gil Carlos RODRÍGUEZ IGLÉSIAS (1994–2003)
Vassilios SKOURIS (2003–15)

REGISTRARS

Albert VAN HOUTTE (1953–82)
Paul HEIM (1982–88)
Jean-Guy GIRAUD (1988–94)
Roger GRASS (1994–2010)

CHAPTER II

THE GENERAL COURT

A | ACTIVITY OF THE GENERAL COURT IN 2016

By Mr **Marc JAEGER,** President of the General Court

For the General Court, 2016 was a year of numerous and profound changes. It brought not only the three-yearly renewal of the Court's membership but also implementation of the reform of the institution's structure, entailing the first two phases of the increase in the number of judges of the Court, [1] the dissolution of the Civil Service Tribunal and the transfer to the Court of jurisdiction at first instance over disputes between the European Union and members of its staff. [2] The in-depth examination carried out by the judges, in close collaboration with the Registry of the General Court and the institution's departments, pursued the fundamental objective of adapting the way in which matters are organised to the needs of an expanded General Court, while preserving the gains in efficiency and quality resulting from the internal reforms that have been carried out for nearly a decade. Strengthened by its new resources, the Court has laid new foundations with the aim of facing up to and achieving the goals which it has set itself in the context of the increase in the number of its judges: speed, and quality, coherence and authority of its case-law.

1. ORGANISATION

First of all, as regards its composition, the General Court welcomed 22 new judges (amounting to exactly half of the number of members currently in office), which made it necessary to take numerous steps in order to ensure harmonious and rapid integration of the new chambers (recruitment, provision of accommodation and equipment, creation of new case-loads, staff training, updating of computer systems, and so forth).

Of those judges, 16 were appointed in the context of the first two phases of the reform of the General Court, under a timetable that was staggered on account of the constraints connected with the decision-making process for appointing judges. They thus entered into office as follows:

– on 13 April 2016, Mr C. Iliopoulos, Mr L. Calvo-Sotelo Ibáñez-Martín, Mr D. Spielmann, Mr V. Valančius, Mr Z. Csehi, Ms N. Półtorak and Ms A. Marcoulli, under the first phase of the reform;

– on 8 June 2016, Mr P.G. Xuereb, Mr F. Schalin and Ms I. Reine, under the first phase of the reform;

– on 19 September 2016:

- Mr J. Passer, under the first phase of the reform;
- Mr E. Perillo, Mr R. Barents, Mr J. Svenningsen, Ms M.J. Costeira and Mr A. Kornezov, under the second phase of the reform.

1 | Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14). Under Regulation 2015/2422, the number of judges of the General Court was to be increased in three stages. In the first phase, ten additional judges were to be appointed from 25 December 2015. In the second phase, seven additional judges were to be appointed from 1 September 2016, within the framework of the dissolution of the Civil Service Tribunal. Finally, in the third phase, the final nine additional judges were to be appointed from 1 September 2019, bringing the number of judges to 56.

2 | Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137). The specific features of EU civil service disputes also made it necessary to amend the Rules of Procedure of the General Court (OJ 2016 L 217, p. 73).

In addition, the Court welcomed six other judges in the context of the three-yearly renewal of its membership: Mr R. da Silva Passos, Mr P. Nihoul, Mr B. Berke, Mr U. Öberg, Ms O. Spineanu-Matei and Ms K. Kowalik-Bańczyk were appointed to replace Ms M.E. Martins Ribeiro, Mr. F. Dehousse, Mr O. Czúcz, Mr C. Wetter, Mr A. Popescu and Ms I. Wiszniewska-Białecka respectively.

Currently composed of 44 judges, [3] the Court is still to welcome the three judges remaining to be appointed (one under the first phase, the other two under the second phase) in order to reach the number of 47 judges laid down in Article 48 of the Statute of the Court of Justice of the European Union for the period 2016-19, 2019 being the year in which the third and last phase of the reform, entailing the appointment of nine additional judges, is finally to take place.

Next, as regards its structure, the Court altered the principle of internal organisation that it applied from September 2007 to September 2016. The Court is thus now composed of nine five-judge chambers, which can sit either with three judges in two sub-formations presided over by the president of the chamber or with five judges. [4]

Finally, as regards its operation, the Court has created the conditions for ensuring a balance between efficiency and coordination. Thus, whilst the ordinary formation of the Court remains a chamber sitting with three judges, the new structure is designed to facilitate the referral of cases to formations sitting with five judges, to facilitate the replacement of judges prevented from acting within the same chamber and to entrust the vice-president and the presidents of chambers with an enhanced role in coordination and in coherence of the case-law.

Also, at the time of the three-yearly renewal of its membership, the Court was called upon to elect its president, vice-president and presidents of chambers for the period from September 2016 to August 2019. Thus, first, Mr Jaeger and Mr van der Woude were elected, respectively, President and Vice-President of the General Court, and, secondly, Ms I. Pelikánová, Mr M. Prek, Mr S. Frimodt Nielsen, Mr H. Kanninen, Mr D. Gratsias, Mr G. Berardis, Ms V. Tomljenović, Mr A.M. Collins and Mr S. Gervasoni were elected President of Chamber.

2. STATISTICS CONCERNING JUDICIAL ACTIVITY

Analysis of the statistics for 2016 concerning the Court's judicial activity essentially reveals a dual phenomenon, that is to say, first, an increase in the number of new cases and of the number of cases pending and, secondly, an appreciable reduction in the duration of proceedings.

The number of new cases increased by 17%, from 831 cases in 2015 to 974 in 2016, to a very large degree because of the transfer of jurisdiction at first instance to hear disputes concerning the EU civil service (which account, by themselves, for 163 cases). [5] The number of cases pending increased by a similar proportion, from 1 267 cases in 2015 to 1 486 cases in 2016. The Court's productivity represents a continuation of the results achieved since 2013, the number of cases completed being one of the best three recorded by the Court since its creation (755 cases completed). The fall-off observed in comparison with 2015 and 2014 can be explained

3| As at 31 December 2016.

4| Pending the arrival of the final three judges to be appointed, three of the nine chambers are, provisionally, composed of four judges and can sit either with three judges in three sub-formations or with five judges, in which case an additional judge from another chamber completes the formation of the Court.

5| The Civil Service Tribunal continued to operate until 31 August 2016. For an overview of this activity, reference should be made to chapter III 'The Civil Service Tribunal'.

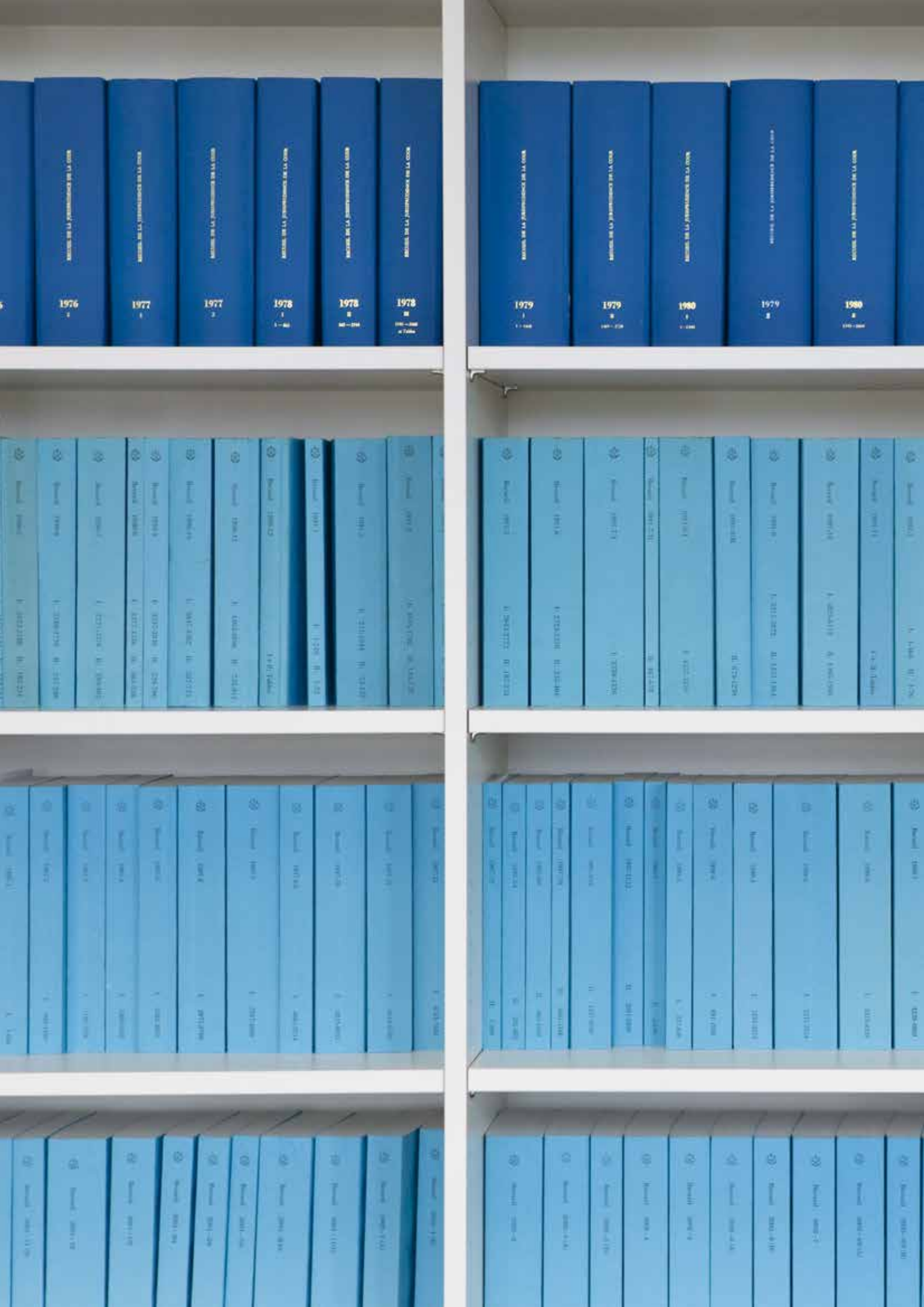
by the combined effect of the clearing of the backlog (in particular in 2015), of the three-yearly renewal and of the Court's internal reorganisation made necessary by integration of the new judges, who cannot make a visible and substantial contribution to the Court's productivity during the first months of their terms of office.

In parallel, the Court's major performance indicator consisting of the duration of proceedings continued its positive trend. The reduction in the duration of proceedings that has been observed since 2013 was confirmed once again, with an overall average (cases disposed of by judgment or by order, whatever the subject matter) of 18,7 months, that is to say, a fall of 1.9 months compared with 2015 and of 8.2 months compared with 2013.

In addition, it should be noted that, on account, in particular, of the reorganisation of the Court and of the new possibilities opened up by implementation of its reform, the number of cases referred to a formation sitting with five judges rose to 29 in 2016, whereas the annual average for such referrals between 2010 and 2015 was below nine per year.

Finally, the points of note, so far as change in the type of proceedings is concerned, are the increase in intellectual property cases (up by 11%), the transfer of jurisdiction at first instance to hear cases concerning the EU civil service (123 cases were transferred from the Civil Service Tribunal on 1 September and there were 40 newly brought cases up until 31 December 2016, giving a total of 163 cases, that is to say, nearly 17% of new cases), the relative reduction in the number of cases concerning restrictive measures (28 cases brought in 2016), the continued high number of State aid cases (76 cases), in particular concerning Member State taxation, and the emergence of a new source of litigation, relating to the application of prudential supervision rules in respect of credit institutions.

In the next part of this report, the Vice-President of the General Court sets out an account of the case-law worthy of note in 2016. The account illustrates the very great variety, and sometimes complexity, of the questions placed before the General Court for determination and the fundamental role with which it is entrusted as guarantor of the right to effective judicial protection and, hence, of a European Union governed by the rule of law.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B | CASE-LAW OF THE GENERAL COURT IN 2016

I. JUDICIAL PROCEEDINGS

ADMISSIBILITY OF ACTIONS BROUGHT UNDER ARTICLE 263 TFEU

The case-law in 2016 enabled the Court, in particular, to rule on compliance with procedural requirements and time limits and on the concepts of a measure against which an action may be brought, of standing to bring an action and of a regulatory act not entailing implementing measures.

1. CONCEPT OF A MEASURE AGAINST WHICH AN ACTION MAY BE BROUGHT

In the judgment of 15 September 2016, ***Italy*** v ***Commission*** (T-353/14 and T-17/15, under appeal, [1] EU:T:2016:495), the Court had the opportunity to clarify the concept of a measure against which an action for annulment may be brought, within the meaning of Article 263 TFEU. Two applications for annulment of two competition notices published by the European Personnel Selection Office (EPSO) [2] were at the origin of the joined cases giving rise to that judgment. The European Commission had raised a plea of inadmissibility, on the ground that, in essence, the contested notices were either confirmatory acts or merely acts implementing the general rules governing open competitions [3] and the general guidelines of the College of the Heads of Administration on the use of languages in EPSO competitions, which are set out in Annex 2 to the general rules.

In the first place, the Court observed that, in order to respond to the Commission's arguments, it was necessary to examine the nature and legal scope of the general rules and the general guidelines. Only if those measures were intended to lay down binding rules and thus constituted acts capable of producing mandatory legal effects could the competition notices at issue constitute only confirmatory acts or mere implementing acts. It was apparent from the actual wording of those measures that, in publishing them, EPSO had not definitively adopted the language regime of all competitions which it was responsible for holding. Furthermore, and in any event, even though those measures consisted of a series of assessments restricting the choice of the second language in competitions organised by EPSO and the language of communication between it and candidates, those assessments could not be interpreted as laying down a language regime applicable to all competitions organised by EPSO, since no provision had conferred on EPSO or on the College of the Heads of Administration the power to lay down such a regime of general application or to adopt in that respect rules of principle from which a competition notice could depart only exceptionally. EPSO was not prevented, in order to ensure equal treatment and legal certainty, from adopting and publishing acts such as the general rules and general guidelines setting out how it proposed to use, in certain situations, the discretion which it enjoyed

1 | Case C-621/16 P, ***Commission*** v ***Italy***.

2 | Notice of open competition — EPSO/AD/276/14 — Administrators (AD 5) (OJ 2014 C 74 A, p. 4), and Notice of open competition — EPSO/AD/294/14 — Administrators (AD 6) in the field of data protection (OJ 2014 C 391 A, p. 1).

3 | General rules governing open competitions (OJ 2014 C 60 A, p. 1).

under those provisions, provided that those measures did not depart from the rules of general application that delimited its powers and on condition that, in adopting them, EPSO did not refrain from exercising the power conferred on it in assessing the needs of the institutions, bodies and agencies of the European Union, including their language requirements, when organising the various competitions. It followed that the general rules and the general guidelines must be interpreted as constituting, at most, communications which announced criteria according to which EPSO proposed to choose the language regime of the competitions which it was responsible for organising.

In the second place, the Court stated that each competition notice was adopted with the aim of establishing the rules governing the procedure for one or more specific competitions, the normative framework of which it thus adopted by reference to the objective determined by the appointing authority. It was that normative framework, established, where appropriate, in accordance with the rules of general application applicable to the organisation of competitions, that governed the procedure of the competition in question, from the time of publication of the competition notice in question until publication of the reserve list containing the names of the successful candidates in the competition in question. Thus, it must be concluded that a competition notice, such as the contested notices, which, taking into account the specific needs of the European Union institutions, bodies or agencies concerned, established the normative framework of a specific competition, including its language regime, and therefore entailed autonomous legal effects, could not in principle be regarded as a confirmatory act or an act that merely implemented previous acts. Consequently, the contested notices were acts which entailed compulsory legal effects as regards the language regime of the competitions in question and were thus acts against which an action might be brought, and the fact that, when adopting them, EPSO had taken into account the criteria set out in the general rules and in the general guidelines, to which the contested notices had made express reference, could not undermine that conclusion.

2. STANDING TO BRING AN ACTION

DIRECT CONCERN

In the order of 28 September 2016, ***PAN Europe and Others*** v ***Commission*** (T-600/15, EU:T:2016:601), the Court provided clarification of the criterion of direct concern, for the purposes of assessing the standing to bring an action of the applicants, an association of beekeepers and environmental protection organisations, for annulment of Implementing Regulation (EU) 2015/1295, [4] in that the purpose of the latter regulation was, in particular, to approve, subject to certain conditions, the active substance sulfoxaflor as an ingredient of plant protection products under Regulation (EC) No 1107/2009 [5] and the inclusion of that substance in the annex to Implementing Regulation (EU) No 540/2011. [6]

In that regard, the Court began by pointing out that the approval of sulfoxaflor and its inclusion on the list of approved active substances, as resulting from the contested measure, had the legal consequence of enabling Member States, subject to a series of additional conditions, to authorise the placing on the market

4| Commission Implementing Regulation (EU) 2015/1295 of 27 July 2015 approving the active substance sulfoxaflor, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2015 L 199, p. 8).

5| Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

6| Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances (OJ 2011 L 153, p. 1).

of plant protection products containing sulfoxaflor, if a request to that effect was made. It was therefore on the legal situation of the Member States, and of that of potential applicants for authorisations to place plant protection products containing sulfoxaflor on the market, that the contested measure had a direct effect. According to the Court, the approval of the active substance sulfoxaflor by the contested measure did not represent a threat to beekeepers' producing activities and therefore had no legal effects on their right to property and their right to conduct a business. On the assumption that the use of plant protection products containing sulfoxaflor was in fact likely to endanger the business activities of the members of the applicant association, those economic consequences would not concern their legal situation, but only their factual situation. Furthermore, that alleged danger also presupposed the authorisation by a Member State of a plant protection product containing sulfoxaflor. Consequently, the effect of the contested measure on the right to property and on the business activities of the members of the applicant association, even if it could be described as legal, could not in any event be described as direct.

In addition, the Court continued, Articles 37 and 47 of the Charter of Fundamental Rights of the European Union did not call in question the interpretation of the fourth paragraph of Article 263 TFEU and, in particular, of the criterion of direct concern. As regards Article 37 of the Charter of Fundamental Rights, it contained only a principle providing for a general obligation on the European Union in respect of the objectives to be pursued in the framework of its policies, and not a right to bring actions in environmental matters before the Courts of the European Union. As regards Article 47 of the Charter of Fundamental Rights, that provision was not intended to change the system of judicial review laid down in the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union. Last, the Court observed that international agreements concluded by the European Union, including the Aarhus Convention, [7] did not have primacy over EU primary law, with the result that derogation from the fourth paragraph of Article 263 TFEU could not be accepted on the basis of that convention. Furthermore, as Article 9(3) of the Aarhus Convention did not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals, individuals could not rely directly on that provision before the Courts of the European Union. In addition, the Court observed that the Aarhus Convention itself, by using the expression members of the public who 'meet the criteria, if any, laid down [in] national law', made the rights that Article 9(3) was supposed to give to members of the public conditional upon their meeting the eligibility criteria arising under the fourth paragraph of Article 263 TFEU. Accordingly, it had not been shown that the fourth paragraph of Article 263 TFEU, as interpreted by the Courts of the European Union, was incompatible with Article 9(3) of the Aarhus Convention.

a. INDIVIDUAL EFFECT

The judgment of 13 December 2016, ***IPSO*** v ***ECB*** (T-713/14, EU:T:2016:727), provided the Court with the opportunity to rule on the standing of a trade union to bring an action for, in particular, annulment of an act of the Directorate of the European Central Bank (ECB) limiting to two years the maximum period during which the ECB could avail itself of the services of any member of the temporary staff performing administrative and secretariat tasks. That action had been brought by the International and European Public Services Organisation in the Federal German Republic (IPSO).

The Court recalled that actions brought by trade union organisations were admissible in three situations, namely where they represented the interests of persons who would themselves have standing to bring

7| Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

proceedings, or where they were distinguished individually because of the impact on their own interests as associations, in particular because their own position as negotiator had been affected by the act annulment of which was sought, or again where a legal provision expressly conferred a number of rights of a procedural nature. In this instance, the applicant relied on standing to bring an action on the basis, in particular, of its own interests as a social and negotiating partner which had participated in the discussions concerning the situation of temporary staff within the ECB.

The Court stated that the mere fact that a union organisation had the status of negotiator was not sufficient for it to be distinguished individually in a manner analogous to that in which the addressee of the act at issue would be distinguished individually. An action brought by such an organisation might nonetheless be admissible when its position as negotiator had been affected by the contested act in special situations in which it had occupied a position as negotiator that was clearly circumscribed and closely linked to the actual subject matter of the contested act. In this instance, the Court considered that the applicant's position as spokesperson for the temporary staff in the discussions with the ECB was sufficient to demonstrate that it was individually concerned by the contested act for the purposes of Article 263 TFEU. That capacity distinguished the applicant individually by comparison with any other union organisation representing persons employed by or working for the ECB, in so far as, among the different unions that might have been active in defending the interests of those persons, it was the only one to have been involved in the discussions with the ECB relating specifically to the matters covered by the contested act.

3. CONCEPT OF A REGULATORY ACT NOT ENTAILING IMPLEMENTING MEASURES

In 2016, the Court had the opportunity, on a number of occasions, to reconsider the concept of a regulatory act not entailing implementing measures, within the meaning of the third situation referred to in the fourth paragraph of Article 263 TFEU. In the first place, in the cases giving rise to the judgments of 14 January 2016, ***Tilly-Sabco*** v ***Commission*** (T-397/13, under appeal, [8] EU:T:2016:8) and of 14 January 2016, ***Doux*** v ***Commission*** (T-434/13, not published, EU:T:2016:7), actions had been brought before the Court by two companies whose activities included the export of deep-frozen whole chickens to the countries of the Middle East. The actions sought annulment of Implementing Regulation (EU) No 689/2013, [9] whereby the Commission had fixed at zero the amount of export refunds on poultrymeat for three categories of whole deep-frozen chickens.

The applicants claimed that their actions were admissible under the fourth paragraph of Article 263 TFEU, on the ground that the contested implementing regulation constituted a regulatory act not entailing implementing measures. In that regard, the Court observed, first of all, that it did indeed follow from the case-law that the concept of a regulatory act which did not entail implementing measures must be interpreted in the light of that provision's objective, which was to ensure effective judicial protection. However, that did not mean that the concept at issue must be examined solely in the light of that objective. Having regard to the wording of the third situation referred to in the fourth paragraph of Article 263 TFEU, only measures adopted by the organs or bodies of the European Union or the national authorities in the normal course of events could constitute implementing measures. If, in the normal course of events, the organs or bodies of the European Union and the national authorities would not adopt any measure in order to implement a regulatory act and to specify the consequences of that act for each of the operators concerned, that regulatory act would not entail any implementing measures. The measures in question must be measures that followed naturally from

8| Case C-183/16 P, ***Tilly-Sabco*** v ***Commission***.

9| Commission Implementing Regulation (EU) No 689/2013 of 18 July 2013 fixing the export refunds on poultrymeat (OJ 2013 L 196, p. 13).

the regulatory act. Thus, it was not sufficient that an operator might be able, in a contrived manner, to oblige the administration to adopt a measure that would be open to appeal, because such a measure was not a measure 'entailed' by the regulatory act.

Because the amount of the export refunds had been fixed at zero by the contested implementing regulation, and as there was no obligation to submit an export licence in order to be able to export the products in question, in the normal course of events no application for an export licence with advance fixing of the refund would be submitted to the national authorities. In the absence of applications of that type, the national authorities would not adopt, in the normal course of events, any measures in order to implement the contested implementing regulation. There would therefore be no measure specifying the consequences which the contested implementing regulation had with regard to the various operators concerned.

In that regard, the fact that an application for an export licence was lodged with a national authority for the sole purpose of being able to have access to a court implied that that application would not be submitted in the normal course of events. As the national authority had no choice other than to fix the amount of the refunds at zero, an exporter could have no interest in having the refunds fixed by the national authority in those circumstances, except in order to secure, in an artificial manner, the adoption of an act that could form the subject matter of an action. It followed that the contested implementing regulation did not entail implementing measures within the meaning of the third situation referred to in the fourth paragraph of Article 263 TFEU.

In the second place, in the case that gave rise to the judgment of 15 September 2016, ***Ferracci*** v ***Commission*** (T-219/13, under appeal, [10] EU:T:2016:485), the Court heard an action by the owner of a guesthouse near the city of Rome (Italy) against a Commission decision concerning a tax regime under which non-commercial entities were exempt from the municipal real estate tax. Although, by that decision, the Commission had declared that the regime at issue was incompatible in part with the internal market, it did not order recovery, as it considered that recovery of the aid would be impossible.

As regards, first, the question whether the contested decision must be classified as a regulatory act, the Court considered that a Commission decision on State aid which applied to situations which were determined objectively and entailed legal effects for a class of persons envisaged in a general and abstract manner was of general application. In particular, the purpose of a decision concerning the tax regime of a Member State was to examine, in the light of Article 107 TFEU, whether national rules applied to an indeterminate number of persons envisaged in a general and abstract manner entailed elements of State aid and, if so, whether the aid at issue was compatible with the internal market and recoverable. Having regard to the nature of the power conferred on the Commission under the FEU Treaty provisions on State aid, such a decision, even if it had only a single addressee, reflected the scope of the national instruments under investigation by the Commission, whether in order to grant the necessary authorisation for an aid measure to be applied or to set out the consequences if that measure were found to be illegal or incompatible with the internal market. In fact, the operators to which the instruments in question applied were defined in a general and abstract manner. Those instruments were therefore of general application.

As regards, second, the existence of implementing measures relating to the contested decision, the Court considered that, provided that the Commission considered that it was absolutely impossible to recover the illegal aid granted by a Member State and thus decided not to require that Member State to recover the sums paid under that regime from each beneficiary, the national authorities would not be required to adopt any measure, particularly vis-à-vis the applicant, in order to implement the contested decision. In addition, the

10| Case C-624/16 P, ***Commission*** v ***Ferracci.***

Court observed that, provided that the Commission considered that a national provision did not constitute aid within the meaning of Article 107(1) TFEU, the contested decision did not entail the adoption of any implementing measure, as the national authorities would merely apply the national legislation as such. No measure would be adopted at national level in order to implement that decision, in particular vis-à-vis the applicant.

4. COMPLIANCE WITH PROCEDURAL REQUIREMENTS AND TIME LIMITS FOR BRINGING ACTIONS

In the case that gave rise to the order of 22 June 2016, ***1&1 Telecom*** v ***Commission*** (T-43/16, EU:T:2016:402), an action had been brought before the Court for annulment of a Commission decision on the implementation of corrective measures provided for in the final commitments annexed to a decision conditionally authorising a concentration. The Commission maintained that the application was inadmissible in that it was not signed by the applicant's lawyer.

In that regard, the Court recalled, first of all, that the absence of signature of the application by a lawyer authorised to undertake procedural steps before the Court was not among the formal procedural irregularities that were capable of being put in order after the expiry of the period prescribed for bringing the action, in accordance with Article 19 of the Statute of the Court of Justice of the European Union and Article 51(4) and Article 78(5) of the Rules of Procedure of the General Court. The requirement for a signature by the applicant's representative on the application, which was designed, for reasons of legal certainty, to ensure that the application was genuine and to eliminate the risk that it was not, in reality, the work of the author authorised for that purpose, must be regarded as an essential procedural rule and applied strictly, so that failure to comply with it meant that the action was inadmissible.

In this instance, the Court noted that the application had indeed been signed by a lawyer authorised to undertake procedural steps before the Court. Admittedly, the first page of the application indicated that the applicant was represented by a lawyer established in Brussels (Belgium), whereas the application was lodged by means of e-Curia by a solicitor registered with the Law Society of England and Wales and associated with that lawyer in the same law firm. However, it was not disputed that that Solicitor was a member of a European Bar or Law Society and was authorised in that capacity to undertake procedural steps before the Court.

The mere fact that that solicitor's name did not appear on the first page of the application was not sufficient to call in question his status as the applicant's representative. That status was evidenced by the fact that the applicant had submitted an authorisation to act in favour of the solicitor. The fact that that authorisation had not been lodged together with the application did not affect that finding or result in the inadmissibility of the application, since such an omission at the time of lodging an application could be put in order, and had been put in order, by the applicant within the time limit prescribed by Article 78(5) of the Rules of Procedure.

Furthermore, the use of an e-Curia account not only constituted signature under Article 3 of the e-Curia Decision, [11] but, unlike a mere handwritten signature, also automatically provided information regarding the identity, professional status and address of the signatory representing the applicant. Accordingly, the application must be treated as having also met the obligation to provide the particulars of status and address of the applicant's representative referred to in Article 76(b) of the Rules of Procedure. In any event, the mere lack of reference to the address of the lawyer concerned or to the fact that the latter was the representative

11 | Decision of the General Court of 14 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ 2011 C 289, p. 9).

of the applicant in the body of the application was not, in itself, such as to render inadmissible an application which was duly signed by a lawyer practising in the Union authorised by the applicant, whether that signature was handwritten or electronic, and lodged within the time limit prescribed in the sixth paragraph of Article 263 TFEU.

In the judgment of 18 October 2016, ***Sina Bank*** v ***Council*** (T-418/14, EU:T:2016:619), the Court was called upon to examine the action brought by an Iranian bank challenging the restrictive measures against it. Before the Court, the Council of the European Union claimed that the third head of claim in the action, seeking annulment of Decision (CFSP) 2015/1008 [12] and Implementing Regulation (EU) 2015/1001, [13] was inadmissible in so far as those measures had maintained the applicant's name on the list at issue. In the Council's submission, the notification of those measures to the applicant's lawyer on 26 June 2015 had caused the limitation period for bringing an action against those measures to begin to run and that period had expired on 5 September 2015.

The Court pointed out that requests to adapt the forms of order sought must be submitted within the period for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU. In order to cause that period to begin to run in the applicant's case, the Council, since it knew the applicant's address, was required to communicate Decision 2015/1008 and Implementing Regulation 2015/1001 to the applicant in person. In the present case, the Court observed, the Council had communicated those measures to the applicant, through its lawyers, by letter and email of 26 June 2015.

However, the sixth paragraph of Article 263 TFEU referred to 'notification [of the measure] to the [applicant]' and not to notification of the measure to the latter's representative. It followed that, where a measure had to be notified in order for the period for bringing proceedings to begin to run, that notification must, in principle, be sent to the addressee of the measure, not to the lawyers representing it. In this instance, the applicable rules, namely Article 24(3) of Decision 2010/413/CFSP [14] and Article 46(3) of Regulation (EU) No 267/2012, [15] made no express reference to the possibility of notifying the restrictive measures taken in respect of a person or entity to its representative, but expressly provided that, where the address of the person or entity concerned was known, the decision to impose restrictive measures on it must be communicated to that person or entity directly. Decision 2015/1008 and Implementing Regulation 2015/1001 therefore had to be notified directly to the applicant, whose address was known to the Council. Since, moreover, there was no indication that the applicant had entered into an agreement with the Council for the measures in question to be notified to it at its lawyers' address, and hence through its lawyers, the Court considered that the actual communication of the measures to the applicant's lawyers did not amount to a communication, and therefore to a notification, of those measures to the applicant itself.

12| Council Decision (CFSP) 2015/1008 of 25 June 2015 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2015 L 161, p. 19).

13| Council Implementing Regulation (EU) 2015/1001 of 25 June 2015 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2015 L 161, p. 1).

14| Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39).

15| Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1).

ABUSE OF PROCEDURE

In the case that gave rise to the order of 16 March 2016, ***One of Us and Others*** v ***Commission*** (T-561/14, EU:T:2016:173), the Court found it necessary to provide clarification of the concept of abuse of procedure, after the applicants had published on a website the applications to intervene in that case, together with negative comments about the organisations which had lodged those applications.

The Court recalled that, according to the rules governing the treatment of cases before it, parties were entitled to protection against the misuse of procedural documents. That protection reflected a fundamental aspect of the general principle of the due administration of justice, according to which parties had the right to defend their interests free from all external influences and particularly from influences on the part of members of the public. It followed that, in order to ensure the serenity of the exchange of argument between the parties and of the deliberations of the Court concerned, a party who was granted access to the procedural documents of other parties was entitled to use those documents only for the purpose of pursuing his own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties to the case. Conduct contrary to the general principle of the due administration of justice constituted an abuse of procedure which might be taken into account in awarding costs. That protection accorded to the parties to judicial proceedings must apply to a prospective intervener, who takes part in the judicial activities and, on that basis, must be entitled to the same level of protection as the parties to the proceedings as regards the possibility of defending his interests free from all external influences.

In the light of those considerations, the Court held that, in the instant case, by disclosing on the internet the applications to intervene, referring directly to the proceedings before the Court and presenting the organisations which had applied to intervene in a negative light in the eyes of the public, the applicants had committed an abuse of procedure, which might be taken into account in awarding costs pursuant to Article 135(2) of the Rules of Procedure.

LEGAL AID

In the order of 17 February 2016, ***KK*** v ***EASME*** (T-376/15 AJ, EU:T:2016:89), the Court provided clarification of the conditions for the grant of legal aid under Articles 146 to 150 of the Rules of Procedure.

In that regard, the Court stated, first of all, that the assessment of the economic situation of a legal person for the purpose of determining whether it must be granted legal aid could not be made having regard solely to its resources considered in isolation, independently of the situation of the direct or indirect holders of its capital. The Court observed that the conditions for granting legal aid, set forth in Articles 146 to 150 of the Rules of Procedure, must be interpreted in the light of the principle laid down in the third paragraph of Article 47 of the Charter of Fundamental Rights, according to which legal aid is to be made available to those who lack sufficient resources in so far as that aid is necessary in order to ensure effective access to justice. A legal person could not be regarded as being deprived of effective access to justice, within the meaning of Article 47 of the Charter of Fundamental Rights, solely because the direct or indirect holders of its capital refused to use the resources at their disposal in order to enable that legal person to bring legal proceedings. In such circumstances, it was not for the EU budget, through the funds made available to the General Court, to offset the inaction on the part of persons who controlled the legal person in question and who, ultimately, were principally interested in defending its rights.

The Court therefore concluded that, in order to assess the financial situation of a legal person requesting the grant of legal aid, it was necessary to take into account not only its own financial resources but also the

resources at the disposal of the group of companies as a whole to which it belonged, directly or indirectly, and the financial possibilities open to its shareholders and members, natural and legal persons.

APPLICATION OF THE NEW RULES OF PROCEDURE

In the case that gave rise to the judgment of 25 May 2016, ***Commission*** v ***McCarron Poultry*** (T-226/14, EU:T:2016:313), the Court ruled on the application *ratione temporis* of Article 123 of the Rules of Procedure, amending the arrangements laid down in the Rules of Procedure of 2 May 1991, previously in force, relating to the procedure by default. The case concerned an action brought by the Commission seeking an order that a private company reimburse part of the amount advanced by the Commission under a contract under the Fifth Framework Programme of the European Community for research, technological development and demonstration activities (1998–2002). Since in this instance the Commission had on 10 March 2015 submitted an application, in accordance with Article 122(1) of the Rules of Procedure of 2 May 1991, that the Court should grant the form of order which it sought, but since, on 1 July 2015, the Rules of Procedure, containing, in Article 123, new provisions on the procedure by default had entered into force, the Court was required to determine which provision was applicable to the dispute.

The Court observed that, as there was no transitional provision referring expressly to Article 123 of the Rules of Procedure, that provision, as a procedural provision, must be regarded as being of immediate application from the entry into force of the Rules of Procedure on 1 July 2015 and, therefore, as being applicable to the present dispute, which was pending at the time when that article entered into force. In that regard, the Court stated that, even on the assumption that the rules applicable to judgment by default in favour of the applicant in the context of a procedure by default could be regarded as being partly a matter of substantive law to the extent that they directly affected the interests of the parties to the dispute, that had no bearing on the application of the rules *ratione temporis*. As the situation which arose out of the failure to lodge a defence and from the submission of an application for judgment by default in favour of the applicant definitively arose only at the time when the Court ruled on that application, the rules in question applied immediately.

Accordingly, pursuant to Article 123(3) of the Rules of Procedure, the Court was to give judgment in favour of the applicant in the judgment by default, unless it was clear that it had no jurisdiction to hear and determine the action or that the action was manifestly inadmissible or manifestly lacking any foundation in law. The Court held that it had jurisdiction to hear the present action pursuant to the arbitration clause, within the meaning of Article 272 TFEU, contained in Article 5.2 of the contract at issue. It also considered that there was no doubt that the action was admissible and that, in view of the contract provisions and the description of the facts set out by the Commission in the application and substantiated by the documents in the file, the action was not manifestly lacking any foundation in law.

II. LAW GOVERNING THE INSTITUTIONS — EUROPEAN CITIZENS' INITIATIVE — SOCIAL POLICY

In the case that gave rise to the judgment of 19 April 2016, ***Costantini and Others*** v ***Commission*** (T-44/14, EU:T:2016:223), an action had been brought before the Court for annulment of the Commission decision rejecting the request for registration of a proposed European citizens' initiative ('ECI'), the aim of which was to invite the European Union to 'propose legislation ensuring [the] fundamental right to human dignity by guaranteeing adequate social protection and access to quality, sustainable long-term care above and beyond health care'. The ECI at issue sought, in essence, that long-term care should, on the basis of Article 14 TFEU, be excluded from the scope of the rules of the internal market and classified as a service of general economic interest ('SGEI'). The Commission had based its rejection of the request on Article 4(2)(b) of Regulation (EU) No 211/2011, 16 being of the view that the proposal manifestly did not come within the powers which enabled it to submit a proposal for the adoption of a legal act of the Union for the purposes of the application of the Treaties. It had considered, in particular, that Article 14 TFEU did not constitute an appropriate legal basis for the proposed ECI, because the EU legislature could not require the Member States to provide an SGEI.

In the first place, the Court observed that the Commission was entitled to conclude that, having regard to the allocation of powers between the Member States and the Union in the field of SGEIs, it was not entitled to submit a proposal for an act founded on Article 14 TFEU and having as its aim that long-term care be classified as an SGEI. Member States were entitled, while complying with EU law, to define the scope and the organisation of their SGEIs. They had a wide discretion to define what they regarded as SGEIs and the definition of such services by a Member State could be questioned by the Commission only in the event of manifest error. That prerogative of the Member State concerning the definition of SGEIs was confirmed by the absence both of any competence specially attributed to the European Union and of a precise and complete definition of the concept of an SGEI in EU law.

In the second place, the Court considered that the Commission had also been entitled conclude in the contested decision that it was manifestly unable to submit a proposal for an act where the proposal was founded on Article 14 TFEU and had the aim that long-term care be excluded from the application of the internal market rules. It was clear from Article 14 TFEU that the specific rules which it laid down were applicable to SGEIs without prejudice to Article 106 TFEU. Under Article 106(2) TFEU, even undertakings entrusted with the operation of such services were to be subject to the rules contained in the Treaties, in particular to the rules on the internal market and on competition, a principle which could be derogated from only under strict conditions, the presence of which depended on the legal and factual circumstances prevailing in each Member State and must be demonstrated in each specific case by the Member State or undertaking which relied on them. It followed, according to the Court, that the Commission could not propose generally to exempt from the application of internal market rules services whose classification as an SGEI depended on the national policy pursued by each Member State.

16| Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, p. 1).

III. COMPETITION RULES APPLICABLE TO UNDERTAKINGS

GENERAL ISSUES

The year 2016 saw a significant number of developments in the case-law relating to competition, in particular as regards the rights of the defence, the conditions laid down for the grant of immunity, the possibility for the Commission to choose an amicable settlement, the obligation to state reasons and the unlimited jurisdiction of the Courts of the European Union.

1. RIGHTS OF THE DEFENCE

a. STATEMENT OF OBJECTIONS

In the case that gave rise to the judgment of 19 January 2016, ***Toshiba*** v ***Commission*** (T-404/12, under appeal, [17] EU:T:2016:18), the Court was called upon to examine the legality of the decision whereby the Commission had re-imposed fines on two participants in a cartel, following the partial annulment of the earlier decision by the Court, which had found an error in the method employed when choosing the reference year for the purpose of calculating the amount of the fine. [18] Whereas, before adopting the contested decision, the Commission had sent the parties concerned a letter of facts setting out the methods to be used in the new calculation of the amount of the fine, the applicant maintained that, rather than merely sending it a letter of facts, the Commission ought to have sent it a new statement of objections.

The Court observed that the content of the statement of objections that preceded the adoption of the earlier decision might be taken into consideration, provided that it was not called in question in the judgment that annulled that decision in part. It pointed out, moreover, that the judgment that had annulled the first decision in part had not called in question the veracity, relevance or validity of the elements of law and fact relating to the calculation of the amount of the fine set out in the statement of objections issued in the context of the adoption of that decision. The Court also rejected the applicant's arguments, based, in particular, on the judgment in ***Cimenteries CBR and Others*** v ***Commission***, [19] concerning the Commission's alleged practice in taking decisions and the Notice on best practices, [20] and concluded that the principle of respect for the rights of the defence did not require the Commission to send a new statement of objections.

17| Case C-180/16 P, ***Toshiba*** v ***Commission.***

18| See also, below, the discussion of this judgment under '(b) Right to be heard' and under 'Developments in the area of Article 101 TFEU — 3. Calculation of the amount of the fine'.

19| Judgment of 15 March 2000 (T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77).

20| Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 [TFEU] (OJ 2011 C 308, p. 6).

b. RIGHT TO BE HEARD

The judgment of 19 January 2016, ***Toshiba*** v ***Commission*** (T-404/12, under appeal, [21] EU:T:2016:18), also allowed the Court to provide clarification of the scope of the right to be heard. [22]

In that regard, the Court observed that respect for the rights of the defence required that the person concerned must have been afforded the opportunity, during the administrative procedure, to make known its view on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there had been an infringement of the FEU Treaty. Thus, where, as in this case, the Commission, following the partial annulment of a decision imposing a fine, adopted a decision amending the amount of the fine, it was required to provide the undertaking concerned with additional information as to how it intended to ensure that the fine would have a deterrent effect, so as to enable the undertaking properly to make known its views, including in relation to the imposition of the additional amount. However, if, before adopting the amending decision, the Commission sent that undertaking a letter of facts, it was not necessary for the Commission to have referred expressly to the information in question in that document, which did not have any particular procedural status. Rather, it was necessary to ascertain whether, in relation to the proceedings as a whole which had led to the adoption of the contested decision, the undertaking concerned had been placed in a position in which it could adequately understand that intention and respond to it.

In the light of those considerations, the Court noted that, in this case, from the time of the initial statement of objections, the undertaking concerned had been aware that the Commission intended to ensure that the fine imposed would have a deterrent effect. It further noted that, at the very latest from the time of the initial decision, the undertaking concerned had been in a position to understand that that intention implied the imposition of an additional amount for a specific period of activity and that that intention had not been called in question in the judgment partially annulling the initial decision and had been reaffirmed both in the letter of facts and at a meeting between the Commission and that undertaking. The Court therefore concluded that no breach of that undertaking's rights of defence in relation to the Commission's intention to impose the additional amount on it had been established.

c. USE OF SECRET RECORDINGS OF TELEPHONE CONVERSATIONS AS EVIDENCE

In the judgment of 8 September 2016, ***Goldfish and Others*** v ***Commission*** (T-54/14, EU:T:2016:455), the Court had the opportunity to rule on the use of secret telephone conversations as evidence in an investigation relating to an infringement of competition law. More particularly, the question that arose in this case was whether evidence collected lawfully by the Commission, in this instance secret recordings of telephone conversations, could be used by the Commission, even though it had originally been obtained by a third party and might have been obtained in breach of the right to respect for the private life of the person whose conversations had been recorded.

On this point, the Court stated that it followed from the case-law of the European Court of Human Rights that the use of an illegal recording as evidence did not in itself conflict with the principles of fairness laid

21 | Case C-180/16 P, ***Toshiba*** v ***Commission.***

22 | See also, above, the discussion of this judgment under '(a) Statement of objections' and, below, under 'Developments in the area of Article 101 TFEU — 3. Calculation of the amount of the fine'.

down in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, even where that evidence had been obtained in breach of the requirements of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, where the applicant in question had not been deprived of a fair trial or of his rights of defence, and also where that had not been the only item of evidence relied on in support of the conviction. In this case, according to the Court, during the administrative procedure the Commission had given all parties the opportunity to access all the audio recordings and written notes accompanying them contained in the file. Nor had the recordings at issue been the only evidence used by the Commission, as the finding in the contested decision of an infringement of Article 101 TFEU by the applicants had been based on a body of evidence obtained by the Commission during the administrative procedure. In those circumstances, the Court considered that, even if it must be held that the recordings at issue had been made unlawfully by one of the applicants' competitors, the Commission had been entitled to use them as evidence in the contested decision in order to find that there had been an infringement of Article 101 TFEU.

2. CONDITIONS LAID DOWN FOR THE GRANT OF IMMUNITY

In the judgment of 29 February 2016, ***Schenker*** v ***Commission*** (T-265/12, under appeal, [23] EU:T:2016:111), the Court ruled on the conditions under which the Commission may grant immunity to an undertaking which discloses its participation in an alleged cartel. [24] An application had been made to the Court for annulment of the Commission decision finding that companies active in the international air freight forwarding services sector had participated in various agreements and concerted practices in that sector. Having begun its investigation following the application for immunity submitted by Deutsche Post AG, pursuant to the 2006 Leniency Notice, [25] the Commission had granted the immunity sought by that undertaking. The applicant challenged the Commission's decision to grant immunity to Deutsche Post, claiming that it had treated that undertaking more favourably than the other undertakings which had submitted applications for immunity and reduction of fines. Although the Commission had found that there were four infringements, it had granted general conditional immunity covering the air freight forwarding sector to Deutsche Post, but failed to examine whether the evidence produced by that undertaking had covered all the conduct at issue. The applicant alleged that, if all the applications for immunity and reduction of fines had been assessed by reference to the freight forwarding sector as a whole, it would have qualified for more favourable treatment.

In that regard, the Court observed that, at the time when the Commission receives an application for immunity under point 8(a) of the 2006 Leniency Notice, it does not yet have any knowledge of the cartel concerned. Accordingly, as stated in footnote 1 to point 8(a) of the 2006 Leniency Notice, the Commission must carry out an *ex ante* assessment of the application for immunity, based exclusively on the type and quality of information submitted by the undertaking. The 2006 Leniency Notice therefore does not preclude the Commission granting conditional immunity to an undertaking even where the information provided by that undertaking does not yet enable the Commission to form a detailed and specific conception of the nature and scope of the alleged cartel. The Court therefore concluded that point 8(a) and points 9 and 18 of the 2006 Leniency Notice did not require that the material submitted by an undertaking should constitute information and evidence pertaining specifically to the infringements which are identified by the Commission at the end of the administrative procedure, but that it was sufficient if that material enabled the Commission

23| Case C-263/16 P, ***Schenker*** v ***Commission.***

24| See also, below, the discussion of this judgment under '3. Possibility for the Commission to opt for a settlement'.

25| Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

to carry out a targeted investigation in relation to an alleged infringement which covered the infringement(s) that the Commission found to exist at the end of that procedure.

3. POSSIBILITY FOR THE COMMISSION TO OPT FOR A SETTLEMENT

The judgment of 29 February 2016, ***Schenker*** v ***Commission*** (T-265/12, under appeal, [26] EU:T:2016:111), also provided the Court with the opportunity to rule on the scope of the Commission's discretion to opt for a settlement in the application of Articles 101 and 102 TFEU. [27] The applicant maintained that the Commission had made an error of assessment in deciding, before it had made contact with the addressees of the contested decision, not to pursue a settlement. In the applicant's submission, the Commission was incapable of fully assessing whether a settlement procedure was appropriate until it had made contact with the parties concerned and explored their interest in achieving a settlement.

The Court pointed out that, under Article 10a(1) of Regulation (EC) No 773/2004, [28] as amended by Regulation No 622/2008, [29] the Commission might set a time limit within which the parties could indicate in writing that they were prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. It was therefore plain from the wording of that provision that the Commission was not obliged to make contact with the parties, but that it had a discretion in that regard. In that context, the Court noted that the Commission's practice was consistent with that approach. According to point 6 of its Notice on the conduct of settlement procedures, [30] where the Commission considered that a particular case might, in principle, be suitable for settlement, it was supposed to explore the possible interest in settlement of all the parties, although the parties to the proceedings did not have a right to that procedure. Accordingly, point 6 also provided for the possibility that the Commission might consider that a case was not suitable for settlement without first having made contact with the parties concerned and explored their interest in achieving a settlement. Thus, in this case, the mere fact that the Commission had not explored the applicant's interest and the interest of the other undertakings concerned in achieving a settlement was not in itself capable of demonstrating that the contested decision was vitiated by errors.

4. OBLIGATION TO STATE REASONS

In the judgment of 13 December 2016, ***Printeos and Others*** v ***Commission*** (T-95/15, EU:T:2016:722), the Court had the opportunity to provide clarification of the extent of the Commission's obligation to state reasons in decisions imposing fines for infringements of competition law which it adopts in the context of a settlement procedure, within the meaning of Article 10a of Regulation No 773/2004 and the Notice on the conduct of settlement procedures.

26| Case C-263/16 P, ***Schenker*** v ***Commission.***

27| See also, above, the discussion of this judgment under '2. Conditions laid down for the grant of immunity'.

28| Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

29| Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ 2008 L 171, p. 3).

30| Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

In that connection, after recalling the principles governing the implementation of the obligation to state reasons, as laid down in the second paragraph of Article 296 TFEU, the Court held that, having regard to the requirements flowing from Article 47 of the Charter of Fundamental Rights, read with Article 263 TFEU, and with Article 261 TFEU and Article 31 of Regulation (EC) No 1/2003, [31] as set out in point 41 of the Notice on the conduct of settlement procedures, those principles applied mutatis mutandis to the Commission's obligation to state reasons for the decision imposing fines which it adopted following a settlement procedure, in which the undertaking concerned was supposed to accept only the maximum amount of the proposed fine.

Compliance by the Commission with the guarantees conferred by the EU legal order in administrative procedures, including the obligation to state reasons, was of even more fundamental importance when it decided, at the stage of setting the amount of the fines imposed, to depart from the general methodology set out in the Guidelines on setting fines, [32] relying, as in the present case, on point 37 of those Guidelines. The 2006 Guidelines laid down a rule of conduct indicating the approach to be adopted from which the Commission could not depart, in a particular case, without stating reasons compatible with, in particular, the principle of equal treatment. Those reasons must be all the more specific because point 37 of the 2006 Guidelines merely made a vague reference to the particularities of a specific case and therefore left a wide discretion to the Commission to make an exceptional adjustment to the basic amounts of fines. It followed that, in this case, the Commission was required to explain in a sufficiently clear and precise manner the way in which it proposed to use its discretion, including the various elements of fact and of law which it had taken into consideration in that respect. In particular, having regard to its obligation to comply with the principle of equal treatment when determining the amounts of the fines, that obligation to state reasons encompassed all the relevant elements required in order to be able to determine whether the undertakings concerned, the basic amounts of whose fines were adjusted, were or were not in comparable situations, whether those situations had been treated equally or unequally and whether any equal or unequal treatment of those situations was objectively justified. In this case, the Court found that, in the contested decision, the Commission had not stated the reasons why it had applied significantly different rates of reduction to the undertakings concerned. It held that the contested decision was vitiated by insufficient reasoning.

5. UNLIMITED JURISDICTION

The judgments of 28 June 2016, ***Portugal Telecom*** v ***Commission*** (T-208/13, EU:T:2016:368), and of 28 June 2016, ***Telefónica*** v ***Commission*** (T-216/13, under appeal, [33] EU:T:2016:369), provided the Court with the opportunity to clarify the scope of the judicial review by the Court of Commission decisions applying Articles 101 and 102 TFEU and, in particular, of the determination of the amount of fines to be imposed in that context. [34] The Court was called upon to examine the legality of the decision whereby the Commission had found that Portugal Telecom SGPS, SA (the largest telecommunications operator in Portugal) and Telefónica, SA (the largest telecommunications operator in Spain) had infringed Article 101 TFEU by participating in a non-compete agreement. At issue was the non-compete clause concerning the Iberian market inserted into the contract for the purchase by Telefónica of Portugal Telecom's stake in the Brazilian mobile telephone operator Vivo.

31 | Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] TFEU (OJ 2003 L 1, p. 1).

32 | Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

33 | Case C-487/16 P, ***Telefónica*** v ***Commission.***

34 | See also, below, the discussion of these judgments under 'Developments in the area of Article 101 TFEU — 2. Restriction by object and 3. Calculation of the amount of the fine'.

In that regard, the Court observed that the system of judicial review of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU consisted in a review of the legality of the acts of the European Union institutions for which provision was made in Article 263 TFEU, which might be supplemented, pursuant to Article 261 TFEU and at the request of the applicants, by the Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission. The Court considered, nonetheless, that in these particular cases it did not have sufficient material before it to determine the final amount of the fines to be imposed on the applicants. The Court emphasised that it was true that the unlimited jurisdiction which it might exercise under Article 31 of Regulation No 1/2003 empowered it, in addition to merely reviewing the lawfulness of the penalty, to substitute its own assessment for the Commission's. In this instance, however, the Commission had not analysed the material put forward by the applicants in order to demonstrate the absence of potential competition between the parties with respect to certain services in order to determine the value of sales to be taken into consideration in the calculation of the amount of the fine. If the Court were to determine the value of those sales that would therefore mean that it was induced to fill a gap in the investigation of the case. The exercise of unlimited jurisdiction did not go so far as leading the Court to undertake such an investigation.

DEVELOPMENTS IN THE AREA OF ARTICLE 101 TFEU

1. CONCEPT OF POTENTIAL COMPETITION

Delivered on the same day as five other judgments (judgments of 8 September 2016, ***Arrow Group and Arrow Generics*** v ***Commission***, T-467/13, not published, EU:T:2016:450; of 8 September 2016, ***Merck*** v ***Commission***, T-470/13, not published, EU:T:2016:452; of 8 September 2016, ***Sun Pharmaceutical Industries and Ranbaxy (UK)*** v ***Commission***, T-460/13, not published, EU:T:2016:453; of 8 September 2016, ***Generics (UK)*** v ***Commission***, T-469/13, not published, EU:T:2016:454; and of 8 September 2016, ***Xellia Pharmaceuticals and Alpharma*** v ***Commission***, T-471/13, not published, EU:T:2016:460), in a number of actions brought against the Commission decision finding that there had been a cartel on the market for antidepressant medicinal products containing the active pharmaceutical ingredient citalopram, the judgment of 8 September 2016, ***Lundbeck*** v ***Commission*** (T-472/13, under appeal, [35] EU:T:2016:449), provided the Court with the opportunity to rule on the concept of potential competition. [36] The case concerned a number of agreements between H. Lundbeck A/S ('Lundbeck'), a company governed by Danish law which controlled a group of companies involved in researching and marketing new medicinal products and owns patents on the medicinal products in question, and certain companies active in the production and sale of generic medicinal products. The agreements were designed to place limits on the latter companies' entry to the market for the products concerned, in exchange for significant sums paid to them by Lundbeck. The Commission had found that Lundbeck and the generic undertakings were at least potential competitors and that the agreements at issue constituted restrictions of competition by object.

In that regard, the Court recalled that the examination of conditions of competition on a given market must be based not only on existing competition but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functioned, there were real and concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to be able to enter the relevant market and compete with established undertakings. In order

35| Case C-591/16 P ***Lundbeck*** v ***Commission.***

36| See also, below, the discussion of this judgment under '2. Restriction by object — (b) Disproportionate reverse payments entailing the exclusion of competitors from the market'.

to ascertain whether an undertaking was a potential competitor, the Commission had to determine whether, if the agreement in question had not been concluded, there would have been real concrete possibilities for that undertaking, within the framework of an economically viable strategy, to enter that market and to compete with established undertakings. Such a demonstration must be supported by factual evidence or an analysis of the structures of the relevant market.

Examining, in that context, more specifically Lundbeck's argument that the contested decision was vitiated by an error of law in that it had found that the launch of medicinal products that infringed third parties' intellectual property rights was the expression of potential competition under Article 101 TFEU, the Court noted that, while patents were indeed presumed valid until they were expressly revoked or invalidated by a competent authority or court, that presumption of validity could not be equated with a presumption of illegality of generic products validly placed on the market which the patent holder deemed to be infringing the patent. Thus, in this instance it was for Lundbeck to prove before the national courts, in the event that the generics entered the market, that those generics infringed one or more of its process patents, since an 'at risk' entry was not unlawful in itself. Moreover, in the context of an infringement action brought by Lundbeck against the generic undertakings, those undertakings could have contested the validity of the patent on which Lundbeck relied by raising a counterclaim. Therefore, in general, the generic undertakings had several routes — constituting real concrete possibilities — by which they might enter the market at the time the agreements at issue had been concluded, in particular by launching a generic product 'at risk', with the possibility of having to face proceedings brought by Lundbeck. That possibility represented the expression of potential competition, in a situation such as that in the present case where Lundbeck's original patents had expired and where there had been other processes that would allow the production of generic citalopram that had not been found to infringe other Lundbeck patents. In addition, the steps taken and investments made by the generic undertakings in order to enter the citalopram market before concluding the agreements at issue showed that they had been ready to enter the market and to accept the risks involved in doing so. The Court further observed that although other statements contemporaneous with the conclusion of the agreements at issue might suggest that the generic undertakings had had doubts concerning the non-infringing nature of their products, or that Lundbeck had been convinced of the validity of its patents, those statements were not enough to call in question the conclusion that the generic undertakings had been perceived as a potential threat for Lundbeck and had been liable, by their very existence, to exert competitive pressure on Lundbeck and on the undertakings operating in the market.

The Court recalled, moreover, that in order to establish the existence of potential competition, all that was required was that the entry to the market should take place within a reasonable period, no specific limit having been fixed in that respect. The Commission therefore did not need to demonstrate with certainty that the entry of the generic undertakings to the market would have taken place before the expiry of the agreements at issue in order to be able to establish the existence of potential competition in the present case, particularly since, in the pharmaceutical sector in particular, potential competition might be exerted long before the expiry of a patent and the steps taken before that expiry were relevant in assessing whether that competition had been restricted. Last, the Court observed that potential competition included, in particular, the activities of the generic undertakings seeking to obtain the necessary marketing authorisations as well as all the administrative and commercial steps required in order to prepare for entry to the market. That potential competition was protected by Article 101 TFEU. If it were possible, without infringing competition law, to pay undertakings which are in the process of taking the necessary steps to prepare for the launch of a generic medicinal product and which have made significant investments to that end to cease or merely slow that process, effective competition would never take place, or would suffer significant delays, at the expense of consumers.

2. RESTRICTION BY OBJECT

a. NON-COMPETE CLAUSE

In the judgments of 28 June 2016, ***Portugal Telecom*** v ***Commission*** (T-208/13, EU:T:2016:368), and of 28 June 2016, ***Telefónica*** v ***Commission*** (T-216/13, under appeal, [37] EU:T:2016:369), the Court was also required to rule on the classification of the non-compete clause at issue as a restriction of competition by object. [38] The applicants disputed that classification on the ground that the Commission had not demonstrated that they were potential competitors and that the clause was therefore capable of restricting competition.

First, as regards the classification of the clause at issue as an 'ancillary restriction', the Court considered that Portugal Telecom had not shown that the restriction introduced by that clause was linked to the option of purchasing its shares held by Telefónica (an option initially provided for and later eliminated from the agreement) and to the resignation of the members of its Management Board appointed by the Telefónica (a condition set out in the final version of the agreement). As for the self-assessment obligation contained in the clause at issue, there was nothing to indicate that the clause contained a self-assessment obligation on which the entry into force of the non-competition obligation depended. Furthermore, although Telefónica claimed that the clause at issue had been imposed by the Portuguese Government or that it had in any event been necessary in order for that Government to refrain from blocking the agreement relating to the 'Vivo operation', the Court considered that Telefónica had not adduced sufficient evidence in support of those claims. In addition, it pointed out that Telefónica had not provided any information capable of explaining why a clause providing for non-competition on the Portuguese and Spanish markets might be considered to be objectively necessary for a transaction relating to the takeover of shares in a Brazilian operator.

Second, as regards the capacity of the clause at issue to restrict competition between Portugal Telecom and Telefónica, the applicants maintained that the Commission had erred in failing to carry out an examination of the conditions of potential competition in order to ascertain whether there were real and concrete possibilities that they would compete with each other on the relevant markets alleged to be affected by the non-compete clause. In that regard, the Court observed that, in order to determine whether an agreement between undertakings or a decision of an association of undertakings presented a sufficient degree of harm to be regarded as a restriction of competition by object within the meaning of Article 101(1) TFEU, it was necessary to have regard to the content of its provisions, its objectives and the economic and legal context of which it formed part. However, the Commission was not always required to produce a precise definition of the markets concerned. Thus, in the context of Article 101(1) TFEU, a prior definition of the relevant market was not required where the agreement at issue had in itself an anticompetitive object. Accordingly, in so far as, in this case, the Commission had found that the clause to which it had taken exception in the contested decision had had market sharing as its object, the applicants could not maintain that a detailed analysis of the markets concerned had been necessary in order to determine whether the clause constituted a restriction of competition by object. Undertakings which concluded an agreement whose purpose was to restrict competition could not, in principle, avoid the application of Article 101(1) TFEU by claiming that their agreement should not have an appreciable effect on competition. Therefore the applicants' argument that the existence of an alleged non-compete agreement could not constitute proof of the existence of potential competition between the parties was irrelevant.

37 | Case C-487/16 P, ***Telefónica*** v ***Commission.***

38 | See also, above, the discussion of these judgments under 'General issues — 5. Unlimited jurisdiction' and, below, under '3. Calculation of the amount of the fine'.

b. DISPROPORTIONATE REVERSE PAYMENTS ENTAILING THE EXCLUSION OF COMPETITORS FROM THE MARKET

In the case that gave rise to the judgment of 8 September 2016, ***Lundbeck*** v ***Commission*** (T-472/13, under appeal, [39] EU:T:2016:449), the Court was required, in particular, to examine whether agreements concluded between the group of companies controlled by Lundbeck, the holder of patents on antidepressant medicinal products containing the active pharmaceutical ingredient citalopram, and undertakings marketing generic medicinal products, under which those undertakings had been excluded from the market for those medicinal products in return for significant payments by Lundbeck, fell within the scope of the prohibition laid down in Article 101(1) TFEU. [40]

First of all, the Court observed that the fact that restrictions of competition had been obtained through significant reverse payments was a decisive factor in the legal assessment of those agreements. It followed that, where a reverse payment was combined with an exclusion of competitors from the market or a limitation of the incentives to seek market entry, it was possible that such a limitation had not arisen exclusively from the parties' assessment of the strength of the patents but had been obtained by means of that payment, which constituted a buy-off of competition. Thus, in this instance the disproportionate nature of such payments, combined with several other factors, such as the fact that the amounts of those payments seemed to correspond at least to the profit expected by the generic undertakings if they had entered the market or the absence of provisions allowing the generic undertakings to launch their products on the market upon the expiry of the agreements without having to fear infringement actions, led to the conclusion that the agreements at issue had as their object the restriction of competition, within the meaning of Article 101(1) TFEU.

Next, the Court noted that it was true that the asymmetry of the risks faced by the generic undertakings and by Lundbeck, whose turnover was essentially represented by the patented medicinal product in question, could partly explain why Lundbeck might have been induced to grant significant reverse payments in order to avoid any risk, even small, that the generics might enter the market. However, that could not preclude the application of Article 101 TFEU. Thus, although it was possible that Lundbeck might have suffered irreparable harm in the event of unlawful entry of the generic undertakings to the market, as a result of the irreversible price falls that such entry would have brought about, regulatory price cuts following the expiry of a patent on the active pharmaceutical ingredient were a characteristic of pharmaceutical markets known to Lundbeck and therefore constituted a normal commercial risk that could not justify the conclusion of anticompetitive agreements. Thus, to accept the argument concerning the asymmetry of risks would amount, ultimately, to considering that Lundbeck could, by concluding agreements such as the agreements at issue with the generic undertakings, protect itself against an irreversible price fall which could not have been avoided even if it had been successful in infringement actions before the national courts. Such an outcome would be manifestly contrary to the objectives of the FEU Treaty provisions on competition, which are intended in particular to protect consumers from unjustified price increases resulting from collusion between competitors. There was thus no reason to suppose that such collusion would be lawful in the present case, under the pretext that certain process patents were in dispute, when the defence of those patents before the national courts could not, even in the most favourable scenario for Lundbeck, have led to the same negative consequences for competition and, in particular, for consumers. The Court emphasised that in any event, even if the restrictions set out in the agreements at issue potentially fell within the scope of the Lundbeck patents, in that they might

39| Case C-591/16 P, ***Lundbeck*** v ***Commission.***

40| See also, above, the discussion of this judgment under '1. Concept of potential competition'.

also have been obtained through litigation, that was merely a possibility at the time the agreements at issue were concluded. The replacement of uncertainty as to whether or not the generic undertakings' products were infringing and as to the validity of Lundbeck's patents by the certainty that the generic undertakings would not enter the market during the term of the agreements at issue constituted, as such, a restriction on competition by object in this instance, since that result had been obtained through a reverse payment.

Last, the Court noted that the generic undertakings had made considerable efforts to prepare for their market entry and that they had not intended to desist from those efforts on account of Lundbeck's patents. It was true that there had been uncertainty as to whether their products might eventually have been declared infringing by a competent court. The contested decision demonstrated, however, that the generic undertakings had had a real chance of succeeding in the event of litigation. Accordingly, by concluding the agreements at issue, the parties thereto had replaced that uncertainty by the certainty that the generic undertakings would not enter the market, in return for significant reverse payments, thus eliminating all competition, even potential competition, on the market during the term of those agreements.

3. CALCULATION OF THE AMOUNT OF THE FINE

In the judgments of 28 June 2016, ***Portugal Telecom*** v ***Commission*** (T-208/13, EU:T:2016:368), and of 28 June 2016, ***Telefónica*** v ***Commission*** (T-216/13, under appeal, [41] EU:T:2016:369), the Court was also called upon to rule on the determination of the value of sales to be taken into consideration in calculating the value of the applicable fine. [42] The applicants claimed that it was necessary to exclude from the calculation the volume of sales achieved on the markets or by means of services not subject to potential competition which did not come within the scope of the non-compete clause at issue.

On this point, although the Commission claimed that, in view of the very broad scope of the non-compete clause, it was not required to analyse potential competition between the parties for each of the services referred to by the applicants in order to determine the value of sales to be taken into consideration when calculating the amount of the fine, the Court found that that argument could not succeed. The clause applied, according to its wording, to 'any project in the telecommunication business that can be deemed to be in competition with the other within the Iberian market'. The Court further observed that, for the purposes of calculating the fine, the Commission had used the value of sales of activities which in its view came within the scope of the clause and had excluded sales corresponding to current activities, which, according to the terms of the clause, were excluded from its scope. Accordingly, sales corresponding to activities that could not be in competition with the other party during the period of application of the clause, which were also excluded from its scope according to its terms, also had to be excluded for the purposes of calculating the fine. It followed that, even though the Commission had not been required to evaluate potential competition with respect to each of the services invoked by the applicants for the purposes of establishing the infringement, it nonetheless ought to have considered whether the applicants were correct to maintain that the value of sales of the services in question should be excluded from the calculation of the amount of the fine on the ground that there was no potential competition between the parties with respect to those services.

In that regard, the Court recalled that the Commission must assess the intended impact on the undertaking in question, taking into account in particular a turnover which reflected the undertaking's real economic situation during the period in which the infringement had been committed. For the purpose of fixing the

41 | Case C-487/16 P, ***Telefónica*** v ***Commission.***

42 | See also, above, the discussion of these judgments under 'General issues — 5. Unlimited jurisdiction' and under 'Developments in the area of Article 101 TFEU — 2. Restriction by object — (a) Non-compete clause'.

fine, it was permissible to have regard both to the undertaking's total turnover and to the proportion of that turnover accounted for by the goods in respect of which the infringement had been committed, which therefore gave an indication of the scale of the infringement. In that context, the objective of point 13 of the 2006 Guidelines on setting fines was to state, as a starting point for the calculation of the amount of the fine to be imposed on an undertaking, an amount that reflected the economic importance of the infringement and the relative weight of that undertaking in the infringement. Consequently, the concept of value of sales referred to in point 13 of the Guidelines extended to sales made in the market to which the infringement related in the European Economic Area (EEA), without there being any need to determine whether those sales had actually been affected by the infringement. Nonetheless, that concept could not be extended to cover the undertaking's sales which did not fall, directly or indirectly, within the scope of that cartel.

According to the Court, the Commission could not be required, when faced with a restriction by object, to carry out on its own initiative an examination of potential competition for all the markets and services concerned by the scope of the infringement. The Court's approach did not impose on the Commission, when determining the amount of the fine, an obligation by which it was not bound for the purposes of applying Article 101 TFEU in the case of an infringement which had an anticompetitive object, but in drawing the inferences from the fact that the value of sales must be directly or indirectly related to the infringement within the meaning of point 13 of the Guidelines and could not cover the sales which did not fall, directly or indirectly, within the scope of the infringement. In this case, in the light of the wording of the clause at issue and of the fact that the applicants had put forward factual material in order to demonstrate that the value of the sales of certain services relied on should be excluded for the purposes of the calculation of the fine on the ground that there had been no competition between the parties, the Commission ought to have examined that material. Thus, the Commission ought to have determined the services for which the parties had not been in potential competition on the Iberian market. Only on the basis of such a factual and legal analysis would it have been possible to determine the sales directly or indirectly related to the infringement, the value of which ought to have served as the starting amount for the calculation of the basic amount of the fine.

In the judgments of 19 January 2016, ***Toshiba*** v ***Commission*** (T-404/12, under appeal, [43] EU:T:2016:18), [44] and of 19 January 2016, ***Mitsubishi Electric*** v ***Commission*** (T-409/12, EU:T:2016:17), the Court, inter alia, provided clarification concerning the determination of the basic amount of the fine where an undertaking has participated in a cartel via a joint venture. During the reference year, the applicants had participated in the cartel at issue via a joint venture held in equal shares with another participant. In order to remedy the illegality that had led to the annulment of the decision which it had initially adopted with respect to that cartel, the Commission had chosen to calculate a hypothetical starting amount for the joint venture on the basis of its turnover for the reference year and to apportion it between the two shareholders in accordance with their respective sales of the products concerned during the last full year preceding the creation of the joint venture.

The Court considered that the Commission had been correct to choose to determine a hypothetical starting point for the joint venture and to divide it between its shareholders, since that joint venture was a separate undertaking which constituted a separate entity from its shareholders, albeit controlled by them jointly. In those circumstances, the fact that the fines imposed in the contested decision had been imposed only on the shareholders, as the joint venture had been dissolved, could not result in the Commission's being required to divide up the joint venture's turnover artificially. As regards the argument that the allocation of the turnover between the two shareholders ought to have been based on their shareholding in the joint venture, rather

43| Case C-180/16 P, ***Toshiba*** v ***Commission.***

44| See also, above, the discussion of this judgment under 'General issues — 1. Rights of the defence'.

than on their sales during the last year preceding the creation of the joint venture, the Court considered that it could not succeed. In that regard, the Court also upheld the Commission's choice to allocate the starting amount between the shareholders by reference to their sales during the last year preceding the creation of the joint venture, since those figures were evidence of the unequal real positions of the two shareholders on the market at the time the joint venture was created, whereas the rate of their participation in the capital might have been motivated or influenced by circumstances unconnected with the market. The Court considered that, in the circumstances of the present case, that choice did not constitute unequal treatment by comparison with the other participants in the cartel.

Also called upon to examine the applicants' argument that the Commission had breached the principle of proportionality by calculating the amount of the fine imposed on them in the same way as it had calculated the amount of the fines imposed on the European producers, the Court recalled that, where an infringement had been committed by several undertakings, the relative gravity of the participation of each of them had to be examined. Thus, the fact that an undertaking had not taken part in all aspects of an anticompetitive scheme or that it had played a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement was assessed and when the fine was determined. In the light of those considerations, the Court stated that, in this case, the inaction on the part of the Japanese undertakings, including the applicants, had been a prerequisite for ensuring that the allocation of gas insulated switchgear projects in the EEA could be carried out among the European producers in accordance with the rules agreed to that effect. Thus, by honouring their commitments, the Japanese undertakings had made a necessary contribution to the functioning of the infringement as a whole. Consequently, the Court concluded, the applicants' contribution to the infringement was comparable to that of the European undertakings.

IV. STATE AID

ADMISSIBILITY

1. ACT AGAINST WHICH AN ACTION MAY BE BROUGHT

In the order of 9 March 2016, ***Port autonome du Centre et de l'Ouest and Others*** v ***Commission*** (T-438/15, EU:T:2016:142), the Court had the opportunity to set out the conditions in which a letter from the Commission constitutes an act against which an action may be brought, within the meaning of Article 263 TFEU, in the context of a procedure relating to existing aid. The letter at issue had been sent in the context of the stage of cooperation between the Member State and the Commission, referred to in Article 17(1) of Regulation (EC) No 659/1999. [45] According to the applicants, the letter contained a decision finding that the existing aid, which resulted from a corporation tax exemption for Belgian ports, was incompatible with the internal market.

According to the Court, given that the proposal for appropriate measures was not a challengeable act, preparatory acts occurring prior to that proposal for appropriate measures, such as the letter at issue, did not, a fortiori, constitute measures producing binding legal effects. It pointed out in that regard that, according to settled case-law, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they were the culmination of an internal procedure, a measure would be open to review only if it was

45 | Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

a measure definitively laying down the position of the institution upon closure of that procedure, and not a provisional measure intended to pave the way for that final decision. That was manifestly not the position in the present case with regard to the letter at issue, given that it was clear from the content of that letter that it concerned a 'preliminary view' of the Commission and that the latter might be obliged, as a result of that view, to move to the next stage of the procedure, which involved the submission of formal proposals concerning appropriate measures to be taken by the Member State concerned. In the light of those considerations, the Court concluded that the letter at issue did not constitute an act producing binding legal effects and capable of being the subject of an action for annulment on the basis of Article 263 TFEU.

2. INDIVIDUAL EFFECT

In the cases that gave rise to the judgments of 4 February 2016, ***Heitkamp BauHolding*** v ***Commission*** (T-287/11, under appeal, [46] EU:T:2016:60), and of 4 February 2016, ***GFKL Financial Services*** v ***Commission*** (T-620/11, under appeal, [47] EU:T:2016:59), the Court, inter alia, provided clarification of the concept of individual effect for the purposes of the fourth paragraph of Article 263 TFEU. [48] The cases concerned a Commission decision declaring that State aid implemented by the Federal Republic of Germany in the form of a scheme for the carry-forward of tax losses provided for by the law on corporation tax was incompatible with the internal market. That scheme enabled undertakings in difficulty which had undergone a significant change in the structure of their ownership to carry forward their losses to future tax years.

In that regard, the Court considered that an undertaking could not, in principle, bring an action for annulment of a Commission decision prohibiting a sectoral aid scheme if it was concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Conversely, where that Commission decision affected a group of persons who had been identified or identifiable when that measure had been adopted by reason of criteria specific to the members of that group, those persons might be individually concerned by that measure inasmuch as they formed part of a limited class of traders. Consequently, an undertaking which, like the applicants, had an acquired right to make a tax saving under national rules, classified as State aid by the decision prohibiting a sectoral aid scheme, must be seen as being part of a closed category of traders, who had been identified or at least readily identifiable at the time of the adoption of that decision, within the meaning of the judgment in ***Plaumann*** v ***Commission***. [49] That conclusion was not called into question by the fact that, following the Commission's decision to open the formal investigation procedure, and then the decision prohibiting the sectoral aid scheme, the national authorities had adopted measures designed to ensure that the national rules in question would not be used.

ADMINISTRATIVE PROCEDURE

In the case that gave rise to the judgment of 1 March 2016, ***Secop*** v ***Commission*** (T-79/14, EU:T:2016:118), an action had been brought before the Court against the Commission decision declaring that the aid granted by the Italian Republic in the form of a public guarantee in favour of ACC Compressors SpA was incompatible

46| Cases C-203/16 P, ***Andres (liquidator in the insolvency of Heitkamp BauHolding)*** v ***Commission***, and C-208/16 P, *Germany* v *Commission.*

47| Cases C-209/16 P, ***Germany*** v ***Commission***, and C-219/16 P, *GFKL Financial Services* v *Commission.*

48| See also, below, the discussion of these judgments under 'Selectivity — Fiscal aid'.

49| Judgment of 15 July 1963 (25/62, EU:C:1963:17).

with the internal market. [50] The Commission had previously decided, in a merger procedure, not to raise objections to the acquisition by a subsidiary of the applicants of the assets of ACC Austria GmbH, one of the subsidiaries of ACC Compressors. Before the Court, the applicant claimed, in particular, that it had not had the opportunity to present its view in the State aid procedure, initiated for the benefit of ACC Compressors, whereas the latter had had the opportunity, in the context of the merger procedure, to oppose the takeover of ACC Austria's shares by the applicant. That, in the applicant's submission, constituted a breach of the principle of equal treatment.

In that regard, the Court observed that, both in the context of a State aid procedure and as part of a merger procedure, the competitors of the undertakings concerned had no right to be automatically associated with the procedure, and that was particularly so in the context of the initial phase, in the course of which the Commission made a preliminary assessment of either the aid at issue or the notified merger. However, ACC Compressors' position in the merger procedure had been not only that of a competitor of Secop Austria, but also that of an 'interested party' within the meaning of Article 11(b) of Regulation (EC) No 802/2004. [51] As the parent company of ACC Austria, whose assets were all to be sold, ACC Compressors had to be assimilated to the vendor of those assets and, therefore, had the status of party to the proposed merger. However, unlike the competitors of the parties to the merger, interested parties had the right to express their views at all stages of the procedure, including the preliminary phase. Therefore the situation of the applicant under the State aid procedure that had led to the contested decision was different from that of ACC Compressors in the merger procedure, in that ACC Compressors had a right to be heard before the decision was adopted. Consequently, the fact that the Commission had not given the applicant the opportunity to state its point of view before adopting the contested decision did not amount to a breach of the principle of equal treatment.

Also called upon to examine the possibility that the Commission might use information obtained in a merger procedure for other purposes, the Court stated, first of all, that, in accordance with Article 17(1) of Regulation (EC) No139/2004, 52 information obtained under that regulation could be used only for the purposes of the request for information, investigation or hearing. However, that information constituted a factor that might, where appropriate, be taken into account in order to justify the opening of a procedure on a different legal basis. In this case, the Court noted, the applicant had taken issue with the Commission not for having failed to open a State aid procedure on the basis of the information gathered as part of the merger procedure, but for not having taken that information into account in the context of the State aid procedure that was already in progress. The Court therefore concluded that the Commission had at least been entitled, in the State aid procedure, to request the production of information or documents that had come to its knowledge in the merger procedure, if that information or those documents were relevant for the assessment of the aid in question. The Court pointed out, moreover, that the Commission must, as a matter of principle, avoid the inconsistences that could arise in the implementation of the various provisions of EU law. It followed that, when adopting a decision on the compatibility of State aid, the Commission must take into account the consequences of a merger that it was assessing under a different procedure. Where appropriate, the Commission might then be required to ask a question of the Member State concerned, in order to introduce the information at issue into the State aid procedure. Given that the information at issue had not been relevant for the purposes of assessing the compatibility of the aid at issue with the internal market, no such obligation had existed in this case.

50| See also, below, the discussion of this judgment under 'State aid compatible with the internal market'.

51| Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1).

52| Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

CONCEPT OF ADVANTAGE

1. BURDEN OF PROOF

In the judgment of 26 May 2016, ***France and IFP Énergies nouvelles*** v ***Commission*** (T-479/11 and T-157/12, under appeal, [53] EU:T:2016:320), the Court ruled on the legality of the decision whereby the Commission had classified as State aid the implied and unlimited guarantee afforded by the French Republic to the Institut français du pétrole (IFP) by the grant of the status of publicly owned industrial and commercial establishment (EPIC). The Court was required, in particular, to examine whether the Commission had been correct to conclude that that guarantee had conferred on IFP Énergies nouvelles (IFPEN) a selective advantage, which was one of the constituent elements of State aid within the meaning of Article 107(1) TFEU.

In that regard, the Court began by observing that the method which the Commission had chosen in order to determine whether IFPEN enjoyed an economic advantage by virtue of its EPIC status had been to examine the advantage which emerged in IFPEN's dealings with its creditors. According to the Court, that method was not wrong in law. First, a guarantee was an ancillary undertaking which could not be examined without taking into account the obligation to which it was attached. Second, the special feature of the guarantee forming the subject of the contested decision was that it was inherent in the status of the undertaking benefiting from it. On account of that special feature, the guarantee might influence the perception which creditors formed of the undertaking benefiting from it. Thus, the advantage which arose from a State guarantee inherent in the status of the undertaking benefiting from it materialised in that undertaking's dealings with its creditors. It took the form of the more favourable treatment which those creditors afforded to the beneficiary undertaking.

However, in the present case the application of that method was seriously flawed. In the first place, the contested decision contained no evidence of the existence of a tendency for suppliers to grant price reductions to establishments benefiting from a State guarantee, so that, in reality, the Commission had merely assumed the existence of a price reduction. In addition, the Commission had set about evaluating the scale of that price reduction by means of an indicator which had not measured the price reduction itself, but only the value of a guarantee which it had considered to be comparable to that from which IFPEN had benefited. In the second place, as regards IFPEN's dealings with its customers, it was clear from the contested decision that the Commission had defined the advantage that IFPEN had been able to derive from the State guarantee inherent in its EPIC status as being the non-payment of a premium for a performance bond. However, the Commission did not adduce any evidence to demonstrate that the assumptions on which its assumptions rested were well founded, or even likely. Thus, the Commission had failed to define the advantage that IFPEN had been able to derive from the guarantee at issue in its dealings with its customers. The Court further emphasised that the statement of reasons on that point set out in the contested decision was obscure and inconsistent and therefore did not meet the standard required by Article 296 TFEU.

That judgment also gave the Court the opportunity to provide clarification of the scope of the judgment in ***France*** v ***Commission***, [54] in which the Court of Justice had held that a simple presumption existed that the grant of an implied and unlimited State guarantee in favour of an undertaking which was not subject to the ordinary compulsory administration and winding-up procedures resulted in an improvement in its financial position through a reduction of the charges that would normally have encumbered its budget. The fact nonetheless remained that the possibility of using a presumption as a means of proof depended on the

53 | Case C-438/16 P, ***Commission*** v ***France.***

54 | Judgment of 3 April 2014 (C-559/12 P, EU:C:2014:217).

plausibility of the assumptions on which that presumption was based. The Commission could not rely on that presumption for the purposes of establishing the existence of an advantage in the dealings between a publicly owned research establishment benefiting from an implied and unlimited State guarantee and its suppliers and customers, inasmuch as the application of that presumption was confined to dealings involving a financial transaction, a loan or, more broadly, credit from the creditor of such a public establishment.

2. PRIVATE CREDITOR TEST

In the case that gave rise to the judgment of 16 March 2016, ***Frucona Košice*** v ***Commission*** (T-103/14, under appeal, [55] EU:T:2016:152), an action had been brought before the Court for annulment of the decision whereby the Commission had declared that State aid granted by the Slovak State for the applicant in the form of the partial remission of a tax debt in the context of an arrangement was incompatible with the internal market. That judgment allowed the Court, inter alia, to reconsider the assessment of the concept of State aid according to the private creditor test and the burden of proof in that context.

First of all, the Court observed that the grant by a public creditor of payment facilities to an undertaking in respect of a debt payable to it by that undertaking constituted State aid within the meaning of Article 107(1) TFEU in so far as, taking account of the significance of the economic advantage thereby granted, the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor which was seeking to recover sums due to it from a debtor in financial difficulties. That assessment was made by applying, in principle, the private creditor test, which, where it applied, was among the factors which the Commission was required to take into account for the purposes of establishing whether such aid existed. It was for the Commission to carry out a global assessment, taking into account any relevant evidence that would enable it to determine whether the recipient undertaking would have been manifestly unable to obtain comparable facilities from such a private creditor. Where a normally prudent and diligent private creditor in a situation as close as possible to that of the local tax authority had a choice between several procedures for the purposes of recovering the sums owed to it, it had to weigh up the advantages and disadvantages of each of those procedures in order to identify the most advantageous solution. Its decision-making process, influenced by a number of factors, including its status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it might hold, its assessment of the chances that the undertaking would be restored to viability and the amount it would receive in the event of a liquidation, as well as the risk that its losses would increase, was also likely to be influenced significantly by the duration of the procedures, which would postpone the recovery of the sums due and, in the case of lengthy procedures, might thus affect, inter alia, their value.

Next, as regards the burden of proof, the Court held, by analogy with the case-law of the Court of Justice on the applicability of the private investor test, that it must be considered that, if a Member State relied on the private investor test during the administrative procedure, it must, in case of doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented fell to be ascribed to the State acting as a private operator. However, it did not follow from that case-law that, where the Member State concerned did not rely on the private creditor test and considered that the disputed measure constituted State aid, the Commission might, on that ground alone, dispense with an examination of that test or consider it to be inapplicable. On the contrary, the private creditor test might be relied on by the recipient of the aid, but it must then, in case of doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented fell to be ascribed to that Member State acting as an economic operator.

55| Case C-300/16 P, ***Commission*** v ***Frucona Košice.***

Last, the Court pointed out that it had already been held that the applicability of the private creditor test depended on the classification of the measure rather than on the form in which the advantage had been conferred, the decisive factor in that regard being whether the measure in question satisfied an economic rationality test. Furthermore, it considered that, in this case, the mere fact that a procedure other than that under which the measure at issue had been adopted, namely a tax execution procedure, had not been accessible to a private creditor did not preclude the analysis of the private creditor test. That fact did not preclude the verification of the economic rationality of the local tax office's decision to opt for the arrangement procedure.

In the judgment of 15 September 2016, ***FIH Holding and FIH Erhvervsbank*** v ***Commission*** (T-386/14, under appeal, 56 EU:T:2016:474), the Court was called upon to rule on the action brought against the Commission decision declaring aid granted by the Kingdom of Denmark to FIH Erhvervsbank A/S, in the form of the transfer of its impaired assets to a new subsidiary and the subsequent purchase of those assets by the Danish body responsible for guaranteeing financial stability, incompatible with the internal market. According to the contested decision, the measures in favour of FIH Erhvervsbank constituted State aid within the meaning of Article 107(1) TFEU, as the Commission considered that the measures at issue did not observe the market economy operator principle. The applicants disputed that finding, maintaining that the Commission had been wrong to consider that a market economy operator would not have invested on equivalent terms and conditions.

In that regard, the Court stated, first of all, that in order to determine whether a State measure constituted aid for the purposes of Article 107 TFEU, it was necessary to determine whether the recipient undertaking had received an economic advantage which it would not have obtained under normal market conditions. Thus, with a view to determining whether action taken by public authorities in respect of the capital of an undertaking was in the nature of State aid, it was necessary to assess whether, in similar circumstances, a private investor of a size comparable to that of the bodies managing the public sector might have been prompted to take the measure in question. The Court pointed out, however, that, as regards the recovery of public debts, there was no need to examine whether the public bodies in question had acted like public investors whose behaviour should be compared to the conduct of a private investor pursuing a structural policy, whether general or sectoral, guided by the longer-term prospects of profitability of the capital invested. Those bodies must in reality be compared to a private creditor seeking to obtain payment of sums owed to him by a debtor in financial difficulties. In that context, it might be rational for an economic operator, having invested capital in a company to which he had also granted a guarantee, to adopt measures involving a loss where they substantially reduced, or indeed eliminated, the risk that he would lose his capital and that the guarantee would be enforced. More specifically, it might be economically rational for a Member State to agree to measures such as a transfer of impaired assets, in so far as they had a limited cost and involved reduced risk and as, in the absence of such measures, it would be highly likely that that Member State would have to bear losses in an amount greater than that cost. The Court thus concluded that the Commission had erred in law by examining the measures at issue by reference to the market economy private investor test rather than in the light of a market economy private creditor principle, irrespective of the result to which that analysis would have led.

56| Case C-579/16 P, ***Commission*** v ***FIH Holding and FIH Erhvervsbank.***

CONCEPT OF STATE RESOURCES

In the case that gave rise to the judgment of 10 May 2016, ***Germany*** v ***Commission*** (T-47/15, under appeal, [57] EU:T:2016:281), an action had been brought before the Court for annulment of the decision whereby the Commission had declared the State aid granted by certain provisions of the German law on renewable energy sources incompatible in part with the internal market. Before the Court, the Federal German Republic claimed that the decision at issue was vitiated by an infringement of Article 107(1) TFEU, in that the Commission had been wrong to consider that the functioning of the mechanism put in place by the legislation at issue involved State resources. The judgment allowed the Court to provide clarification of the scope of the judgment in ***PreussenElektra***. [58]

First of all, the Court observed that the legislation at issue established a scheme to support producers of electricity from renewable energy sources ('EEG electricity'). In order to finance that support measure, it introduced an 'EEG surcharge' payable by suppliers. That surcharge was payable to interregional operators of high and very-high-voltage transmission systems ('TSOs'), which were required to market the EEG electricity. The TSOs were responsible for managing the support scheme for the production of electricity from renewable sources and were the central point in the operation of the system laid down by the legislation at issue. According to the Court, the tasks for the management and administration of that system could be assimilated, from the point of view of their effects, to a State concession. Indeed, the funds involved in the operation of that system, consisting in the additional costs passed on to the final consumers and paid by the electricity suppliers to the TSOs, did not pass directly from the final consumers to the producers of EEG electricity, that is to say, between autonomous economic operators, but required the intervention of intermediaries. In particular, they were subject to separate accounting and allocated exclusively to the financing of the support and compensation schemes, to the exclusion of any other purpose. Accordingly, those funds remained under the dominant influence of the public authorities.

Next, the Court observed that the resources at issue in the present case, generated by the EEG surcharge, were obtained by means of charges ultimately imposed on private persons by the legislation at issue and that it was not disputed that the electricity suppliers in practice passed on the financial burden resulting from the EEG surcharge to the final customers. Having regard to the extent of that burden, which represented 20% to 25% of the total amount of an average final consumer's bill, its passing on to final consumers therefore had to be regarded as a consequence foreseen and organised by the German legislature. It was a charge that was unilaterally imposed by the State in the context of its policy of supporting producers of EEG electricity, imposed by a public authority, in the general interest and in accordance with an objective criterion. The Court therefore considered that the sums at issue, generated by the EEG surcharge, must be classified as funds which involved a State resource and could be assimilated to a levy.

The Court further pointed out that, while the TSOs were, for the most part, entities in the form of companies governed by private law, they were entrusted, in addition to the responsibilities inherent in their main activity, with managing the system of aid for the production of EEG electricity and, moreover, were monitored when performing that task. In that context, the action of those bodies was therefore not that of an economic entity acting freely on the market for the purpose of making a profit, but an action defined by the German legislature.

57| Case C-405/16 P, ***Germany*** v ***Commission.*** It should be noted that proceedings in a number of cases have been stayed pending the judgment in the appeal, namely Cases T-103/15, ***Flabeg Deutschland*** v ***Commission***; T-108/15, ***Bundesverband Glasindustrie and Others*** v ***Commission***; T-109/15, S***aint-Gobain Isover G+H and Others*** v ***Commission***; T-294/15, ***ArcelorMittal Ruhrort*** v ***Commission***; T-319/15, ***Deutsche Edelstahlwerke*** v ***Commission***; T-576/15, ***VIK*** v ***Commission***; T-605/15, ***Wirtschaftsvereinigung Stahl and Others*** v ***Commission***; T-737/15, ***Hydro Aluminium Rolled Products*** v ***Commission***; T-738/15, ***Aurubis and Others*** v ***Commission***; and T-743/15 ***Vinnolit*** v ***Commission***.

58| Judgment of 13 March 2001, C-379/98, EU:C:2001:160.

The TSOs were also under an obligation to administer the sums obtained pursuant to the legislation at issue in a specific joint account subject to control by State authorities. That constituted a further indication that the funds in question were not funds corresponding to normal resources belonging to the private sector. More specifically, as regards the monitoring of the TSOs by State bodies, which was carried out at various levels, the Court stated that the existence of such strict monitoring fell within the general approach of the overall structure provided for in the legislation at issue and corroborated the conclusion that the TSOs did not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds.

SELECTIVITY — FISCAL AID

The judgments of 4 February 2016, ***GFKL Financial Services*** v ***Commission*** (T-620/11, under appeal, [59] EU:T:2016:59), and of 4 February 2016, ***Heitkamp BauHolding*** v ***Commission*** (T-287/11, under appeal, [60] EU:T:2016:60), enabled the Court to provide a useful reminder of the three stages of the analysis of the selectivity test that must be carried out in connection with fiscal aid. [61]

The Court recalled that in order to classify a domestic tax measure as 'selective' it was necessary, first of all, to identify and examine the common or 'normal' tax regime applicable in the Member State concerned. It was in relation to that common or 'normal' tax regime that it was necessary, second, to assess and determine whether any advantage granted by the tax measure at issue might be selective by demonstrating that the measure derogated from that common regime. Following those first two stages of the review, a measure might be described as prima facie selective. The Court made clear, however, that, in a third stage, it was necessary to ascertain whether the selective nature of that advantage was justified by the nature or the general scheme of the system of which it formed part, which it was for the Member State concerned to demonstrate. If that was the case, the 'selectivity' condition was not fulfilled.

In order to prove that the measure at issue applied selectively to certain undertakings or to the production of certain goods, it was for the Commission to prove that the measure differentiated between undertakings which, with regard to the objective pursued by the system at issue, were in a comparable factual and legal situation, while it was for the Member State which had made such a distinction between undertakings in relation to charges to show that that distinction was actually justified by the nature and general scheme of the system in question.

In this case, as regards the first stage in the analysis, the Court observed, first of all, that the Commission had not erred when, while noting the existence of a more general rule, namely the loss carry-forward rule, it had determined that the legislative framework of reference established in order to assess the selectivity of the measure at issue had been constituted by the rule governing the forfeiture of losses. That rule had applied systematically to all cases in which there had been a change of ownership of 25% or more of a company's share capital, without any distinction being drawn on the basis of the nature or characteristics of the undertakings concerned.

As regards the second stage in the analysis, the Court considered that a measure involving tax relief which, by way of derogation from a rule limiting the possibility of loss carry-forward in the event of the acquisition

59| Cases C-209/16 P, ***Germany*** v ***Commission*** and C-219/16 P, ***GFKL Financial Services*** v ***Commission.***

60| Cases C-203/16 P, A***ndres (liquidator in the insolvency of Heitkamp BauHolding)*** v ***Commission*** and C-208/16 P, ***Germany*** v ***Commission.***

61| See also, above, the discussion of these judgments under 'IV. State aid — Admissibility — 2. Individual effect'.

of 25% or more of a company's share capital, allowed, on certain conditions, loss carry-forward where a company in difficulty had been acquired for restructuring purposes was prima facie selective, since it did not cover all companies whose ownership had changed substantially, but applied to a very specific category of companies, namely those which, at the time of acquisition, were, or were likely to be, insolvent or over-indebted. According to the Court, that measure, certain conditions of which were not connected with the objective of preventing abuse and did not cover all companies in a comparable legal and factual situation with regard to the objective of the tax system at issue, had the effect of favouring undertakings in difficulty. The Court concluded that the Commission had therefore not erred in finding that the measure at issue had differentiated between operators which, in the light of the objective assigned to the tax system, were in a comparable factual and legal situation.

As regards the third stage in the analysis, the Court recalled that a national measure might be justified by the nature or general scheme of the tax system at issue only if, first, it was consistent not only with the characteristics forming an essential part of the tax system at issue but also with the implementation of that system and, second, it was consistent with the principle of proportionality and did not go beyond what was necessary, in that the legitimate objective being pursued could not have been attained by less far-reaching measures. In this case, the Court considered that the tax measure at issue was not justified by the nature or general scheme of the tax system, since its main objective of facilitating the restructuring of undertakings in difficulty did not come within the founding or guiding principles of the tax system and was therefore not intrinsic but extrinsic to that system; there was therefore no need to ascertain whether the measure at issue was proportionate to the objective pursued.

STATE AID COMPATIBLE WITH THE INTERNAL MARKET

The judgment of 1 March 2016, ***Secop*** v ***Commission*** (T-79/14, EU:T:2016:118), also gave the Court the opportunity to provide clarification of the conditions in which rescue aid for an undertaking in difficulty may be regarded as compatible with the internal market and, in particular whether the Commission is required in that context to take into account the cumulative effect of that aid and alleged earlier aid. [62]

The Court pointed out that point 23 of the Guidelines on State aid for rescuing and restructuring firms in difficulty [63] expressly provided that the cumulative effect of earlier aid with new rescue or restructuring aid was to be taken into account only where the earlier aid had been unlawful. As to whether such an effect must be taken into account where no obligation to that effect was expressly mentioned in the 2004 Guidelines, the Court considered that the specific features of rescue aid precluded the cumulative effect of any earlier aid not referred to in point 23 of the 2004 Guidelines being taken into account. It followed from the definition of rescue aid in point 15 of the 2004 Guidelines that, both by the restriction of the eligible measures and by their temporary and reversible nature and the fact that they were restricted to only those measures necessary for the temporary survival of the firm concerned, they had very limited effects on the internal market. It was the limited nature of those effects, together with the urgency of rescue aid, that justified the Commission normally examining them under a simplified procedure. If the cumulated effect of any allegedly illegal earlier aid were taken into account the period of one month which the Commission is to endeavour to respect under the simplified procedure could not be met and such an approach would not be compatible with the urgency of that review and the limited impact of that aid on competition.

62| See also, above, the discussion of this judgment under 'IV. State aid — Administrative procedure'.

63| Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2).

Furthermore, if earlier aid other than that defined in point 23 of the 2004 Guidelines — which was already the subject of a final negative decision by the Commission — were taken into account, that would be liable to breach the requirements arising from the principle of legal certainty. Such an approach would require the Commission to review, indirectly, the earlier aid the classification of which as aid and as unlawful aid might be disputed between the Commission and the Member State concerned and must, if necessary, be the object of a separate procedure and a separate decision. That might ultimately lead either to the rescue aid being refused, on the basis of a cursory review of the earlier aid, whereas that aid might subsequently prove to be lawful or not to constitute aid, or to the decision on the rescue aid being unduly delayed. The Court thus concluded that the Commission could not be required to take into account the cumulative effect of alleged earlier aid with rescue aid, other than in the cases referred to in point 23 of the Guidelines.

RECOVERY OF AID

In the judgments of 22 April 2016, ***Ireland and Aughinish Alumina*** v ***Commission*** (T-50/06 RENV II and T-69/06 RENV II, under appeal, [64] EU:T:2016:227), and of 22 April 2016, ***France*** v ***Commission*** (T-56/06 RENV II, EU:T:2016:228), [65] the Court had the opportunity to rule on the application of the rules on the recovery of State aid in the light of the principles of respect for a reasonable time, protection of legitimate expectations and legal certainty. Decision 2006/323/EC, [66] whereby the Commission had found that the measures exempting mineral oils used for the production of alumina from excise duties adopted by three Member States constituted State aid and ordered recovery of that aid, was at the origin of those judgments. The Court was required to rule on those cases for the third time, after the judgments which it had previously delivered in those cases [67] were set aside by the Court of Justice on appeal. [68]

In the first judgment, the Court observed that the principle of estoppel was a principle of common law that did not exist as such in EU law; that did not mean, however, that certain principles, such as the principles of legal certainty and protection of legitimate expectations, and certain rules, such as the principle nemo potest venire contra factum proprium, enshrined in EU law, might not be regarded as connected or related to that principle. Accordingly, although the complaint based on breach of that principle must be rejected as unfounded in law, that was without prejudice to the possibility of examining the applicant's arguments where they might be deemed to support a plea deriving, in essence, from the principles of legal certainty or protection of legitimate expectations.

The Court observed, moreover, that in the judgment in ***Commission*** v ***Ireland and Others***, [69] the Court of Justice had held that a Council decision authorising a Member State to introduce an exemption from excise

64| Cases C-373/16 P, ***Aughinish Alumina*** v ***Commission***, and C-369/16 P, ***Ireland*** v ***Commission.***

65| See also judgment of 22 April 2016, ***Italy and Eurallumina*** v ***Commission***, T-60/06 RENV II, EU:T:2016:233.

66| Commission Decision 2006/323/EC of 7 December 2005 concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia respectively implemented by France, Ireland and Italy (OJ 2006 L 119, p. 12).

67| Judgments of 12 December 2007, ***Ireland and Others*** v ***Commission***, T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06, not published, EU:T:2007:383, and of 21 March 2012, ***Ireland*** v ***Commission***, T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV, EU:T:2012:134.

68| Judgments of 2 December 2009, ***Commission*** v ***Ireland and Others,*** C-89/08 P, EU:C:2009:742, and of 10 December 2013, Commission v Ireland and Others, C-272/12 P, EU:C:2013:812.

69| Judgment of 10 December 2013, C-272/12 P, EU:C:2013:812.

duty under Article 8(4) of Directive 92/81/EEC, [70] could not have the effect of preventing the Commission from exercising the powers conferred on it by the Treaty and, accordingly, from setting in motion the procedure laid down in Article 108 TFEU in order to review whether that exemption constituted State aid and, on the conclusion of that procedure, from adopting a decision such as the contested decision. It followed that, in implementing the procedure provided for in Article 108 TFEU, in order to determine whether the exemption at issue constituted State aid, and in adopting, on the conclusion of that procedure, a decision ordering partial recovery of the aid, the Commission had merely been exercising the powers conferred on it by the Treaty in the field of State aid. In so doing, the Commission could not have encroached upon the powers vested in the Council by the Treaty in the field of the harmonisation of legislation relating to excise duties or the acts which the Council had adopted in the exercise of those powers. The Court made clear that the Council's authorisation decisions, adopted on a proposal from the Commission, could produce effects only within the area covered by the rules in the field of harmonisation of legislation relating to excise duties and did not predetermine the effects of any decision, such as the contested decision, that could be adopted by the Commission in the exercise of its powers in the area of State aid. The Court therefore concluded that the complaints alleging breach of the principles of legal certainty and the *effet utile* of acts of the institutions, infringement of Article 8(5) of Directive 92/81 or the exceeding of powers had to be rejected.

The Court further pointed out that the concept of State aid corresponded to an objective situation and could not depend on the conduct or statements of the institutions. Consequently, the fact that the Commission had taken the view, at the time when the Council adopted decisions under Article 8(4) of Directive 92/81/EEC, that exemptions from excise duties on mineral oils used as fuel for the production of alumina did not give rise to a distortion of competition and did not impede the proper functioning of the internal market could not preclude those exemptions from being classified as State aid if the conditions laid down in Article 107 TFEU were met. It followed a fortiori that the Commission was not bound, for the purpose of classifying the exemptions from excise duty as State aid, by the Council's assessments in its decisions in the field of harmonisation of legislation relating to excise duties, according to which those exemptions did not give rise to a distortion of competition and did not impede the proper functioning of the internal market.

In the second judgment, in the first place, after referring to the case-law relating to the principles of legal certainty and protection of legitimate expectations, in particular in the field of State aid, the Court observed that, in this instance, the period of just over 49 months that had elapsed between the adoption of the decision to initiate the formal investigation procedure and the adoption of the final decision was unreasonable, as the circumstances relating to the number and the complexity of the files, the evolution of the applicable legislation and the practical and linguistic difficulties could not justify it.

In the second place, the Court considered whether the period thus taken by the Commission might have given the recipient of the aid reasonable grounds to believe that the Commission's doubts no longer existed and that the exemption at issue would encounter no objection, and whether that was such as to prevent the Commission from requesting recovery of the aid granted. In that regard, it was indeed important to ensure compliance with requirements of legal certainty which protected private interests. However, those requirements had to be balanced against requirements which protected public interests, including, in the area of State aid, the interest in preventing the operation of the market from being distorted by State aid injurious to competition, which required unlawful aid to be repaid in order to re-establish the previously existing situation. Consequently, it was only where exceptional circumstances applied, as in the case that had given rise to the judgment in ***RSV*** v ***Commission***, [71] that failure to act within a reasonable time in adopting the

70 | Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

71 | Judgment of 24 November 1987, 223/85, EU:C:1987:502.

final decision on State aid might be taken into account for the purpose of finding, on the part of the recipient of the aid, a legitimate expectation of such a kind as to prevent the Commission from requiring the national authorities concerned to order the refund of that aid. In fact, the exceptional circumstances present in that case were not to be found in this instance. In particular, in the case in point, the aid at issue had been granted after the Commission had initiated the formal investigation procedure relating to the exemption at issue.

In that regard, the Court also held that, in the area of State aid, no legitimate expectation could result from the Commission's failure to act when the aid scheme had not been notified to it. [72] Thus, in this case, the Commission's apparent failure to act, inconsistent though it might be with the principle that action must be taken within a reasonable time, did not suffice for a finding of the existence of exceptional circumstances of such a kind as to give rise, on the part of the recipient of the aid, to a legitimate expectation that the exemption was lawful under the State aid rules. Consequently, the mere breach of the principle that action must be taken within a reasonable time in the adoption of the final decision did not, in the circumstances of this case, prevent the Commission from ordering recovery of the aid at issue.

V. INTELLECTUAL PROPERTY — EUROPEAN UNION TRADE MARK

AUTONOMY OF THE EUROPEAN UNION TRADE MARK SYSTEM

In the judgment of 18 March 2016, ***Karl-May-Verlag*** v ***OHIM — Constantin Film Produktion (WINNETOU)*** (T-501/13, EU:T:2016:161), the Court found it necessary to recall the principle of the autonomy and independence of the EU trade mark scheme. In support of its action, the applicant took issue with the First Board of Appeal of the European Intellectual Property Office (EUIPO), in particular, for having breached those principles by basing its decision solely on the decisions of the German courts, without having carried out an autonomous assessment in the light of the criteria established for that purpose in EU trade mark law.

In that regard, the Court held that, apart from the situation referred to in Article 8(4) of Regulation (EC) No 207/2009, [73] in which EUIPO was obliged to apply national law, including the national case-law, EUIPO or the Court could not be bound by the decisions of national administrative bodies or courts. The EU trade mark system was an autonomous system, with its own set of objectives and rules peculiar to it; it applied independently of any national system. Nothing in Regulation No 207/2009 obliged EUIPO or, on appeal, the Court to come to the same conclusions as those arrived at by national administrative bodies or courts in similar circumstances. While EUIPO was not bound by decisions taken by national authorities, it might nevertheless take those considerations into account — although they were not binding or even determinative — as indicia in the assessment of the facts of the case.

In this case, the Court found that the Board of Appeal had accepted the findings set out in the German court decisions regarding the registrability of the sign involved in the present case, the perception of that sign and the descriptive character of the contested mark in respect of the goods and services concerned, without carrying out an independent assessment in the light of the arguments and evidence submitted by the parties.

72| Judgment of 11 November 2004, ***Demesa and Territorio Histórico de Álava*** v ***Commission,*** C-183/02 P and C-187/02 P, EU:C:2004:701, paragraph 52.

73| Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

It concluded that, by treating the decisions of the German courts not as possessing an indicative value as evidence in the context of the assessment of the facts of the case, but as binding as to the registrability of the contested mark, the Board of Appeal had erred in law.

ABSOLUTE GROUNDS FOR REFUSAL

Five judgments are worthy of mention this year in connection with the absolute grounds for refusal of registration laid down in Article 7(1) of Regulation No 207/2009.

1. RAISED BY THE BOARD OF APPEAL OF ITS OWN MOTION

In the judgment of 28 September 2016, ***European Food*** v ***EUIPO — Société des produits Nestlé (FITNESS)*** (T-476/15, under appeal, [74] EU:T:2016:568), [75] the Court was called upon to determine whether, in invalidity proceedings brought on absolute grounds, EUIPO was required to examine the relevant facts of its own motion, and also whether, in that context, the Boards of Appeal could decide not to take into account evidence that had been submitted late.

After recalling the differences between proceedings for absolute grounds of refusal of registration and opposition proceedings for relative grounds of refusal, the Court stated that, according to Article 76(1) of Regulation No 207/2009, when examining absolute grounds for refusal, EUIPO's Boards of Appeal were required to examine the facts of their own motion in order to determine whether the mark for which registration was sought came within one of the grounds for refusal of registration set out in Article 7 of that regulation. The Court nonetheless made clear that, in invalidity proceedings, initiated upon application by a party, EUIPO could not be required to carry out afresh the examination which the examiner had conducted, of his own motion, of the relevant facts which could have led him to apply the absolute grounds of refusal. As was clear from the provisions of Articles 52 and 55 of that regulation, the EU trade mark, until it had been declared invalid by EUIPO, enjoyed a presumption of validity which limited EUIPO's obligation, laid down in Article 76(1) of Regulation No 207/2009, to examine the relevant facts of its own motion. In invalidity proceedings, as the registered EU trade mark was presumed to be valid, it was for the person who had filed the application for a declaration of invalidity to invoke before EUIPO the specific facts which called the validity of that trade mark into question.

2. OBLIGATION TO STATE REASONS

In the judgment of 15 December 2016, ***Intesa Sanpaolo*** v ***EUIPO (START UP INITIATIVE)*** (T-529/15, EU:T:2016:747), the Court had the opportunity to provide clarification of the scope of EUIPO's obligation to state the reasons on which a decision refusing to register an EU trade mark is based.

In that regard, the Court stated that the examination of the grounds for refusal of a trade mark application must cover each of the goods or each of the services for which registration of the mark was requested. Where the same ground of refusal was raised for a category or a group of goods or services, the statement of reasons might be general for all the goods or services concerned. However, such an option extended only to goods and services having such a sufficiently direct and actual link between them that they formed a

74 | Case C-634/16 P, ***EUIPO*** v ***European Food.***

75 | See also, below, the discussion of this judgment under '6. Production of evidence'.

sufficiently homogenic category or group of goods or services. The mere fact that the goods or services came within the same class for the purposes of the Nice Agreement [76] did not suffice to prove such homogeneity, as those classes often contained a large variety of goods and services which did not necessarily have a sufficiently direct and actual link between them.

The Court stated that the homogeneity of the goods or services was assessed in the light of the actual ground for refusal raised against the trade mark application in question. A general statement of reasons could be provided for the goods and services if the link between them was sufficiently solid and direct, that is, to the point that they formed a category homogenous enough for it to be possible for all the legal and factual considerations that constituted the grounds of the decision in question to make clear, to the requisite legal standard, the reasoning followed for each of the goods and services within that category and for those considerations to be applied without distinction to every one of those goods and those services.

3. BAD FAITH

In the case that gave rise to the judgment of 7 July 2016, ***Copernicus-Trademarks*** v ***EUIPO — Maquet (LUCEO)*** (T-82/14, EU:T:2016:396), the Court was called upon to determine the action brought against the decision of the Fourth Board of Appeal of EUIPO confirming the Cancellation Division's finding that the applicant had acted in bad faith when filing the application for registration of the mark at issue. According to the Board of Appeal, the proprietor had applied for registration solely in order to be able to oppose an application for registration submitted by a third party of another EU trade mark and to derive economic benefits from that opposition.

The Court recalled that the concept of bad faith referred to in Article 52(1)(b) of Regulation No 207/2009 related to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other 'sinister motive'. Bad faith existed inter alia where applications for trade marks were diverted from their initial purpose and filed speculatively or solely with a view to obtaining financial compensation.

In addition, the Court observed that the applicant had not put forward arguments capable of contesting the Board of Appeal's finding that, in order to determine whether he had acted in bad faith, it was necessary to take into account not only the applicant's own conduct, but also that of his representative and of the companies linked with him. In this case, the applicant's representative had pursued a filing strategy consisting in submitting, every six months, chains of applications for registration of national marks in two different Member States, without paying registration fees, with the intention of being granted a blocking position. Where a third party filed an application for registration of an identical or similar EU trade mark, the applicant's representative, in turn, applied for registration of an EU trade mark and claimed priority for it by relying on the last link of the chain of applications for registration of national marks. According to the Court, such conduct was not compatible with the objectives of Regulation No 207/2009, since it sought to circumvent the six-month period of reflection provided for in Article 29 of Regulation No 207/2009 and the five-year grace period provided for in Article 51(1)(a) of that regulation. In those circumstances, the Board of Appeal had been entitled to consider that the sole objective of that filing strategy had been to oppose applications for registration filed by third parties and to derive economic advantages from that opposition.

76| Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of 15 June 1957, as revised and amended.

4. GEOGRAPHICAL INDICATION

In the judgment of 20 July 2016, ***Internet Consulting*** v ***EUIPO — Provincia Autonoma di Bolzano-Alto Adige (SUEDTIROL)*** (T-11/15, EU:T:2016:422), the Court ruled on the application of the absolute ground of refusal relating to the descriptive character of a mark, provided for in Article 7(1)(c) of Regulation No 207/2009, to marks consisting of geographical indications of origin. In the case giving rise to this judgment, the Court was required to examine the legality of the decision whereby the Board of Appeal of EUIPO had upheld the intervener's action and declared the contested mark to be invalid.

The Court first of all rejected the plea that the intervener, as a public body, did not have *locus standi* to bring an application for a declaration of invalidity against the contested mark. It observed, in that regard, that the grounds for revocation and invalidity, in particular the absolute grounds for invalidity within the meaning of Article 52 of Regulation No 207/2009, might be invoked by any person, regardless of private or public capacity, provided that that person 'has the capacity in its own name to sue and be sued', in accordance with Article 56(1)(a), ***in fine***, of that regulation.

Next, in answer to the applicant's argument that the Board of Appeal had infringed the provisions of Regulation No 207/2009 by considering that the contested mark constituted a geographical indication of origin of a place known to the relevant public that would provide information about the geographic source of the services in question, and not their commercial origin, the Court observed that the purpose of Article 7(1)(c) of that regulation was to prevent an economic player from monopolising a geographical indication of origin to the detriment of its competitors. In that regard, while the Board of Appeal was required in principle to examine the relevance of the geographical indication of origin for competitive relationships, by considering the association between that origin and the goods or services for which the mark was sought, before being able to refuse registration under Article 7(1)(c) of Regulation No 207/2009, the fact nonetheless remained that the depth of that examination might vary according to several factors, such as the extent, the reputation or the nature of the geographical indication of origin in question. In this instance, it was not disputed that the likelihood that the geographical indication of origin in question could have an impact on relationships with competitors should be considered a strong one, in view of the favourable response which the reference to South Tyrol (Italy) might evoke when the services in question were marketed. The Court pointed out, moreover, that Article 7(1)(c) of Regulation No 207/2009 did not preclude the registration of geographical names which were unknown to the relevant class of persons. In this case, the services covered by the contested mark did not possess any particular quality that could lead the relevant public to disassociate the geographical indication from the geographical origin of the services. It followed that Article 7(1)(c) of Regulation No 207/2009 precluded the registration of the geographical indication at issue, which was known to those concerned as the designation of a geographical region.

Last, the Court observed that, in accordance with Article 12(b) of Regulation No 207/2009, the right conferred by the EU trade mark did not permit its proprietor to prohibit a third party from using in the course of trade indications concerning the geographical origin. It was true that the purpose of that provision was to ensure, inter alia, that the use of an indication relating to geographical origin which also formed part of a composite trade mark did not fall within the prohibition in Article 9 of that regulation. However, Article 12(b) of Regulation No 207/2009 did not confer on third parties the right to use a geographical name as a trade mark, but merely ensured their right to use it descriptively, that is to say, as an indication of geographical origin, provided that it was used in accordance with honest practices in industrial and commercial matters.

5. SOUND MARKS

In the case that gave rise to the judgment of 13 September 2016, ***Globo Comunicação e Participações*** v ***EUIPO (sound mark)*** (T-408/15, EU:T:2016:468), an action had been brought before the Court for annulment of the decision whereby the Fifth Board of Appeal of EUIPO had rejected the application for registration of a sound mark as an EU trade mark for, in particular, media for the dissemination of information electronically, orally or by means of television, on the ground that it was devoid of any distinctive character.

Relying on the judgment in ***Shield Mark***, [77] the Court began by noting that Article 4 of Regulation No 207/2009 must be interpreted as meaning that sounds might constitute a trade mark, provided that they could also be represented graphically, and that it was not disputed that the notation of musical notes on a stave, accompanied by a clef, rests and accidentals, such as that at issue in that case, constituted such a graphical representation.

As regards the distinctive character of the mark applied for, the Court observed that, although the public was used to perceiving word or figurative marks as signs which identified the commercial origin of goods and services, the same was not necessarily true when the sign consisted solely of a sound element. Nonetheless, as regards certain goods or services, especially in the television broadcasting, radio broadcasting or telephony sector, and in the IT media, computer software or media sector in general, it was not only not unusual, but also even common for the consumer to identify a product or service in those sectors as a result of a sound element (jingles, tunes) which made it possible to distinguish that product or service as coming from a particular undertaking. However, according to the Court, it was necessary for the sound sign in respect of which registration is sought to have a certain resonance which enabled the target consumer to perceive and regard it as a trade mark and not as a functional element or as an indicator without any inherent characteristics. Consequently, a sound sign which did not have the capacity to mean more than the mere banal combination of the notes of which it consisted would not enable the target consumer to perceive it as functioning to identify the goods and services at issue, since it would be reduced to a straightforward 'mirror effect', in the sense that it would refer only to itself and to nothing else. In the light of those considerations, the Court concluded that, because the mark applied for amounted to the ringing of an alarm which did not have any inherent characteristic separate from the repetition of the note of which it consisted (two G sharps) and which would serve to identify anything other than that ringing of an alarm or telephone, the mark would generally go unnoticed and would not be remembered by the consumer. In those circumstances, the Court held that EUIPO had not erred in refusing to register the mark applied for, as it was devoid of any distinctive character.

6. PRODUCTION OF EVIDENCE

In the judgment of 28 September 2016, ***FITNESS*** (T-476/15, under appeal, [78] EU:T:2016:568), [79] the Court considered that, under Article 76(2) of Regulation No 207/2009, EUIPO could disregard facts on which the parties had not relied or evidence which they had not submitted in due time. However, it did not follow from

77| Judgment of 27 November 2003, C-283/01, EU:C:2003:641.

78| Case C-634/16 P, ***EUIPO*** v ***European Food.***

79| See also, above, the discussion of this judgment under '1. Raised by the Board of Appeal of its own motion'.

Rule 37(b)(iv) of Regulation (EC) No 2868/95 [80] that the Board of Appeal was required to regard evidence that had not been submitted before the Cancellation Division as belated. That rule stated merely that the application for a declaration of invalidity must include the evidence on which it is based. The Court observed, moreover, that, in contrast to certain provisions making provision for time limits, and for the consequences of non-compliance with such time limits, applicable in opposition proceedings, revocation proceedings and invalidity proceedings based on relative grounds for refusal, Regulations No 207/2009 and No 2868/95 did not contain any provisions setting a time limit for the production of evidence in relation to an application for a declaration of invalidity based on an absolute ground for refusal. The Court therefore held that Article 76 of Regulation No 207/2009, read in conjunction with Rule 37(b)(iv) of Regulation No 2868/95, did not imply that evidence submitted for the first time before the Board of Appeal must be regarded by the Board of Appeal as belated in invalidity proceedings based on an absolute ground for refusal.

Last, the Court observed that, if invalidity proceedings based on absolute grounds for refusal were initiated on application by a party, as set out in Article 52(1) of Regulation No 207/2009, that provision referred directly to the absolute grounds for refusal set out in Article 7 of that regulation, which pursued aims which were in the public interest. In addition, the purpose of invalidity proceedings based on absolute grounds for refusal was, inter alia, to enable EUIPO to review the validity of the registration of a trade mark and to adopt, where necessary, a position which it ought to have adopted of its own motion under Article 37 of that regulation. Consequently, the application by analogy of the third subparagraph of Rule 50(1) of Regulation No 2868/95 to invalidity proceedings based on absolute grounds would run counter to the public interest pursued by the provisions of Article 7 of Regulation No 207/2009.

RELATIVE GROUNDS FOR REFUSAL

In the context of the litigation dealing with relative grounds for refusal, the Court delivered a number of decisions that deserve particular attention.

1. RAISED BY THE BOARD OF APPEAL OF ITS OWN MOTION

In the judgment of 13 December 2016, ***Sovena Portugal — Consumer Goods*** v ***EUIPO — Mueloliva (FONTOLIVA)*** (T-24/16, EU:T:2016:726), the Court had the opportunity to rule on whether the Boards of Appeal were required to raise of their own motion the question of the expiry of the validity of the registration of a trade mark. An action had been brought before the Court against the decision of the Second Board of Appeal of EUIPO upholding the decision whereby the Opposition Division had found that there was a likelihood of confusion between the word mark registration of which had been sought by the applicant and an earlier national word mark. The applicant maintained, in particular, that when the Board of Appeal had confirmed that the opposition was well founded, the registration of the earlier mark had not been renewed and that its validity had therefore expired.

According to the Court, it did not follow from Article 41(3) and Article 76 of Regulation No 207/2009, or from Rule 19(1) and (2)(a)(ii) and the first and third subparagraphs of Rule 50(1) of Regulation No 2868/95, or from the other applicable procedural provisions that a Board of Appeal, when examining the legality of a decision of an Opposition Division which had determined a relative ground of refusal of registration, would itself be required to raise of its own motion the question of the expiry of the validity of the registration of the earlier

80| Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

mark after the expiry of the period set by the Opposition Division for the opposing party to produce evidence of that validity. Nor could any of those provisions be interpreted as requiring the opposing party to provide, on its own initiative, evidence that the registration of the earlier mark was valid until the time at which the Board of Appeal gave its ruling. Those findings were, however, without prejudice to the possibility for the applicant for the trade mark which had been the subject of the opposition proceedings to argue before the Board of Appeal that the evidence that the validity of the registration of the earlier mark had been maintained for a reasonable period, having regard to the proceedings before the Board of Appeal, had not been adduced by the opponent, in order to encourage the latter to reply in that regard and the Board of Appeal to take that situation into account. In this instance, however, the applicant for the mark had not raised before the Board of Appeal the question whether the validity of the registration of the earlier national mark had been maintained, although the year during which that registration would expire and would, if necessary, have to be renewed was close, and indeed had already begun. The applicant could still have raised the question of validity at that point by relying on the provisions of Article 76(2) of Regulation No 207/2009, which provide that '[EUIPO] may disregard facts or evidence which are not submitted in due time by the parties concerned'. The Court therefore concluded that the Board of Appeal could not be criticised for not having taken into account the possible non-renewal of the registration of the earlier national mark, on which the opposition had been based, when it adopted the contested decision, irrespective of the definitive expiry date of that registration under national law.

2. EVIDENCE

In the judgment of 5 February 2016, ***Kicktipp*** v ***OHIM — Società Italiana Calzature (kicktipp)*** (T-135/14, EU:T:2016:69), the Court ruled on the interpretation of Rule 19(2) of Regulation No 2868/95 with regard to the question of the evidence which the opposing party must produce in order to establish the existence, validity and scope of the protection of his earlier mark.

In that regard, the Court recalled that, according to the wording of the first part of Rule 19(2)(a)(ii) of Regulation No 2868/95, in the French version, an opposing party was required to provide the registration certificate 'et' (and), as the case might be, the latest renewal certificate for an earlier registered trade mark which was not an EU trade mark. The opposing party must therefore, in principle, provide the registration certificate even if he also provided the renewal certificate. In accordance with the last part of Rule 19(2)(a)(ii) of Regulation No 2868/95, it was also possible for the opposing party to produce 'equivalent documents emanating from the administration by which the trade mark was registered'. The Court considered that that provision must be interpreted as meaning that the possibility of providing an equivalent document did not relate only to the renewal certificate, but also to the registration certificate. It was also possible that the renewal certificate might at the same time constitute a document 'equivalent' to the registration certificate. Therefore, the submission of a renewal certificate was sufficient to establish the existence, validity and scope of protection of the mark on which the opposition was based, if it contained all the information necessary for that purpose.

The Court also stated that, where the application for renewal of the earlier mark had been made in good time but the competent authority had not yet reached a decision regarding that application, it was sufficient to produce a certificate providing evidence of the application, if that certificate had been issued by that authority and contained all the necessary information relating to the registration of the mark, such as would be included in a registration certificate. By contrast, where the mark on which the opposition was based was registered, it was no longer sufficient under Rule 19(2)(a)(ii) of Regulation No 2868/95 to submit the filing certificate. It was thus necessary to produce the registration certificate or an equivalent document. Likewise, it was not sufficient to produce a certificate providing evidence of an application for renewal where the renewal had taken place.

In the judgment of 9 September 2016, ***Puma*** v ***EUIPO — Gemma Group (Representation of a pouncing feline)*** (T-159/15, under appeal, [81] EU:T:2016:457), the Court had the opportunity to provide clarification of the case-law relating to the obligation for EUIPO, having regard to the principles of equal treatment and sound administration, to take its earlier practice in taking decisions into consideration.

In support of its action, the applicant claimed that the Fifth Board of Appeal had erred in law in departing from, in particular, EUIPO's practice in taking decisions relating to the reputation of the earlier marks, which had been relied on in support of the opposition.

After pointing out that, according to Article 41(2) of the Charter of Fundamental Rights, the right to good administration included, inter alia, the obligation of the administration to give reasons for its decisions, the Court recalled that, according to the judgment in ***Agencja Wydawnicza Technopol*** v ***OHIM***, [82] it followed from the principles of equal treatment and sound administration that EUIPO must, when examining an application for registration of an EU trade mark, take into account the decisions already taken in respect of similar applications and consider with especial care whether it should decide in the same way. However, the way in which the principles of equal treatment and sound administration were applied must be consistent with respect for legality. Moreover, for reasons of legal certainty and of sound administration, the examination of any trade mark application must be stringent and comprehensive and must be undertaken in each individual case.

In this instance, the Court pointed out that the earlier marks had been found to have a reputation by EUIPO in three recent decisions, which had been borne out by a number of national decisions, and that those decisions had concerned the same earlier marks, goods which were identical or similar to those at issue and some of the Member States concerned in the present case. Furthermore, the Court stated that the finding that the earlier marks had a reputation was a finding of a factual nature which did not depend on the mark applied for. In addition, it followed from the judgment in ***Budziewska*** v ***OHIM — Puma (Pouncing feline)***, [83] on which the applicant relied, that the earlier design had a reputation. In those circumstances, the Court considered that, having regard to the judgment in ***Agencja Wydawnicza Technopol*** v ***OHIM*** [84] and to the obligation to state reasons imposed on the Board of Appeal, the latter could not depart from EUIPO's practice in taking decisions without providing the slightest explanation regarding the reasons which had led it to take the view that the factual findings in respect of the reputation of the earlier marks which had been made in those decisions were not, or were no longer, relevant. In that regard, the Court rejected EUIPO's argument that the decisions on which the applicant relied did not have to be taken into account, on the ground that they had not been accompanied by the evidence of the earlier marks' reputation which had been submitted in the context of those proceedings. The Board of Appeal had a discretion to decide whether or not to take into account additional or supplementary facts and evidence which had not been presented within the time limits set or specified by the Opposition Division. In those circumstances, the Board of Appeal ought, in accordance with the principle of sound administration, to have either requested that the applicant submit supplementary evidence of the reputation of the earlier marks or provided the reasons why it considered that the findings made in those previous decisions as regards the reputation of the earlier marks had to be discounted. As the Board of Appeal had not complied with those requirements, it must be held that there had been a breach

81| Case C-564/16 P, ***EUIPO*** v ***Puma.***

82| Judgment of 10 March 2011, C-51/10 P, EU:C:2011:139, in particular paragraphs 74 to 77.

83| Judgment of 7 November 2013, T-666/11, not published, EU:T:2013:584.

84| Judgment of 10 March 2011, C-51/10 P, EU:C:2011:139.

of the principle of sound administration, in particular of EUIPO's obligation to state the reasons on which its decisions are based.

3. LIMITATION IN CONSEQUENCE OF ACQUIESCENCE

In the judgment of 20 April 2016, ***Tronios Group International*** v ***EUIPO — Sky (SkyTec)*** (T-77/15, EU:T:2016:226), the Court was able to provide clarification concerning the determination of the starting point of the period of limitation in consequence of acquiescence if there is use of a later trade mark identical to or confusingly similar to the earlier trade mark, within the meaning of Article 54(2) of Regulation No 207/2009.

In that regard, the Court noted, first of all, that four conditions must be satisfied before the period of limitation in consequence of acquiescence could start to run in such a case. First, the later trade mark must be registered; second, the application must have been made in good faith by its proprietor; third, the later trade mark must be used in the Member State in which the earlier trade mark is protected; and last, fourth, the proprietor of the earlier trade mark must be aware of the use of that trade mark after its registration. The Court pointed out, next, that the purpose of Article 54(2) of Regulation No 207/2009 was to penalise the proprietors of earlier marks who had acquiesced in the use of a later EU trade mark for a period of five consecutive years, while being aware of such use, by excluding them from seeking a declaration of invalidity or from bringing opposition proceedings in respect of that trade mark. That provision was thus intended to strike a balance between the interests of the proprietor of a mark in safeguarding its essential function and the interests of other economic operators in having signs capable of denoting their goods and services. That objective implied that, in order to safeguard that essential function, the proprietor of an earlier mark must be in a position to oppose the use of a later mark identical or similar to his own mark.

It therefore followed from a teleological interpretation of Article 54(2) of Regulation No 207/2009 that the relevant date from which the period of limitation in consequence of acquiescence started running was when the proprietor became aware of the use of the later mark. That interpretation required the proprietor of the later mark to submit evidence of an actual awareness of the use of that mark by the proprietor of the earlier mark, failing which the latter would not be in a position to oppose the use of the later mark. According to the Court, it was necessary to take into account the similar rule on limitation in consequence of acquiescence contained in Article 9(1) of Directive 89/104/EEC, [85] replaced by Article 9(1) of Directive 2008/95/EC. [86]

PROCEDURAL ISSUES

In the judgment of 4 February 2016, ***Meica*** v ***OHIM — Salumificio Fratelli Beretta (STICK MiniMINI Beretta)*** (T-247/14, under appeal, [87] EU:T:2016:64), the Court provided clarification of the conditions for the admissibility of submissions whereby the defendant to *inter partes* proceedings before the Board of Appeal seeks a decision altering the decision of the Opposition Division contested by the intervener. In this case, the Board of Appeal had declared such submissions inadmissible on the ground, in particular, that they did not comply with the conditions relating to the time limit and to payment of the fee for appeal provided for in Article 60 of

85| First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

86| Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

87| Case C-182/16 P, ***Meica*** v ***EUIPO.***

Regulation No 207/2009 and widened the scope of the appeal in that they concerned a point in the contested decision that had not been raised in the appeal brought by the intervener.

In that regard, the Court observed that it was clear from the wording of Article 8(3) of Regulation (EC) No 216/96 [88] that the defendant, in *inter partes* proceedings for the annulment or altering of a contested decision, could make submissions before the Board of Appeal on a point not raised in the appeal. However, those submissions, which the defendant must make in the response, ceased to have effect if the appellant discontinued the proceedings before the Board of Appeal. Thus, in order to challenge a decision of the Opposition Division, the separate proceedings provided for in Article 60 of Regulation No 207/2009 were the only legal remedy by which it was certain that a party's objections might be asserted. It followed that submissions seeking a decision annulling or altering a contested decision on a point not raised in the appeal within the meaning of Article 8(3) of Regulation No 216/96 differed from the appeal provided for in Article 60 of Regulation No 207/2009. Thus, the conditions relating to the time limit and fee for appeal provided for in Article 60 of Regulation No 207/2009 did not apply to submissions based on Article 8(3) of Regulation No 216/96. In this case, the applicant, in accordance with the latter provision, had, in his response and within the prescribed period, made submissions seeking alteration of the decision of the Opposition Division concerning a point not raised by the intervener. In order to do so, the applicant had not been required to comply with the conditions laid down in Article 60 of Regulation No 207/2009. The Board of Appeal had therefore been wrong to reject those submissions as inadmissible.

In the case that gave rise to the judgment of 8 June 2016, ***Monster Energy*** v ***EUIPO (Representation of a peace symbol)*** (T-583/15, EU:T:2016:338), the Court had the opportunity to make clear that the question of compliance with the time limit for bringing proceedings before the Court is a question the assessment of which falls exclusively within the jurisdiction of the Courts of the European Union and that failure to comply with that time limit is not capable of being the subject of an application for ***restitutio in integrum*** on the basis of Article 81 of Regulation No 207/2009. The applicant had filed such an application before EUIPO on the ground that it had been unable to challenge before the Court a decision of one of EUIPO's Boards of Appeal within the period that had begun to run when the decision was notified by fax, since that fax had not reached the applicant. EUIPO's Second Board of Appeal had, however, confirming the position taken by the Registry of the Boards of Appeal, considered that that application could not be granted, having regard, in particular, to the fact that Article 81 of Regulation No 207/2009 concerned only the time limits applicable before EUIPO and not those applicable before the Court. In the proceedings before the Court, the applicant maintained, on the contrary, that in referring to 'a time limit vis-à-vis the Office', the legislature had intended to refer to time limits 'regarding' or 'in relation to' EUIPO. In the applicant's submission, EUIPO was concerned in various ways by the period for bringing an action before the Court and a failure to comply with that time limit was therefore capable of being the subject of an application for *restitutio in integrum*.

On that point, the Court observed that recital 12 of Regulation No 207/2009 stated that the creation of EUIPO must not detract from the competencies exercised by the European Union institutions and that to acknowledge that one of EUIPO's departments had the power to grant an application for *restitutio in integrum* as regards a time limit for bringing an action before the Court would be tantamount to encroaching upon the jurisdiction of the Court, which was the only court, subject to review by the Court of Justice, that could determine whether a case brought before it was admissible, in accordance with Articles 256 and 263 TFEU. Admissibility was one of the criteria for an action that fell within the jurisdiction of the Court, particularly because it was a criterion that the Court must examine of its own motion. It was therefore not Article 81 of Regulation No 207/2009 on *restitutio in integrum* that applied where an action brought before the Court against a decision of a Board

88| Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OJ 1996 L 28, p. 11).

of Appeal of EUIPO might be regarded as out of time by the Court, but the provisions applicable to the Court, namely, in addition to Article 263 TFEU, the second paragraph of Article 45 of the Statute of the Court of Justice of the European Union, which provided that 'no right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of ***force majeure***'.

VI. COMMON FOREIGN AND SECURITY POLICY — RESTRICTIVE MEASURES

As in previous years, the litigation concerning restrictive measures in the field of Common Foreign and Security Policy (CFSP) increased in 2016. A number of decisions deserve special mention.

ISLAMIC REPUBLIC OF IRAN

In the first place, in the judgment of 28 April 2016, ***Sharif University of Technology*** v ***Council*** (T-52/15, under appeal, [89] EU:T:2016:254), the Court had the opportunity to provide further clarification of the legal criterion relating to the provision of support to the Government of Iran within the meaning of Article 23(2)(d) of Regulation No 267/2012 and Article 20(1)(c) of Decision 2010/413.

According to the Court, that criterion did not involve establishing a causal link between the conduct constituting the provision of support to the Government of Iran and the pursuit of nuclear proliferation activities. It was true that, according to the case-law, the contested criterion did not concern all forms of support to the Government of Iran, but those which contributed to the pursuit of Iran's nuclear activities, and thus objectively defined a limited category of persons and entities which might be subject to fund-freezing measures. However, it did not follow from the case-law that the concept of 'support to the Government of Iran' required proof of a connection between that support and the nuclear activities of the Islamic Republic of Iran. In that regard, the Court considered that the Council had been correct to take the view that the applicant had confused the criterion relating to the provision of support to the Government of Iran, which was the only relevant criterion in this case, and the criterion relating to the provision of support 'for … Iran's proliferation-sensitive nuclear activities or for the development of nuclear weapon delivery systems'. The application of the first criterion did not imply a certain degree of connection, even indirect connection, with the nuclear activities of the Islamic Republic of Iran. The existence of a connection between the provision of support to the Government of Iran and the pursuit of nuclear proliferation activities was expressly established by the applicable legislation. In that context, the contested criterion must be construed as being aimed at any support which, even though it had no direct or indirect connection with the development of nuclear proliferation, was nevertheless capable of encouraging such development by providing the Government of Iran with resources or facilities of, inter alia, a material, financial or logistic nature. In addition, that criterion could not be interpreted as being intended solely to deprive the Government of Iran of its sources of revenue and thus to compel it to end its nuclear proliferation activities.

The Court considered that it was therefore necessary to ascertain whether, in the context of the applicable legislation, activities which did not correspond to any of the three types of support — material, financial or logistical — referred to by way of example in that legislation, was capable of falling within the scope of the

89| Case C-385/16 P, ***Sharif University of Technology*** v ***Council.***

contested criterion. On that point, the Court observed that it followed from that legislation that restrictive measures might be adopted in respect of persons or entities involved in procurement by the Islamic Republic of Iran of prohibited goods and technology or providing technical assistance in relation to such goods and technology. In particular, Article 1(1)(c) of Decision 2010/413 prohibited the supply, sale or transfer to the Islamic Republic of Iran of arms and related material. Moreover, by virtue of Article 5(1)(a) of Regulation No 267/2012, the provision, whether direct or indirect, of technical assistance relating to the goods and technology listed in the Common Military List of the European Union, [90] or associated with the provision, manufacture, maintenance and use of goods on that list, to any Iranian person, entity or body or for use in Iran, was prohibited. Thus, by providing for such a ban, the legislature had established a connection between procurement by the Islamic Republic of Iran of that type of equipment and pursuit by the Government of Iran of the proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems. That interpretation was confirmed by Resolutions 1737 (2006) [91]and 1929 (2010) [92] of the United Nations Security Council. Accordingly, the provision of support to the Government of Iran in respect of research and technology development in military or military-related fields satisfied the contested criterion, where it related to equipment or technology on the Common Military List, the procurement of which by the Islamic Republic of Iran was prohibited.

In the second place, in the judgment of 2 June 2016, ***Bank Mellat*** v ***Council*** (T-160/13, under appeal, [93] EU:T:2016:331), an action had been brought before the Court for annulment of Article 1(15) of Regulation (EU) No 1263/2012, [94] which had introduced into Regulation No 267/2012 a prohibition on transfers of funds to or from financial institutions domiciled in Iran. In that action, the applicant had raised a plea of illegality in respect of Article 1(6) of Decision 2012/635/CFSP. [95]

In that regard, the Court began by examining the question of its jurisdiction to hear the plea of illegality raised by the applicant. It observed that the measures laid down by Article 1(6) of Decision 2012/635 were of a general nature, their scope being determined by reference to objective criteria and not by reference to identified natural or legal persons. Consequently, Article 1(6) of Decision 2012/635 did not constitute, in itself, a decision providing for restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU. Since Article 1(15) of the contested regulation did not satisfy that requirement either, the plea of illegality in respect of Article 1(6) of Decision 2012/635 had not been raised in support of an action for annulment brought against a decision providing for restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU. The Court therefore did not have jurisdiction under that provision to rule on that plea of illegality. Nonetheless, the exception to the jurisdiction of the Courts of the European Union provided for in Article 275 TFEU could not be interpreted as going so far as to preclude review of the legality of a measure adopted under Article 215 TFEU, such as Article 1(15) of the contested regulation, that did not fall within the CFSP, simply because the valid adoption of that measure was contingent on the prior adoption of a decision falling within the CFSP.

90| Common Military List of the European Union, adopted by the Council on 17 March 2014 (OJ 2014 C 107, p. 1).

91| UN Security Council Resolution 1737 (2006) of 23 December 2006.

92| UN Security Council Resolution 1929 (2010) of 9 June 2010.

93| Case C-430/16 P, ***Bank Mellat*** v ***Council.***

94| Council Regulation (EU) No 1263/2012 of 21 December 2012 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2012 L 356, p. 34).

95| Council Decision 2012/635/CFSP of 15 October 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2012 L 282, p. 58).

As regards the admissibility of the application for annulment of Article 1(15) of the contested regulation, the Court noted that that provision was of general application and did not constitute a legislative act, but a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU. After stating that the provision in question was of direct concern to the applicant and did not entail implementing measures since it amended certain provisions of Regulation No 267/2012, having regard, in particular, to the fact that the competent national authorities had no discretion in the application of those provisions, and that the applicant therefore had standing to bring proceedings in that regard, the Court observed, as regards the applicant's interest in bringing proceedings, that the adoption of the regime at issue had not had an immediate effective impact on the applicant, inasmuch as the individual restrictive measures to which the applicant had previously been made subject had imposed more severe restrictions. Nonetheless, following the annulment of the individual restrictive measures concerning it, the applicant had been automatically subject to that regime. In those circumstances, a finding that the applicant had no interest in bringing proceedings against Article 1(15) of the contested regulation would have the effect of infringing his right to effective judicial protection, and that interest in bringing proceedings must therefore be recognised.

Concerning the substance, the Court pointed out that the concept of necessity referred to in Article 215(1) TFEU did not concern the relationship between the act adopted under Article 215 TFEU and the CFSP aim pursued, but the relationship between that act and the CFSP decision on which the act was based. Thus, the reference to 'necessary measures' was intended to ensure that the Council would not, under Article 215 TFEU, adopt restrictive measures that went beyond those laid down by the corresponding CFSP decision. As regards the extent of the judicial review carried out by the Court, it was necessary to take account of the particular nature of the regime at issue, since Article 1(15) of the contested regulation was of general application and did not therefore constitute an individual act and, moreover, certain provisions of Regulation No 267/2012 amended or introduced by Article 1(15) of the contested regulation were of direct concern to the applicant and did not entail implementing measures. In those circumstances, the Council had a margin of discretion as to whether it was appropriate to adopt restrictive measures as such and when determining the general restrictive measures to be adopted in order to attain the objective pursued. As the regime at issue was not an individual restrictive measure, there was no need to apply the case-law relating to such measures to the present case by analogy, and there was therefore, in particular, no need to require the Council to establish that the entities affected by the regime at issue were actually involved in nuclear proliferation.

As regards the proportionality of the regime at issue, the Court observed that the aim of preventing transfers of funds that could contribute to the nuclear proliferation pursued by the Iranian regime clearly fell within the parameters of the legitimate aim of preventing nuclear proliferation in itself and its funding. While it was indeed the case that the obligation to notify and the obligation to lodge a prior request for authorisation applied both to transfers that could contribute to nuclear proliferation and to those that could not, that was inevitable given the purpose of the obligations in question and did not mean that those obligations were not necessary. The Council's choice, to provide that the regime at issue must apply to transfers involving Iranian financial institutions, while other transfers were subject to a restrictive regime that differed in certain respects, fell within the scope of the power which the Council must be acknowledged to have in that respect. In addition, the regime at issue was not a general, indiscriminate and non-targeted embargo.

Furthermore, as regards the obligation to state reasons applicable whenever an act of general application such as the regime at issue was adopted, the Court noted that, as regards that category of acts, the legal safeguards required by Article 215(3) TFEU did not include an obligation for the Council to give the actual and specific reasons in respect of each person or entity affected, an obligation to grant access to the file or an opportunity for persons and entities affected to submit observations and an obligation for the Council to take such observations into consideration. The essential legal procedural safeguard consisted in the effective judicial review of the legality of the act in question. Last, since the complaints alleging breach of the

principle of legal certainty and the principle of non-arbitrariness and alleging discrimination on the ground of nationality also had to be rejected, the Court dismissed the action in its entirety.

Last, and in the third place, in the judgment of 24 May 2016, ***Good Luck Shipping*** v ***Council*** (T-423/13 and T-64/14, EU:T:2016:308), the Court ruled, inter alia, on the inferences that must be drawn from the annulment of the restrictive measures in respect of an entity when examining the legality of restrictive measures in respect of the entities owned or controlled by or acting on behalf of that entity.

The Court stated that the legality of an entity's inclusion on the list of persons or entities covered by restrictive measures on the ground of its links with another entity included on that list was conditional on the fact that, at the date of listing, the other entity must have been lawfully included on that list. Thus, the inclusion on the list of persons or entities covered by restrictive measures applicable to an entity, on the basis of the criterion of a link with another entity also on that list, had no legal basis when the inclusion of the latter entity, following an annulment judgment concerning it, ceased to be part of the legal order. In that regard, the Court observed that, although the effects of the restrictive measures annulled by a judgment might be maintained until the expiry of the period referred to in the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, that suspension of the annulment of an act did not affect the principle that, once the period of suspension had expired, the annulment of the measures concerned produced effects retroactively, so that the measures covered by the annulment were deemed never to have existed.

In addition, the Court recalled the rule that, in principle, the legality of contested measures could be assessed only on the basis of the elements of fact and law on which they had been adopted and not on the basis of elements of fact and law which had occurred after the adoption of those measures. Therefore, although, when the Court annulled restrictive measures, it might prescribe a period during which the effects of an annulment of a measure would be suspended in order to enable the Council to remedy the infringements identified by adopting, as appropriate, new general criteria for inclusion on the list of persons or entities subject to restrictive measures and new restrictive measures, neither those new general listing criteria nor those new restrictive measures enabled measures found to be illegal by a judgment of the Court to be rendered lawful. Nor, in that regard, did a modification of the general criteria for inclusion adopted by the Council in order to justify inclusions based on previous general criteria and successively annulled by a judgment of the Court affect the principle that listings which are annulled are eliminated retroactively from the legal order, as though they had never existed. That modification of the general criteria could not remedy the illegalities identified by the Court in its annulment judgment, or render lawful, from that modification onwards, the inclusions based on previous general listing criteria that could not justify the annulled listings.

TUNISIAN REPUBLIC

In the cases that gave rise to the judgments of 30 June 2016, ***CW*** v ***Council*** (T-224/14, not published, EU:T:2016:375), of 30 June 2016, ***Al Matri*** v ***Council*** (T-545/13, not published, EU:T:2016:376), and of 30 June 2016, ***CW*** v ***Council*** (T-516/13, not published, EU:T:2016:377), the Court was called upon to determine actions brought by individuals whose assets had been frozen because they had been the subject of judicial proceedings in Tunisia concerning the misappropriation of State funds. In those judgments, the Court, in particular, provided clarification of the concept of misappropriation of State funds referred to in Article 1(1) of Decision 2011/72/CFSP. [96]

96| Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia (OJ 2011 L 28, p. 62).

On that point, the Court stated, first of all, that the uniform application of EU law required, in the absence of an express reference to the laws of the third States concerned, international law or the laws of the Member States, that the concept of misappropriation of State funds be given an autonomous interpretation, independent of any national system. In adopting interim measures against persons responsible for misappropriation of Tunisian State funds, namely measures whose sole object was to maintain the possibility for the Tunisian authorities to recover misappropriated State funds that might be held by those persons, the Council sought to facilitate both the finding of acts committed to the detriment of the Tunisian authorities and the restitution of the proceeds of those acts. Having regard to those objectives, and also to the general context in which Decision 2011/72 had been adopted and its legal basis, it was appropriate to consider that the concept of misappropriation of State funds encompassed any act consisting in the unlawful use of resources belonging to the Tunisian public authorities or entrusted to their control for purposes contrary to those for which those resources were intended, in particular for private purposes. That use must thus have had the consequence of adversely affecting the financial interests of those authorities and therefore have caused harm capable of being evaluated in financial terms. Consequently, according to the Court, it could not be precluded that actions that had not been treated in law by the Tunisian judicial authorities as misappropriation of State funds had nonetheless had the effect of unlawfully depriving the Tunisian public authorities of funds due to them, and it was therefore necessary to freeze the assets of those responsible for those actions and their associates in order to ensure that those funds could be recovered by the Tunisian authorities, by all possible means.

The Court also stated that, having regard to the objectives of Decision 2011/72, Article 1(1) of that decision must be interpreted as meaning that it referred not only to persons who had been convicted of offences of 'misappropriation of Tunisian State funds' but also to persons subject to ongoing judicial proceedings designed to establish their involvement in the commission of specific acts constituting such misappropriations. The precise stage reached in such proceedings could not constitute a factor capable of justifying the exclusion of the persons concerned from the category of persons at whom the measure was aimed. Likewise, the concept of persons 'responsible for misappropriation of Tunisian State funds' and that of persons associated with them, within the meaning of that decision, could not be restricted solely to the final beneficiaries of the proceeds of such acts, since that would also undermine the practical effect of that decision. Furthermore, the persons subject to criminal proceedings for involvement in those acts came, at least, within the category of persons 'associated with persons responsible'. According to the Court, that expression was aimed at a particularly wide category which was capable of including any person, entity or body with sufficiently close links with a person responsible for misappropriation of State funds, in such a way that his assets might have benefited from the proceeds of that misappropriation. A more restrictive interpretation would undermine the practical effect of the provision at issue.

Last, the Court observed that, although the Council could not, admittedly, confirm in all circumstances the findings of the Tunisian judicial authorities, it was not for it, in principle, itself to examine and assess the accuracy and relevance of the evidence on which those authorities relied in order to conduct, in this case, the criminal proceedings at issue. Thus, in the cases in point, it was for the Council to assess, by reference to the actual circumstances, the need to carry out additional checks, in particular to request the Tunisian authorities to communicate additional evidence if that already supplied had proved insufficient. In so far as the Council had adduced evidence that criminal proceedings had been conducted against the applicants, it was for the applicants to indicate the specific evidence on which they proposed to rely in order to call in question the merits of those proceedings.

UKRAINE

By three judgments of 15 September 2016, ***Klyuyev*** v ***Council*** (T-340/14, EU:T:2016:496), of 15 September 2016, ***Yanukovych*** v ***Council*** (T-346/14, under appeal, [97] EU:T:2016:497), and of 15 September 2016, ***Yanukovych*** v ***Council*** (T-348/14, under appeal, [98] EU:T:2016:508), the Court adjudicated on restrictive measures adopted in view of the situation in Ukraine and referring to persons identified as being responsible for misappropriation of State funds. At issue was the applicants' inclusion on the list of persons to whom the restrictive measures adopted in view of the situation in Ukraine applied. Based initially on the fact that the applicants had been the subject of investigations carried out by the Ukrainian authorities relating to offences connected with the misappropriation of Ukrainian State funds and their illegal transfer outside Ukraine, that listing had been maintained, following the modification of the applicable legislation, on the ground that the applicants had been subject to criminal proceedings by the Ukrainian authorities for misappropriation of public funds or assets. The applicants claimed that neither their initial listing nor the maintenance of their listing was well founded.

As regards, in the first place, the applicants' initial listing, the Court recalled that, although the Council had a broad discretion as regards the general criteria to be taken into consideration for the purpose of adopting restrictive measures, the effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights required that, as part of the review of the lawfulness of the grounds which formed the basis of the decision to include or maintain a person's name on the list of persons subject to restrictive measures, the Courts of the European Union must ensure that that decision, which affected that person individually, was taken on a sufficiently solid factual basis. That entailed a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review was not limited to an assessment of the cogency in the abstract of the reasons relied on, but concerned the question whether those reasons were substantiated by sufficiently specific and concrete evidence.

Turning to the letter from the Office of the Prosecutor General of Ukraine to the High Representative of the European Union for Foreign Affairs and Security Policy, on which the Council had relied in support of the inclusion of the applicants on the list at issue, the Court observed that, while that letter emanated from a high judicial authority of a third country, it contained no more than a vague and general statement linking the applicants' names, among those of other former senior officials, to investigations which had established that State funds had been misappropriated. That letter provided no details of the acts which the Ukrainian authorities were in the process of determining by their investigations and, still less, as to the applicants' individual responsibility, even presumed, in respect of those acts. It followed, according to the Court, that the letter at issue could not constitute a sufficiently solid factual basis for including the applicants' names on the list at issue on the ground that they had been identified as responsible for the misappropriation of State funds. The Court therefore annulled the contested measures in so far as they concerned the applicants.

As regards, in the second place, the maintenance of the applicants' names on the list, first, the Court considered that the general listing criterion, concerning 'persons identified as responsible for the misappropriation of Ukrainian State funds', must be interpreted as meaning that it did not concern, in abstract terms, any act classifiable as misappropriation of State funds, but rather acts of misappropriation of State funds or public assets which, having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence had taken place, were, at the very least, such as to undermine the legal and institutional foundations of Ukraine. Second, the Court considered that the maintenance of the applicants' names on

97| Case C-598/16 P, ***Yanukovych*** v ***Council.***

98| Case C-599/16 P, ***Yanukovych*** v ***Council.***

the list at issue facilitated, in the event that the prosecutions were successful, the punishment, through the courts of law, of alleged acts of corruption committed by members of the former regime, and thereby contributed to the support of the rule of law in Ukraine. The Court therefore dismissed the actions in so far as they sought annulment of the maintenance of the applicants' names on the list at issue.

SYRIAN ARAB REPUBLIC

In the case that gave rise to the judgment of 26 October 2016, ***Hamcho and Hamcho International*** v ***Council*** (T-153/15, EU:T:2016:630), the Court was called upon to determine the action brought by a businessman of Syrian nationality and the holding company owned by him, concerning the restrictive measures against them adopted on the basis of the legislation introducing restrictive measures against certain persons and entities responsible for the violent repression against the civilian population in Syria. [99] The applicants took issue with the Council on the ground that the documents, in particular the press articles, produced in support of the relisting of their names in the contested measures were vague, abstract and wholly lacking in probative value, as those documents did not, in the applicants' submission, identify the primary source of the information which they contained. The applicants also claimed that the Council had erred in assessing whether that relisting was well founded.

In the first place, as regards the failure to identify the primary sources of the information in the press articles produced by the Council, the Court recalled that, like that of the Court of Justice, its activity was governed by the principle of the unfettered assessment of evidence, and that it was only the reliability of the evidence before the Court that was decisive when it came to the assessment of its value. In addition, when evaluating the probative value of a document, it was necessary to have regard to the credibility of the information which it contained, to have regard, in particular, to the person from whom the document originated, the circumstances in which it had come into being and the person to whom it was addressed and whether, on its face, the document appeared to be sound and reliable. In that regard, the Court observed that evidence from different sources of digital information and academic studies, and from a variety of geographic origins, published on different dates and containing different information might be regarded as reliable even though the various pieces of information did not expressly state the primary source of their information. The state of war in Syria made it difficult, and indeed impossible, in practice, to gather testimony from persons who would agree to be identified. The ensuing difficulties in carrying out investigations and the danger to which those providing information were exposed constituted a barrier to the production of the precise sources of personal conduct in support of the regime.

In the second place, recalling the case-law of the Court of Justice according to which, in view of the situation in Syria, the Council discharges the burden of proof borne by it if it presents to the Courts of the European Union a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated, [100] the Court considered that the reasons stated in the contested measures for relisting the applicants were sufficiently substantiated. The applicant's function within economic councils such as the Syrian Bilateral Business Councils for China, whose objective was to promote the Syrian economy and the development of its undertakings, its

99| See, in particular, Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1); Council Implementing Regulation (EU) 2015/108 of 26 January 2015 implementing Regulation (EU) No 36/2012 (OJ 2015 L 20, p. 2); Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria (OJ 2013 L 147, p. 14); and Council Implementing Decision (CFSP) 2015/117 of 26 January 2015 implementing Decision 2013/255 (OJ 2015 L 20, p. 85).

100|Judgment of 21 April 2015, ***Anbouba*** v ***Council***, C-630/13 P, EU:C:2015:247, paragraph 53.

commercial activities and investment, could be explained only by a certain proximity to the regime in place and constituted an undisputed factor which demonstrated a certain link between the applicant and the regime of Mr Basher el-Assad. That link was corroborated by the fact that in December 2014 the applicant had been appointed Secretary-General of the Damascus (Syria) Chamber of Commerce by the Minister for the Economy of the Syrian Arab Republic.

FIGHT AGAINST TERRORISM

In the judgment of 13 December 2016, ***Al-Ghabra*** v ***Commission*** (T-248/13, EU:T:2016:721), the Court had the opportunity to implement the principles laid down by the Court of Justice in its judgment in ***Commission and Others*** v ***Kadi ('Kadi II')*** [101] with the respect to the review of the lawfulness of a decision freezing the funds of a person identified as being linked to the Al-Qaida network. An action had been brought before the Court seeking, in particular, annulment of Regulation (EC) No 14/2007 [102] in that, by that regulation, the applicant's name had been included on the list in Annex I to Regulation (EC) No 881/2002. [103] The applicant claimed that the contested decision was unlawful on the ground, in particular, that there had been a breach of the 'reasonable time' principle.

In that regard, the Court began by recalling that the 'reasonable' nature of the time taken by the institution to adopt the measure at issue must be appraised in the light of all the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the parties to the case. In this instance, the Court noted, the particular circumstances of the case put forward by the Commission accounted in part for the relatively lengthy process of reviewing decisions to include the persons concerned on the list at issue that followed delivery of the judgment in ***Kadi and Al Barakaat International Foundation*** v ***Council and Commission***. [104] The fact remained that, in this instance, the period of more than four years between the date of the request for review and the date on which the contested decision was adopted substantially exceeded what might be regarded as the 'usual' period for completing such a review procedure, even if all the special circumstances alleged were taken into account. Although, in those circumstances, it must be held that there had been a breach of the 'reasonable time' principle, such a breach justified annulment of a decision taken at the end of an administrative procedure only in so far as it also entailed a breach of the rights of defence of the person concerned. In this case, it had not been proved, or even seriously alleged, that the applicant's ability to defend himself effectively had actually been compromised by the excessive duration of the review procedure. The applicant could not therefore rely on the delay in question in order to secure annulment of the contested decision.

Next, the Court observed that, in paragraphs 114 and 115 of the judgment in ***Kadi II***, the Court of Justice had made clear that it was for the Commission, in accordance with its obligation to examine, carefully and impartially whether the alleged reasons were well founded, to assess, having regard inter alia to the content of comments made by the individual concerned, whether it was necessary to seek the assistance of the

101 | Judgment of 18 July 2013, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518.

102 | Commission Regulation (EC) No 14/2007 of 10 January 2007 amending for the 74th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2007 L 6, p. 6).

103 | Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9).

104 | Judgment of 3 September 2008, C-402/05 P and C-415/05 P, EU:C:2008:461.

Sanctions Committee in order to obtain the disclosure of additional information or evidence. However, the Commission could not be criticised in this case on that basis alone for having failed, during the administrative procedure that had led to the adoption of the contested decision, to obtain from the Sanctions Committee or the designating State information or evidence in support of the allegations made against the applicant and for therefore having carried out a 'purely formal and artificial' review as to whether the alleged reasons were well founded, in the light of the observations made by the person concerned in relation to the statement of reasons supplied by that committee.

The Court pointed out, moreover, that the 'legal test' that must be applied at the administrative stage of the review of listing decisions had to be distinguished from the test that must be applied at the judicial review stage. Thus, while the burden of proof undoubtedly lay with the Commission, it did not have to be applied by the Commission at the re-examination stage, but only at the subsequent stage of the judicial review of its decision to maintain the listing after re-examination. It was therefore only at the latter stage that the question of the requisite standard of proof arose. In that regard, it was for the Court alone to satisfy itself that the contested decision '[was] taken on a sufficiently solid factual basis', by determining whether the facts alleged in the summary of reasons were 'supported' and, therefore, their accuracy 'established'. Therefore, any error of law by the Commission in the definition of the standard of proof required or in the application thereof was not capable, by itself, of justifying the annulment of the contested decision if that decision otherwise satisfied those evidential requirements. In any event, the Commission had not erred in considering that the inclusion of an individual's name on the list at issue and, therefore, the freezing of his funds should be based 'on reasonable grounds, or on a reasonable basis, to suspect or believe that such funds or other assets could be used to finance terrorist activity'. Last, the Court observed that, while it was true that, at the time when the contested decision had been adopted, no information or evidence had been adduced to substantiate the grounds put forward in that decision with respect to the applicant, it was consistent with the principles laid down by the Court of Justice in the judgment in ***Kadi II*** to take the new information and evidence annexed to the defence into account for the purposes of the review of lawfulness to be carried out by the Court. It was necessary to distinguish, on the one hand, the procedural requirement of a sufficiently specific statement of reasons and its disclosure to the person concerned in the course of the administrative procedure and, on the other, the determination, to be made by the Court, that the statement of reasons thus disclosed had a sufficiently solid factual basis, after having requested the competent authority, where necessary, to produce information or evidence relevant to such an examination. The new material annexed to the defence had been specifically intended for that purpose.

VII. REGISTRATION OF CHEMICAL PRODUCTS

The case-law in 2016 enabled the Court, in particular, by two judgments delivered on the same day, to rule on the fee payable for registration of substances with the European Chemicals Agency (ECHA) and, in particular, on the power of the ECHA to grant a reduction of that fee to micro, small and medium-sized enterprises.

In the first place, in the case that gave rise to the judgment of 15 September 2016, ***La Ferla*** v ***Commission and ECHA*** (T-392/13, EU:T:2016:478), the applicant maintained, in particular, that the ECHA did not have the necessary power to evaluate the size of registrant undertakings when determining the fee payable. In that regard, the Court pointed out that one of the objectives pursued by Regulation (EC) No 1907/2006 [105] was to

105 | Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

have the ECHA ensure effective management of the technical, scientific and administrative aspects of that regulation and play a pivotal role in its implementation, particularly through the grant of high regulatory capacities. In addition, Regulation (EC) No 340/2008 [106] provided, in particular, that the ECHA might request, at any time, evidence that the conditions for a reduction of fees or charges or for a fee waiver applied. The Court concluded that the ECHA had the necessary power to verify that the conditions enabling a registrant undertaking to receive a reduction in fees or charges or a fee waiver were met.

In addition, the applicant claimed that the ECHA had exceeded or misused its powers in that, in essence, it ought to have confined itself to applying the definition of enterprise categories set out in Article 2 of the Annex to Recommendation 2003/361/EC. [107] On that point, the Court observed that both Regulation No 1907/2006 and Regulation No 340/2008 made express reference to Recommendation 2003/361, for the purposes of defining what was meant by small and medium-sized undertakings (SMEs), the purpose of that recommendation being to ensure that the same definition of SMEs would be applied at EU level in EU policies. It could not be precluded, in principle, that the provisions of a recommendation might be applicable by means of an express reference in a regulation to its provisions, provided that general principles of law and, in particular, the principle of legal certainty were observed. Furthermore, the Court held that there was no basis for considering, in the absence of specific provision to that effect, that that reference concerned only part of the definition of SMEs set out in Recommendation 2003/361, and excluded some of the criteria mentioned in the annex to that recommendation. The Court concluded that there was nothing to indicate that the ECHA, in deciding to apply all the criteria set out in the Annex to Recommendation 2003/361, had exceeded, or indeed misused, its powers.

In the second place, in the judgment of 15 September 2016, ***K Chimica*** v ***ECHA*** (T-675/13, EU:T:2016:480), the Court was called upon to rule on the criteria used by the ECHA in calculating the size of an undertaking for the purposes of determining the amount of the fee to be charged.

In that regard, after recalling that Regulations No 1907/2006 and No 340/2008 referred to Recommendation 2003/361 in order to define SMEs, first of all, the Court observed that, in the case of an autonomous enterprise, that is to say an enterprise which was not classified as a 'partner enterprise' or a 'linked enterprise' within the meaning of Article 3(2) and (3) of the Annex to Recommendation 2003/361, the data, including the number of staff, were to be determined solely on the basis of the accounts of that enterprise, in accordance with Article 6(1) of that annex.

Next, the Court stated that, in the case of an enterprise having partner enterprises or linked enterprises, the data, including the headcount, were to be determined on the basis of the accounts and other data of the enterprise or, where they existed, the consolidated accounts of the enterprise, or the consolidated accounts in which the enterprise was included through consolidation, in accordance with the first subparagraph of Article 6(2) of the Annex to Recommendation 2003/361. According to the second and third subparagraphs of Article 6(2) of the Annex to Recommendation 2003/361, it was necessary to add to these data, on the one hand, the data of the partner enterprises (situated immediately upstream or downstream from the enterprise in question) in proportion to the percentage interest in the capital or voting rights, whichever was greater of these two percentages, and, second, 100% of the data of any enterprise which was linked directly or indirectly to the enterprise in question, where the data had not already been included through consolidation in the accounts.

106 | Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the ECHA pursuant to Regulation No 1907/2006 (OJ 2008 L 107, p. 6).

107 | Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36).

Last, the Court made clear that, for the purposes of Article 6(2) of the Annex to Recommendation 2003/361, the data of partner enterprises of the enterprise in question were derived from their accounts and their other data, consolidated if they existed, which were added to 100% of the data of enterprises which were linked to these partner enterprises, unless their data were already included through consolidation, pursuant to the first subparagraph of Article 6(3) of the Annex to Recommendation 2003/361. As for the data of the enterprises which were linked to the enterprise in question, they were to be derived from their accounts and their other data, consolidated if they existed. To these were added, pro rata, the data of any partner enterprise of those linked enterprises, situated immediately upstream or downstream from it, unless they had already been included in the consolidated accounts with a percentage at least proportional to the percentage interest in the capital or voting rights, whichever was the higher of those two percentages, pursuant to the second subparagraph of Article 6(3) of the Annex to Recommendation 2003/361.

VIII. DUMPING

In the case that gave rise to the judgment of 9 June 2016, ***Growth Energy and Renewable Fuels Association*** v ***Council*** (T-276/13, under appeal, [108] EU:T:2016:340), application had been made to the Court for annulment in part of Implementing Regulation (EU) No 157/2013 [109] in so far as that measure affected the applicants and their members. The Court was required to rule, in particular, on whether, as associations representing the interests of the United States bioethanol industry, the applicants could assert a right to bring proceedings in their own right in this case.

In that regard, the Court recalled that, where a regulation that introduced an anti-dumping duty imposed different duties on a series of undertakings, an undertaking had standing to bring proceedings only against those provisions which imposed a specific anti-dumping duty on it and determined the amount of that duty, and not in relation to those provisions which imposed anti-dumping duties on other undertakings, with the result that an action brought by that undertaking would be admissible only in so far as it sought the annulment of those provisions of the regulation that exclusively concerned it. Moreover, an annulment could produce effects only vis-à-vis the members of an association whose actions would have been admissible. If it were otherwise, a professional association would be able to rely on the standing to bring proceedings of some of its members in order to obtain the annulment of a regulation for the benefit of all of its members, including those who did not themselves satisfy the conditions set out in the fourth paragraph of Article 263 TFEU. It followed that, in this instance, the applicants could seek the annulment of the contested regulation for the benefit of their members only in so far as it affected those of their members who themselves had standing to bring an action for annulment under the fourth paragraph of Article 263 TFEU against the contested regulation.

Called upon, moreover, to examine the applicants' standing to bring proceedings on their own behalf, the Court held that, although the fact that the applicants had been parties to the anti-dumping proceedings did not affect the finding that the imposition of anti-dumping duties on the products of the applicants' members did not create any rights for or obligations on the applicants, they must, as interested parties in the proceedings, be recognised as having standing to bring proceedings on the ground that they were directly and individually concerned. However, they were entitled to rely only on the single plea in law whereby they sought to safeguard their procedural rights.

108 | Case C-465/16 P, ***Council*** v ***Growth Energy and Renewable Fuels Association.***

109 | Council Implementing Regulation (EU) No 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America (OJ 2013 L 49, p. 10).

The Court pointed out, moreover, that if, on behalf of the four sampled producers, the applicants called in question the merits of the decision imposing an anti-dumping duty as such, they must demonstrate that those producers had a particular status within the meaning of the judgment of 15 July 1963, ***Plaumann*** v ***Commission*** (C-25/62). It stated that, even in the case of producers of a product subject to an anti-dumping duty but which were in no way involved in the export of that product, that would certainly be the case where, first, those producers were able to demonstrate that they had been identified in the measures adopted by the Commission or the Council or had been concerned by the preliminary investigations and, second, their market position was substantially affected by the anti-dumping duty to which the contested regulation related. In so far as the four sampled producers had been concerned by the preliminary investigations because they had participated intensively in them and had been substantially affected by the anti-dumping duty to which the contested regulation related, the Court considered that they were individually concerned by that regulation.

The Court further observed that it followed from the actual adoption of Regulation (EU) No 765/2012 [110] amending the basic regulation on protection against dumped products from third States [111] that the EU legislature had considered that, by Article 9(5) of the basic regulation, the European Union had intended to implement a particular obligation assumed in the context of the World Trade Organisation (WTO) contained, in this instance, in Articles 6.10 and 9.2 of the WTO Anti-Dumping Agreement. [112] It followed that Article 9(5) of the basic regulation, in the original version, must be interpreted in a manner that was consistent with those provisions of the WTO Anti-Dumping Agreement. Thus, any exporter or producer included in the sample who therefore cooperated with the institutions throughout the investigation satisfied the conditions for being considered to be a 'supplier' within the meaning of Article 9(5) of that regulation. In that connection, the Court noted that the objective of selecting a sample of exporting producers was to establish as precisely as possible, in a limited investigation, the pressure on prices to which the EU industry was subjected. Therefore, the Commission had the power to alter, at any time, the composition of a sample according to the needs of the investigation. Last, the Court pointed out that, where the institutions used sampling, as in the present case, in principle, an exception to the determination of individual dumping margins and the imposition of individual anti-dumping duties was possible only in respect of undertakings which did not form part of a sample and which did not otherwise have a right to have their own individual anti-dumping duty. In particular, Article 9(5) of the basic regulation did not allow for any exception to the obligation to impose an individual anti-dumping duty on a sampled producer which had cooperated in the investigation where the institutions considered that they were not in a position to establish an individual export price for that producer.

IX. SUPERVISION OF THE FINANCIAL SECTOR

In the order of 24 June 2016, ***Onix Asigurări*** v ***EIOPA*** (T-590/15, EU:T:2016:374), the Court provided clarification of the mechanism provided for in Article 17 of Regulation (EU) No 1094/2010, [113] which allows the European Insurance and Occupational Pensions Authority (EIOPA) to deal with cases of breach of EU law by the national

110 | Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community (OJ 2012 L 237, p. 1).

111 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51).

112 | Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103).

113 | Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ 2010 L 331, p. 48).

authorities in their supervisory practices. The applicant sought, in particular, annulment of EIOPA's decision refusing to take action following a request to initiate an investigation made under Article 17 of that regulation.

First, the Court stated that it followed from Article 17 of Regulation No 1094/2010 that EIOPA has a discretion in relation to investigations, both when it received a request from one of the bodies expressly referred to in Article 17(2) of Regulation No 1094/2010 and when it acted on its own initiative. It followed that EIOPA was under no obligation to act under Article 17 of Regulation No 1094/2010. That interpretation was also consistent with EIOPA's objectives and with the general scheme of the mechanism established by Article 17 of Regulation No 1094/2010. According to Article 1(6) of that regulation, the objective of EIOPA was to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and businesses. In addition, it was clear from recital 26 of that regulation that the aim established by Article 17 was not to provide individual protection or redress in disputes between a natural or legal person and a competent authority at the national level.

Second, the Court observed that the lodging of a complaint such as that made in the instant case by the applicant did not create any special legal relationship between the applicant and EIOPA and could not oblige EIOPA to carry out an investigation under Article 17(2) of Regulation No 1094/2010. In those circumstances, the refusal decision in that case did not produce binding legal effects. In particular, as the applicant could not require EIOPA to initiate an investigation under Article 17(2) of Regulation No 1094/2010, EIOPA's refusal to initiate such a procedure on its own initiative had not been capable of affecting the applicant's interests by bringing about a distinct change in his legal position. The refusal decision could not therefore be classified as an act open to challenge.

X. PUBLIC PROCUREMENT BY THE INSTITUTIONS OF THE UNION

In the first place, in the judgment of 27 April 2016, ***Österreichische Post*** v ***Commission*** (T-463/14, EU:T:2016:243), the Court adjudicated in an action for annulment brought by an Austrian universal postal service provider against a Commission decision [114] applying Article 30 of Directive 2004/17/EC, [115] which excluded from the application of the European rules on public procurement procedures in the water, energy, transport and postal services sectors activities 'directly exposed to competition'.

In that respect, the Court held that the Commission had not erred in taking the view that the criteria and methodology used in assessing direct exposure to competition under Article 30 of Directive 2004/17 were not necessarily identical to those used to perform an assessment under Articles 101 and 102 TFEU or Regulation (EC) No 139/2004. [116] Admittedly, Article 30(2) of Directive 2004/17 provided that the question whether an activity was directly exposed to competition was to be decided on the basis of criteria that were in conformity with the FEU Treaty provisions on competition. However, the wording of that provision did not require that those criteria should be exactly the same as those referred to in the provisions of EU competition law.

114 | Commission Implementing Decision 2014/184/EU of 2 April 2014 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2014 L 101, p. 4).

115 | Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

116 | Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

Likewise, it followed from recitals 2 and 40 of Directive 2004/17 that, in examining a request made pursuant to Article 30 of that directive, the Commission was not required to apply the criteria and methods laid down in the FEU Treaty provisions on competition as such. Last, as regards the Notice on market definition [117] and the Commission document entitled 'Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases', on which the applicant relied, the Court observed that they referred exclusively to EU competition law. Nowhere did those documents indicate that the Commission was required to apply the criteria and methodology in the context of procedures involving public procurement law.

In the second place, in the judgment of 27 April 2016, ***European Dynamics Luxembourg and Others*** v ***EUIPO*** (T-556/11, under appeal, [118] EU:T:2016:248) the Court ruled on the concept of conflict of interest. [119] It recalled that the existence of structural links between two companies, one of which had participated in the preparation of the tender specifications, while the other had participated in the tendering procedure for the public contract in question, was, in principle, capable of causing such a conflict of interest. However, the risk was less significant where, as in this instance, the company or companies responsible for the preparation of the tender specifications were not themselves part of the tenderer consortium, but were merely members of the same group of undertakings as that to which the company that was a member of the consortium belonged. In that regard, the mere finding of a relationship of control between the parent company and its various subsidiaries was not sufficient for the contracting authority to be able automatically to exclude one of those companies from the tendering procedure, without checking whether that relationship had actually impacted on its conduct in the context of the procedure. However, the existence of a conflict of interest must lead the contracting authority to exclude the tenderer concerned, where its exclusion was the only measure available to avoid a breach of the principles of equal treatment and transparency, which were binding in any procedure for the award of a public contract, that is to say, where no less restrictive measure that would ensure compliance with those principles existed.

XI. ACCESS TO DOCUMENTS OF THE INSTITUTIONS

In 2016 the Court had the opportunity to deliver a number of important judgments concerning access to documents. That case-law enabled it, in particular, to provide fresh clarification concerning requests for access to previously disclosed documents and the exceptions relating to protection of the decision-making process, legal opinions and judicial proceedings.

APPLICATION FOR ACCESS TO PREVIOUSLY DISCLOSED DOCUMENTS

In the case that gave rise to the judgment of 26 April 2016, ***Strack*** v ***Commission*** (T-221/08, EU:T:2016:242), the Court was called upon to rule on the lawfulness of the Commission's refusal to give the applicant access to a number of documents relating to an investigation by the European Anti-fraud Office (OLAF). [120] The applicant

117 | Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

118 | Case C-376/16 P, ***EUIPO*** v ***European Dynamics Luxembourg and Others*** and order of 24 November 2016, ***European Dynamics Luxembourg and Others*** v ***EUIPO***, C-379/16 P, not published, EU:C:2016:905.

119 | See also, below, the discussion under 'XII. Actions for damages — Loss of opportunity'.

120 | See also, below, the discussion of this judgment under 'Exception relating to protection of the decision-making process'.

disputed, in particular, the refusal of his request for access to certain documents which had previously been disclosed to him in full, marked 'PD' (previously disclosed), on a basis other than Regulation (EC) No 1049/2001. [121] The reason stated for the refusal was that those documents were already in the applicant's possession.

In that regard, the Court observed that documents disclosed under Regulation No 1049/2001 enter the public domain. Thus, refusal to grant the applicant access to the documents marked 'PD' on the basis of that regulation prevented those documents from being regarded as public, which was precisely the aim sought by the applicant and corresponded to the objective pursued by Regulation No 1049/2001. Consequently, the fact that the person requesting access already held the documents concerned by his request for access and that the purpose of the request was therefore not to enable him to discover their content but, rather, to disclose them to third parties was irrelevant. The Court concluded that an institution could not rely on the sole fact that the person requesting access was already, or was regarded as already being, in possession of the requested documents, but on a different basis, as a reason for refusing to examine the request for access to those same documents under Regulation No 1049/2001.

EXCEPTION RELATING TO PROTECTION OF THE DECISION-MAKING PROCESS

The judgment of 26 April 2016, ***Strack*** v ***Commission*** (T-221/08, EU:T:2016:242), also gave the Court the opportunity to provide clarification of the scope of the exception relating to protection of the decision-making process provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 as regards access to documents concerning an OLAF investigation. [122]

The Court stated that public access to documents linked with an OLAF investigation would be particularly harmful to the ability of the Commission, and in particular of OLAF, to accomplish its mission to combat fraud in the public interest. The disclosure of the documents concerned would seriously undermine the Commission's and OLAF's decision-making process, because it would seriously compromise the complete independence of future OLAF investigations and their objectives by revealing OLAF's strategy and working methods and by reducing OLAF's chances of receiving independent assessments from its collaborators and of consulting the Commission's services on very sensitive subjects. Disclosure would also be likely to discourage individuals from providing information concerning possible cases of fraud and would thereby deprive OLAF and the Commission of information that would be of use for the purpose of undertaking investigations for the protection of the financial interests of the European Union. That conclusion was all the more compelling since the exceptions to the right of access to documents, set out, in particular, in Article 4 of Regulation No 1049/2001, could not, where, as in this instance, the documents in question fell within a particular area of EU law, be interpreted without taking account of the specific rules governing access to those documents, namely those laid down in Decision 1999/352/EC [123] and Regulation (EC) No 1073/1999. [124]

121 | Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

122 | See also, above, the discussion of this judgment under 'Application for access to previously disclosed documents'.

123 | Commission Decision 1999/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ 1999 L 136, p. 20).

124 | Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

According to the Court, the special confidentiality which those documents relating to the investigation enjoyed was justified not only in so far as OLAF receives, in the course of such an investigation, sensitive trade secrets and highly sensitive information in relation to persons, disclosure of which could considerably harm their reputation, but also in so far as access to documents relating to an internal OLAF investigation, even after the procedure in question had been closed, would be likely to seriously hinder the operations of that body, reveal OLAF's methodology and strategy for obtaining information, compromise the willingness of persons involved in the procedure to collaborate in the future and, accordingly, compromise the proper running of the procedures in question and the attainment of the objectives pursued. In those circumstances, the Commission had been correct, for the purposes of applying the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, to presume, without conducting a concrete and individual assessment of each of the documents in question, that public access to those documents, on the basis of Regulation No 1049/2001, would in principle harm the protection of the interests referred to in that regulation.

EXCEPTION RELATING TO THE PROTECTION OF LEGAL ADVICE

In the judgments of 15 September 2016, ***Herbert Smith Freehills*** v ***Council*** (T-710/14, EU:T:2016:494), and of 15 September 2016, ***Philip Morris*** v ***Commission*** (T-796/14, EU:T:2016:483), 125 concerning a request for disclosure of documents relating to the discussions held preparatory to the adoption of Directive 2014/40/EU, 126 the Court ruled on the exception to the right of access to documents relating to protection of legal advice, provided for in the second indent of Article 4(2) of Regulation No 1049/2001.

In the first case, the Court had the opportunity to rule, in particular, on the concept of legal advice. In that regard, in the first place, the Court observed that the concept of 'legal advice' was not defined in Regulation No 1049/2001. That concept related to the content of a document and not to its author or addressees. As was apparent from a literal interpretation of the words 'legal advice', the reference was to advice relating to a legal issue, regardless of the way in which that advice was given. In other words, it was irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing such advice had been provided at an early, late or final stage of the decision-making process. In the same way, the fact that the advice had been given in a formal or an informal context had no effect on the interpretation of those words.

In the second place, the Court made clear that there was nothing in the wording of the second indent of Article 4(2) of Regulation No 1049/2001 to support the conclusion that that provision concerned only advice provided or received internally by an institution. The exception relating to legal advice must be interpreted as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. Although, as a general rule, an institution seeks advice from its own legal service, there is nothing to prevent that institution from seeking such advice from an outside source. That would be the case, for example, where the institution in question sought advice from a law firm. Accordingly, the question whether the legal advice emanated from an internal or external author was irrelevant so far as the institution relying on the exception relating to the protection of the advice was concerned. Nor, last, was there anything to prevent the institution which had invoked the exception relating to the protection of legal advice from sharing that advice 'with a third party'. The fact that a document containing legal advice issued by an institution had been sent to the legal services of other institutions or to a Member State did not alter, as such, the nature of that

125 | See also, below, the discussion of the latter judgment under 'Exception relating to the protection of judicial proceedings'.

126 | Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

document. Accordingly, it did not follow from the second indent of Article 4(2) of Regulation No 1049/2001 that legal advice must be issued by an institution solely for internal use. In this instance, the Court considered that the exchanging of legal views between the legal services of three institutions for the purpose of reaching a compromise, in the context of the ordinary legislative procedure set out in Article 294 TFEU, regarding a legislative text might, where appropriate, be described as legal advice and, as a result, might come under the relevant exception. The legal services act under a mandate and with the aim of reaching an agreement. They thus act as negotiators and at the same time as advisers with regard to legal matters.

In the second case, the Court provided clarification of the conditions in which an institution may refuse to disclose legal advice. In that regard, the Court began by recalling that, although it followed from the judgment in ***Sweden and Turco*** v ***Council*** [127] that, in principle, legal advice must be disclosed, that judgment did not preclude a refusal to disclose legal advice in specific cases. The Court observed, moreover, that, the Court of Justice had indeed rejected the argument that disclosure of legal advice could compromise an institution's ability, in any subsequent court proceedings, to defend the validity of a legislative act, on the ground that such a general argument could not justify an exception to the openness provided for in Regulation No 1049/2001. However, the situation was different where, as in this case, at the time of the adoption of the decision refusing to disclose specific legal advice given in the context of a legislative procedure, an action challenging the validity of the legal advice concerned, in which it was highly likely that a reference would be made for a preliminary ruling, was pending before the courts of a Member State and, in addition, an action had been brought before the Courts of the European Union by a Member State challenging the validity of a number of provisions of that measure which were alleged to infringe Article 114 TFEU, the principle of proportionality and the principle of subsidiarity.

Consequently, the Court considered that the Commission's argument that both its ability to defend its position during court proceedings and the principle of equality of arms would be compromised was not without merit. Indeed, it was apparent from the parts of the document in question that had been disclosed that the Legal Service had been of the opinion that, in respect of certain policy options, some of which had been redacted, contained in the draft Impact Assessment and connected with tobacco products, the European Union had not been competent to legislate or the policy options had not been proportionate in the light of Article 114 TFEU. Disclosure of the redacted parts of that document might undermine the protection of legal advice, that is to say, the protection of an institute's interest in seeking legal advice and receiving frank, objective and comprehensive advice, and also the position of the Commission's Legal Service in defending the validity of Directive 2014/40 before the Court of Justice of the European Union on an equal footing with the other parties, in so far as it would reveal the position of the Commission's Legal Service on sensitive and contentious issues before it had even had the opportunity to present that position during the judicial proceedings, although no similar obligation was imposed on the other party. Last, it could be seen from the contested decision that the Commission had provided reasons pertaining to its rights of defence that justified making the public interest connected with transparency subject to the grounds underlying the exception which it had raised, and had established that the applicant's interest in obtaining the widest possible access to the documents was not a public interest, but was clearly a private interest. Consequently, it could not be held that the Commission had failed to carry out a specific assessment or that it had failed to set out the grounds justifying its decision.

127 | Judgment of 1 July 2008, C-39/05 P and C-52/05 P, EU:C:2008:374.

EXCEPTION RELATING TO THE PROTECTION OF JUDICIAL PROCEEDINGS

The judgment of 15 September 2016, ***Philip Morris*** v ***Commission*** (T-796/14, EU:T:2016:483), also gave the Court the opportunity to reconsider the scope of the exception to the right of access to documents relating to court proceedings, also provided for in the second indent of Article 4(2) of Regulation No 1049/2001. [128]

The Court observed, first of all, that it did not follow from the judgment in ***Sweden and Others*** v ***API and Commission*** [129] that documents other than pleadings were to be excluded, where appropriate, from the scope of the exception relating to the protection of court proceedings. Indeed, it could be seen from that case-law that the principle of equality of arms and the sound administrative of justice are at the heart of that exception. The need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents disclosure of which is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial. However, in order for that exception to apply, it was necessary that the requested documents should reveal the position of the institution concerned on contentious issues raised during the court proceedings relied upon. According to the Court, those considerations could also be applied to proceedings pending before a national court at the time of adoption of a decision refusing access to the requested documents, on condition that they raised a question of interpretation or validity of an act of EU law so that, having regard, to the context of the case, a reference for a preliminary ruling appeared particularly likely. In those two cases, although those documents had not been drawn up in the context of specific court proceedings, the integrity of the court proceedings concerned and the equality of arms between the parties could be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending or potential (but imminent) proceedings. In the light of those factors, the Court considered that, in this case, the Commission had been right to consider, having regard to the history of the legislative procedure relating to the adoption of Directive 2014/40, that a reference for a preliminary ruling was highly likely in the near future and, consequently, that disclosure of the documents in question could undermine the principle of equality of arms in the expected preliminary ruling proceedings.

The Court observed, moreover, that the principle of equality of arms required that the institution by which the contested act had been issued be in a position effectively to defend the legality of its actions before the courts. That possibility would be seriously compromised if the institution in question were to be obliged to defend itself, not only having regard to the pleas in law and arguments raised by the applicant or, as in this case, in the context of future preliminary ruling proceedings, but also having regard to positions taken internally concerning the legality of the various options envisaged in the context of the drawing-up of the act in question. In particular, disclosure of documents containing that type of position was such as to oblige the institution concerned to defend itself against assessments by its own staff which had ultimately been disregarded. That fact could upset the balance between the parties to court proceedings, inasmuch as the applicant could not be obliged to disclose that type of internal assessment. It followed that disclosure of such documents to the public while court proceedings concerning the interpretation and the legality of the act in question were pending could compromise the Commission's defensive position and the principle of equality of arms, in so far as it would already reveal the internal legal positions of its services on contentious issues although no similar obligation would be imposed on the other party.

128 | See also, above, the discussion of this judgment under 'Exception relating to the protection of legal advice'.

129 | Judgment of 21 September 2010, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541.

XII. ACTIONS FOR DAMAGES

ACCESSION OF THE REPUBLIC OF CROATIA TO THE EUROPEAN UNION

In the judgment of 26 February 2016, ***Šumelj and Others*** v ***Commission*** (T-546/13, T-108/14 and T-109/14, under appeal, [130] EU:T:2016:107), the Court was called upon to determine an action for damages, seeking compensation for the harm alleged by the applicants as a result of what they claimed to be the Commission's wrongful conduct when monitoring the Republic of Croatia's compliance with its accession commitments. These cases enabled the Court to provide clarification for the first time on the obligations imposed on the Commission when it monitors compliance with the commitments given by a candidate State seeking accession to the European Union and, in this instance, the obligations which the Croatian authorities were required to assume by way of commitments under Article 36 of the Act of Accession of the Republic of Croatia to the European Union [131] and, in particular, Annex VII to that Act, concerning the commitments undertaken by the Republic of Croatia in the area of the judiciary and fundamental rights.

While making clear that what was alleged to be the Commission's unlawful conduct consisted solely in a wrongful omission, namely its failure to adopt the measures that would have prevented the repeal of the Public Bailiffs Act, the Court first of all began by stating, with respect to commitment 1 in Annex VII to the abovementioned Act of Accession, that it followed from the wording of that commitment that it was not aimed at a specific judicial reform strategy and action plan. That commitment referred generally to the Croatian authorities' 'Judicial Reform Strategy' and 'Action Plan', without more, although the strategy and plan in question could have been identified, by mentioning those in force on the date of signature of the Treaty of Accession. Such general references might be explained by the fact that during the period between the date of signature of the Act of Accession and the date of actual accession there were regular exchanges between the EU authorities and the authorities of the acceding State, which necessarily took the form of adjustments on both sides. It followed that the reform strategy and action plan mentioned in Annex VII to the Act of Accession had not referred solely to the Judicial Reform Strategy and the Action Plan in force on the date of the Act of Accession, so that commitment 1 therefore did not give rise to any obligation for the Croatian authorities to establish the office of Public Bailiff. It could not be inferred, however, that the Croatian authorities had had unlimited discretion to amend the Judicial Reform Strategy and the Action Plan in force at the time of accession. In view of the provisions of the Act of Accession, in particular Article 36 and Annex VII, those authorities had been required to comply not only with commitment 1 but also with all the other commitments referred to in that annex.

Next, as regards commitment 3 in Annex VII to the Act of Accession, concerning the improvement of the effectiveness of the judicial system, the Court observed that it concerned only the efficiency of the judicial

130 | Case C-239/16 P, ***Šumelj and Others*** v ***Commission.***

131 | Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21), annexed to the Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union (OJ 2012 L 112, p. 10).

system and did not require that power to enforce court decisions be conferred on one body in particular according to pre-defined procedures. It thus could not be inferred from that commitment that there was any obligation to entrust the enforcement procedures to public bailiffs.

Last, as regards the Commission's alleged failure to have regard to the principle of protection of legitimate expectations, the Court noted that the applicants had not relied on any factor showing or giving rise to the assumption that the European Union institutions, including, in particular, the Commission, had caused them to have legitimate expectations that they would ensure that the profession of public bailiff would be maintained. The — unsubstantiated — circumstance that the Commission had participated in the preparation of the Public Bailiffs Act, had financed it, and indeed had been at the origin of it could not in itself constitute a precise assurance given by the Commission that it would regard the establishment of public bailiffs as the only means capable of complying with the accession commitments. In order for such assurances to be established, those acts providing initial support for the Public Bailiffs Act would, having regard to the fact that the Republic of Croatia had been under no obligation to create the profession of Public Bailiff, have needed to be supplemented by subsequent consistent and explicit acts to that effect.

PROCESSING OF PERSONAL DATA

The case that gave rise to the judgment of 20 July 2016, ***Oikonomopoulos*** v ***Commission*** (T-483/13, EU:T:2016:421), had its origins in a number of contracts concluded between a company and the Commission in the context of the Sixth Framework Programme for Research, Technological Development and Demonstration, contributing to the creation of the European Research Area and to innovation (2002–2006). An audit report had revealed anomalies and an investigation had been initiated by OLAF in order to ascertain whether criminal offences affecting the financial interests of the European Union had been committed. The director of the company involved had brought an action before the Court seeking, first, compensation for the damage caused by the Commission and by OLAF and, second, a declaration that the measures taken by OLAF were legally void and inadmissible for evidentiary purposes before the national authorities. [132] The Court thus found it necessary to determine, in particular, whether the delayed notification to the data protection officer of the processing during the investigation of personal data concerning the applicant constituted a sufficiently serious breach of a rule of law intended to confer rights on individuals for the Union to incur non-contractual liability.

In that regard, the Court observed that, with respect to the non-contractual liability of the Union, when Article 25(1) of Regulation (EC) No 45/2001 [133] had been infringed, because the data had been notified to the data protection officer after they had been processed, the institution concerned breached a rule of law intended to confer rights on the persons concerned by the personal data held by the institutions and bodies of the European Union. As to whether such a breach might be regarded as sufficiently serious, the Court pointed out that, under Regulation No 45/2001, the data protection officer's role was to ensure that the processing of personal data did not affect the rights and freedoms of the relevant data subjects. In that context, his role was, inter alia, to warn the European Data Protection Supervisor (EDPS) against any processing of data that could constitute a risk within the meaning of Article 27 of Regulation No 45/2001. It followed that, if the data protection officer was not informed of that data processing, he himself could not notify the EDPS and could not therefore effectively fulfil the essential task of supervision assigned to him by

132 | See also, below, the discussion of this document under 'XII. Actions for damages — Powers of OLAF'.

133 | Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

the European legislature. The Court further noted that, as stated in recital 14 of Regulation No 45/2001, the provisions of that regulation were to apply to any processing of personal data carried out by all the institutions. The institutions and bodies of the Union thus have no discretion when applying Regulation No 45/2001. In the light of those elements — the essential character of the data processing officer's monitoring role and the lack of any discretion on the part of the institutions and bodies of the Union —, it had to be held that the mere breach of Article 25(1) of Regulation No 45/2001 was sufficient to establish the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. In this instance, the Commission had been late in notifying the processing of personal data to the data protection officer. Although the Commission sought to justify that delay by the fact that the practices required by Article 25(1) of Regulation No 45/2001 could be carried out only gradually and that the EDPS had considered, in a decision relating to a delayed notification, that there was no reason to find that the above regulation had been infringed, since the infringement had been remedied, the Court held that the rectification of the situation did not make it possible to find that no infringement had occurred. Article 25(1) of Regulation No 45/2001 had thus been infringed, since the notification of the data had taken place after they had been processed.

POWERS OF OLAF

In the case that gave rise to the judgment of 20 July 2016, ***Oikonomopoulos*** v ***Commission*** (T-483/13, EU:T:2016:421), the Court was required, in particular, to rule on OLAF's power to conduct an investigation into the performance of a contract concluded for the implementation of a framework programme. [134]

In the first place, the Court stated that, in order to make the protection of the financial interest of the Union affirmed in Article 325 TFEU effective, it was imperative that the deterrence and combating of fraud and other irregularities occurred at all levels and in respect of all activities in the context of which Union interests might be affected by such phenomena. It was in order to ensure that that objective could be fully attained that the Commission had provided that OLAF should exercise its powers in external administrative investigations. Thus, the existence of a contractual relationship between the Union and natural or legal persons suspected of illegal activities had no impact on OLAF's investigative power. OLAF might conduct investigations in respect of those persons if they were suspected of fraud or illegal activity, notwithstanding the existence of a contractual relationship between the abovementioned parties. The Court also made clear that the lack of a specific provision in that regard in Regulation No 1073/1999 was not to be interpreted as meaning that OLAF was prohibited from organising interviews as part of external investigations. The power to carry out on-the-spot checks and inspections undeniably entailed the power to schedule interviews with individuals involved in those checks and inspections. Furthermore, no provision of Regulation (Euratom, EC) No 2185/96 [135] or, moreover, of any other regulation prevents the Commission or, in the present case, OLAF from carrying out an on-the-spot check or inspection at a subcontractor's premises without having previously carried out a check or inspection at the premises of the trader suspected of fraud.

In the second place, as regards the scope of the rights of the defence in the context of an external investigation, the Court considered that observance of those rights was sufficiently guaranteed if the person concerned was promptly informed of the possibility that he was personally involved in acts of fraud, corruption or illegal activities detrimental to the interests of the Union, where such information did not interfere with the investigation. However, OLAF was under no obligation to grant a person concerned by an external

134 | See also, above, the discussion of this document under 'Processing of personal data'.

135 | Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292, p. 2).

investigation access to the documents which were the subject of such an investigation or to those drawn up by OLAF itself for that purpose, since the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be impeded. As regards, in particular, access to the final report of an external obligation, no provision placed such an obligation on OLAF.

Last, and in the third place, with regard to the existence of a causal link between the infringement of Article 25(1) of Regulation No 45/2001, owing to the late notification to the data protection officer of the processing of the personal data concerning the applicant, and the damage alleged by the applicant, the Court considered that the applicant had been unable to demonstrate such a causal link. He had not submitted any argument showing how, in this instance, that late notification had undermined his reputation and led him to cease his business activities and interrupt his university activities; nor had he explained how the late notification had caused him any non-pecuniary loss.

LOSS OF OPPORTUNITY

The judgment of 27 April 2016, ***European Dynamics Luxembourg and Others*** v ***EUIPO*** (T-556/11, under appeal, [136] EU:T:2016:248), allowed the Court to provide clarification of the concept of loss of opportunity in proceedings relating to public procurement by the institutions of the Union. [137] In this instance, the Court was required to adjudicate in an action seeking, first, annulment of the decision whereby EUIPO, in the context of a call for tenders, had rejected the applicant's tender, and of related EUIPO decisions adopted in the context of the same tender procedure, including those awarding the contract in question to other tenderers, and, second, compensation for the alleged harm sustained as a result of the loss of an opportunity to be awarded that contract.

When examining the claim for damages, the Court recalled that, in order for the European Union to incur non-contractual liability, within the meaning of the second paragraph of Article 340 TFEU, on account of the unlawful conduct of its bodies, three conditions must be satisfied: the alleged conduct must be unlawful, the damage sustained must be real and there must be a causal link between the conduct alleged and the damage relied on. Those principles applied *mutatis mutandis* to the non-contractual liability incurred by the European Union, within the meaning of that provision, as a result of the unlawful conduct of and damage cause by one of its bodies, such as EUIPO, which the latter, pursuant to Article 118(3) of Regulation No 207/2009, is required to make good. In that regard, the Court pointed out that, in this particular case, the claim for damages was based on the same unlawful conduct as that relied on in support of the application for annulment of the decision to reject the tender, which was vitiated by various instances of substantive unlawful conduct, including breach of the principle of equal treatment between tenderers and manifest errors of assessment, and also several shortcomings in the statement of reasons. As regards the existence of a causal link between those illegalities and the damage allegedly sustained, however, the Court stated that inadequate reasoning was not capable of showing that, had the reasoning not been inadequate, the contract could, or should, have been awarded to the applicant. However, with respect to the causal link between the other illegalities affecting the contested decisions, on the one hand, and the loss of opportunity, on the other, EUIPO could not merely claim that, in view of its broad discretion as a contracting authority, it had not been obliged to sign a framework contract with the applicant. Those errors had necessarily affected the applicant's chance of being ranked higher in the procedure in question. It followed that, even taking account of the contracting authority's broad discretion

136 | Case C-376/16 P, ***EUIPO*** v ***European Dynamics Luxembourg and Others***, and order of 24 November 2016, ***European Dynamics Luxembourg and Others*** v ***EUIPO***, C-379/16 P, not published, EU:C:2016:905.

137 | See also, above, the discussion of this judgment under 'X. Public procurement by the institutions of the Union'.

with respect to the award of the contract at issue, the loss of opportunity suffered in this case by the applicant constituted actual and certain damage.

Furthermore, in a situation such as the present case, in which there was a significant risk that the contract at issue would already have been implemented in full by the time the proceedings before the Court were completed, a failure by the Courts of the European Union to recognise the loss of such an opportunity and the need to award compensation in that regard would in itself be contrary to the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights. The Court further noted that it was necessary to have regard to the fact that, owing to the conditions governing interlocutory proceedings before the President of the General Court, a tenderer whose tender had been assessed and unlawfully rejected was, in practice, only rarely able to obtain suspension of the operation of such a decision. Consequently, it was necessary to compensate the applicant in respect of the loss of opportunity, in so far as the decision to reject the tender, even in the event that it should be annulled with retroactive effect, had in practice definitively removed any possibility of the applicant's being awarded the contract at issue.

XIII. APPEALS

Among the 39 decisions delivered by the Appeal Chamber of the General Court during 2016, the judgment of 27 October 2016, ***ECB*** v ***Cerafogli*** (T-787/14 P, EU:T:2016:633), deserves special mention, in that it marks a development in the rules governing the admissibility of a plea of illegality in civil service proceedings.

In that judgment, the Court, sitting as a bench of five judges, concluded that the rationale of the legal framework of the plea of illegality and, in particular, the considerations relating to the fact that the court alone has the authority to determine the inapplicability of an act of general application must lead it not to apply the rule of correspondence between the application and the complaint, which requires that, in order to be admissible in the judicial proceedings, the plea of illegality must already have been raised at the pre-litigation stage. Thus, the Court held that, although the incidental nature of the plea of illegality did not make it impossible to raise such a plea at the complaint stage, that did not mean that the plea was inadmissible when it was raised for the first time before the Court.

XIV. APPLICATIONS FOR INTERIM MEASURES

In 2016, the Court definitively disposed of 23 cases, [138] made 9 suspensory orders under Article 157(2) of the Rules of Procedure and allowed two applications for suspension of operation of the relevant measures, by the orders of 20 July 2016, ***PTC Therapeutics International*** v ***EMA*** (T-718/15 R, not published, under appeal, [139] EU:T:2016:425) and of 20 July 2016, ***MSD Animal Health Innovation and Intervet international*** v ***EMA*** (T-729/15 R, not published, under appeal, [140] EU:T:2016:435).

In those two orders, which related to the problems associated with the disclosure, envisaged by the European Medicines Agency (EMA) under Regulation No 1049/2001, of what was alleged to be confidential information,

138 | Two decisions were taken in accordance with the combined provisions of Article 157(4) and Article 12 of the Rules of Procedure of the General Court, namely the orders of 16 December 2016, ***Casasnovas Bernad*** v ***Commission*** (T-826/16 R, not published, EU:T:2016:752), and of 11 November 2016, ***Solelec and Others*** v ***Parliament*** (T-281/16 R, not published, EU:T:2016:659).

139 | Case C-513/16 P(R), ***EMA*** v ***PTC Therapeutics International***.

140 | Case C-512/16 P(R), ***EMA*** v ***MSD Animal Health Innovation and Intervet International.***

the President of the General Court adopted the same approach as in the corresponding orders signed in 2014 and 2015. [141]

The President of the Court acknowledged, first of all, that there was a prima facia case, observing that, in regard to disputes relating to the provisional protection of what is alleged to be confidential information, the judge hearing an application for interim measures, if he is not to disregard the intrinsically ancillary and provisional nature of the proceedings for interim measures, may, as a rule, conclude that there is no prima facie case only where the information in question is obviously not confidential. In this instance, the President of the Court found that it was necessary to examine the confidentiality of reports setting out the inventive business strategy put in place by the applicants for the purpose of carrying out either the clinical studies necessary in order to obtain a marketing authorisation for a medicinal product or the toxicological tests required in the context of the safety tests of a medicinal product. In that regard, the President of the Court pointed out that, since there was no case-law in the area of pharmaceuticals that would make it possible to give a ready answer to the questions of confidentiality to be decided in this instance by the future judgment on the substance, the application raised novel questions of principle which could not be resolved for the first time by the judge hearing the application for interim measures, but required thorough examination within the main proceedings.

The President of the Court considered, next, that the weighing-up of interests was in favour of the applicants. In the cases that had given rise to those two orders, the Court hearing the main application would be required to determine the legality of the EMA's decision to disclose the reports at issue to a third party. In order to preserve the effectiveness of a judgment annulling that decision, the applicants must be able to ensure that such disclosure did not take place before the main proceedings were closed. If the application for interim measures were dismissed, such a judgment would be deprived of practical effect, as the EMA would be able to disclose the reports, which would prejudge the future decision on the substance of the case. Furthermore, in answer to the EMA's objection that that approach would permit a dilatory strategy, the President of the Court concluded that there was no such risk, in so far as he found that there was a prima facie case and, moreover, if the EMA deemed it necessary to rely on the principle of transparency at an earlier stage, it was always possible for it to request an expedited procedure.

As regards urgency, the President of the Court recognised, first, that the alleged harm was serious, pointing out that, in the light of the relevant case-law, it must be presumed, for the purposes of the interim measures proceedings, that the information contained in the reports at issue was confidential. As those reports concerned the applicants' manufacturing and commercial activity, they constituted an intangible asset that might be used for competitive purposes, whose value would be seriously reduced if the reports did not remain secret. The President of the Court concluded, second, that the harm likely to be caused by disclosure of the reports at issue to third parties who had requested access to them pursuant to Regulation No 1049/2001 would be irreparable. As already pointed out in the orders made in 2014 and 2015, it followed from the mechanism of access to documents put in place by that regulation that third parties could immediately take cognisance of the sensitive information and use it straightaway for competitive purposes and thus weaken the applicants' competitive position. As disclosure of a document on that legal basis acquired an ***erga omnes***

141 | Namely, the orders of 13 February 2014, ***Luxembourg Pamol (Cyprus) and Luxembourg Industries*** v ***Commission*** (T-578/13 R, not published, EU:T:2014:103), and of 25 July 2014, ***Deza*** v ***ECHA*** (T-189/14 R, not published, EU:T:2014:686), which were not the subject of an appeal (see Annual Report 2014, pp. 155 and 156), and the order of 1 September 2015, ***Pari Pharma*** v ***EMA*** (T-235/15 R, EU:T:2015:587). This last order was the subject of an appeal, on which the Court of Justice held that there was no need to adjudicate (order of 17 March 2016, ***EMA*** v ***Pari Pharma***, C-550/15 P(R), not published, EU:C:2016:196). In an action by the EMA following that order that there was no need to adjudicate, the President of the General Court rejected the request seeking the cancellation of the suspension order of 1 September 2015 (order of 23 May 2016, ***Pari Pharma*** v ***EMA,*** T-235/15 R, not published, EU:T:2016:309). On appeal, the Vice-President of the Court of Justice set aside the order of 23 May 2016 and cancelled the order of 1 September 2016 (order of 18 October 2016, ***EMA*** v ***Pari Pharma***, C-406/16 P(R), not published, EU:C:2016:775).

effect, the alleged harm did not appear to be capable of being quantified, as an undetermined and unlimited number of current and potential competitors all over the world would be able to obtain that information in order to exploit it in the short, medium or long term.

The President of the Court further observed that, in any event, even if the harm alleged by the applicants could not be classified as irreparable, he would be required protect the reports at issue in their entirety from the disclosure envisaged by the EMA. He observed that he could not examine the confidentiality of each individual piece of data in the reports at issue with a view to allowing the partial disclosure of the reports, since it could not be precluded, at the stage of examining the application for interim measures, that the Court dealing with the main application would uphold the principle of a general presumption of confidentiality for the reports at issue. If such a solution were adopted, no disclosure — not even partial disclosure — of the reports would be authorised. In those circumstances, the judge hearing the application for interim measures must take into account the ancillary nature of his powers and refuse partial access, in order not to deprive the decision of the Court dealing with the main application of its practical effect. Otherwise, the disclosure of data which the Court dealing with the main application would subsequently classify as confidential would have the effect that the judge hearing the application for interim measures would de facto assume the powers of that Court, which was the sole body with jurisdiction to determine, in the decision bringing the main proceedings to a close, whether the data in question were confidential and, consequently, whether disclosure could be definitively authorised. By interfering with the prerogatives of the Court dealing with the main application in such a way, and doing so intentionally and in full awareness of his actions, the judge hearing the application for interim measures might well infringe the principle of the right to be heard by a court or tribunal established in accordance with the law, resulting from Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Among the cases that gave rise to an order dismissing the application for suspension of operation, the order of 19 July 2016, ***Belgium*** v ***Commission*** (T-131/16 R, not published, EU:T:2016:427), gave the President of the General Court the opportunity, in particular, to examine the relevance, in the context of the recovery of State aid declared to be incompatible with the internal market, of the relaxation of the condition relating to urgency when the prima facie case established was particularly serious. In that regard, the President of the Court recalled that such relaxation had been permitted in only three areas of litigation (restrictive measures, public procurement and access to documents), in which it was excessively difficult, if not impossible, for systemic reasons, to satisfy that condition, as laid down in the Rules of Procedure and traditionally interpreted in the case-law. Since the instant case could not be subsumed within any of the reasons which had justified the relaxation of the relevant requirements in those areas of litigation, it was necessary to apply the conditions relating to a prima facie case and urgency as they had been traditionally interpreted in the case-law, and, consequently, the Kingdom of Belgium ought to have demonstrated the imminence of serious and irreparable harm; a prima facie case, however, strong, could not make up for the lack of urgency.

C | ACTIVITY OF THE REGISTRY OF THE GENERAL COURT IN 2016

By Mr **Emmanuel COULON**, Registrar of the General Court

These remarks break new ground. They are the first ever made by a registrar of the General Court in a report on the institution's judicial activity.

The opportunity is thus provided to underline three characteristics of the Registry of the General Court.

First, the Court Registry is the General Court's only department. It thus differs, within the Court of Justice of the European Union, from the departments which are common to the Court of Justice and the General Court (and which were also shared with the Civil Service Tribunal until 1 September 2016). This fact results from the applicable provisions, which reflect functional requirements.

Secondly, the Registry is at the heart of the administration of justice. Conscious that good administration contributes to good judicial decision-making, the Registry takes action in order to enable the General Court to make decisions of quality within a foreseeable and optimal period of time. The Registry therefore sets itself the daily objective of contributing to the proper functioning of the Court and, in a more general way, to the quality of the justice administered. This contribution to the proper working of the Court is provided in compliance with the provisions governing procedure, and using the resources made available to the Court. It must be borne in mind, in that regard, that the Registry has no control over the number of cases brought, the number of cases completed or the number of procedural documents lodged in the cases that are pending; it must, accordingly, deal with all those procedural documents and this task of assisting the Court cannot be outsourced. Likewise, it is to be remembered that the Registry deals with procedural documents lodged in any of the 24 languages envisaged by the Rules of Procedure of the General Court and corresponds with the representatives of the parties in the language of the case.

Thirdly, the activities of the Registry are directed both externally, since it is with it that the parties communicate throughout the judicial procedure, except at the hearing, and internally, as it directly serves the members of the Court, whom it assists in all their official functions.

The year 2016, which saw implementation of the first [1] and second [2] stages of the reform of the judicial structure of the institution designed to double the number of judges of the General Court by 2019, sounded the beginning of a new period. The entry into office of additional judges, the transfer of jurisdiction at first instance over cases brought by officials and other members of staff against the institutions of the European Union and the departure and arrival of judges in the context of the partial renewal of the Court's membership are events that required the adoption of various types of measures, which necessarily were prepared beforehand and implemented subsequently. The Court's organisation and operation, which were rethought in depth, have been adapted in order to achieve the aim of the reform of the judicial structure of the Court of Justice of the European Union, which consists first and foremost in reducing the number of pending cases and the duration of proceedings before the General Court. Means were consequently provided to the Court

1 | The proposal of the Court of Justice submitted in March 2011 acquired concrete form with the adoption of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

2 | Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

and its Registry. The number of budgetary posts of the Registry was thus increased from 55 to 72 with effect from 1 January 2016.

The Registry played a significant role in implementation of the reform. Adapt and organise oneself, react, anticipate, observe, listen, propose, and so forth, there is certainly no lack of verbs to classify the actions that the Registry took in order to ensure its optimal operation and to continue working with care during the period when the reform was taking concrete form. The Court could count once again on the involvement of the Registry's skilled and motivated staff and it reaped full benefit from the new procedural arrangements (in the Rules of Procedure and Practice Rules for the Implementation of the Rules of Procedure), which are adapted to the nature of the cases brought before the Court and entered into force on 1 July 2015.

At the end of 2016, it can be stated with satisfaction that the Registry fulfilled the tasks which are entrusted to it by the relevant provisions and by the Court, in compliance with the requirements of a fair hearing, and did so despite a context characterised by several sets of major and profound changes.

The Registry provided judicial and administrative assistance to the Court:

- by ensuring the proper conduct of proceedings and the proper keeping of files;
- by ensuring communication between the representatives of the parties and the judges;
- by actively assisting the judges and their staff;
- by running the Court under the authority of its President and with the assistance of the departments of the Court of Justice of the European Union.

Implementation of the reform did, however, have a great number of effects.

I. ORGANISATIONAL EFFECTS CONNECTED WITH THE ENTRY INTO OFFICE OF NEW JUDGES

In the course of 2016, 22 new judges of the General Court were appointed and entered into office in a number of successive stages.

In the context of the first stage of the reform of the judicial structure of the institution, the aim of which is the appointment of 12 additional judges of the Court, 7 judges appointed on 23 March 2016 took the oath before the Court of Justice on 13 April 2016, 3 judges appointed on 24 May 2016 took the oath on 8 June 2016 and 1 judge appointed on 7 September 2016 took the oath on 19 September 2016.

Under the second stage of the reform, the aim of which is the appointment of seven additional judges of the Court, five judges were appointed on 7 September 2016 and took the oath on 19 September 2016. [3]

3| As at 31 December 2016, one of the twelve additional judges whose appointment was envisaged under the first stage of the reform and two of the seven additional judges whose appointment was envisaged under the second stage of the reform still had to be appointed.

Five new judges appointed to succeed judges of the Court whose term of office had not been renewed and one new judge appointed to replace a judge of the Court who had resigned also took the oath before the Court of Justice on 19 September 2016.

On 20 September 2016 the Court elected its President and its Vice-President and then, on 21 September, the judges elected the nine new presidents of the chambers, which are composed of five judges.

After the entry of each of the judges into office, the Court allocated them to chambers, new caseloads were created and cases were reassigned between judges. In accordance with the Rules of Procedure, the Registry informed the parties in the cases concerned and published all the decisions adopted by the Court in the ***Official*** *Journal of the European Union*. [4] The Registry updated all the internal databases when each of those reassignment operations took place.

The taking up of duties by the judges and the staff in their *cabinets*, and their move into accommodation fitted out for that purpose, are operations which required unflagging administrative assistance on the part of the Registry, taking the form of a significant amount of preparatory work with the institution's shared departments, of an appropriate welcome and support, and of strict monitoring of assignments of staff.

The departure of six judges from office also provided the opportunity to pay tribute to their contribution to the task of administering justice at a formal event which the Court organised for the first time to mark the departure of judges, held on 19 September 2016.

As at 31 December 2016, one half of the Court's 44 judges had entered into office in the course of the year. Such a situation is unprecedented in the history of our institution and proved, in terms of administrative effects on the Court Registry, to be of a different scale from the arrival of the 10 judges from the Member States that acceded to the European Union in 2004.

II. PROCEDURAL EFFECTS OF THE REFORM

Transfer of staff cases at first instance

Regulation 2015/2422 envisaged that the increase of seven in the number of judges of the Court on 1 September 2016 should be accompanied by the transfer to the Court of jurisdiction at first instance over staff cases.

That transfer of jurisdiction at first instance over disputes between the European Union and its staff acquired concrete form in Regulation 2016/1192, according to which the General Court is to exercise at first instance jurisdiction in disputes between the European Union and its servants as referred to in Article 270 TFEU, including disputes between all institutions, bodies, offices or agencies, on the one hand, and their staff, on the other, in respect of which jurisdiction is conferred on the Court of Justice of the European Union.

Regulation 2016/1192 was adopted on 6 July 2016. Its adoption was a prerequisite for approval by the Council of the European Union of the amendments to the Rules of Procedure intended to provide the Court with an appropriate permanent procedural framework for dealing with staff cases from 1 September 2016.

4| In particular, the decisions of the General Court on the Method of designation of the Judge replacing a Judge prevented from acting (OJ 2016 C 296, p. 2), on the Composition of the Grand Chamber (OJ 2016 C 296, p. 2), on the Criteria for the assignment of cases to Chambers (OJ 2016 C 296, p. 2) and on the Formation of Chambers and assignment of Judges to Chambers (OJ 2016 C 392, p. 2).

The Court was therefore anticipating events when, following an opinion from the Court of Justice, it submitted amendments to its Rules of Procedure to the Council back in March 2016.

Approved by the Council on 6 July 2016, and adopted by the Court on 13 July 2016, the amendments to the Rules of Procedure were published in the *Official Journal of the European Union* on 12 August 2016 [5] and entered into force on 1 September 2016.

The Court also took account of the specific features of staff cases and of the effects of the changes to the Rules of Procedure when it decided to amend the Practice Rules for the Implementation of the Rules of Procedure on 13 July 2016. [6]

The adoption of Regulation 2016/1192 had the direct consequence that the European Union Civil Service Tribunal was dissolved on 31 August 2016 and that the staff cases pending before it on that date were transferred to the Court. The Tribunal Registry and the Court Registry worked together in the best possible way to prepare that transfer and make sure that it took place under excellent conditions.

The physical and digital transfer of the files took place flawlessly, computer systems were updated to take account of the specific features of the provisions governing staff cases, databases were updated immediately and the Court Registry promptly began to handle the new files. The dissemination of information by the Tribunal Registry prior to the transfer, followed by the communication in the letters which the Court Registry sent to the representatives of the parties in the 139 cases transferred and by publication in the ***Official*** *Journal of the European Union* [7] of a correlation table between the numbers of the cases before the Tribunal (F-...) and those allocated by the General Court after the transfer (T-...), definitely enabled the parties and the public concerned to have appropriate information.

Other amendments to the Rules of Procedure

Whilst a great amount of energy was expended during 2016 on implementation of the structural reform, alterations to the instruments governing procedure were nevertheless proposed when circumstances warranted or required this.

First, obliged to comply with a regulatory requirement resulting from the entry into force of Regulation (EU) 2015/2424, [8] the Court had to amend its Rules of Procedure to take account of the change in the name of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), which had become the European Union Intellectual Property Office (EUIPO) on 23 March 2016. The amendment to the Rules of Procedure, approved by the Council on 6 July 2016, was adopted by the Court on 13 July 2016. [9]

Although a terminological change of this kind is minor, the alterations that resulted for the Court and the institution cannot be ignored. All the institution's information systems had to be altered to take account of the change, by means of the use of resources of the Registry and of a number of other departments.

5| OJ 2016 L 217, p. 73.

6| OJ 2016 L 217, p. 78.

7| OJ 2016 C 364, p. 2.

8| Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to OHIM (OJ 2015 L 341, p. 21).

9| OJ 2016 L 217, p. 71.

Secondly, Article 105 of the Rules of Procedure, concerning the treatment of information or material pertaining to the security of the European Union or that of one or more of its Member States or to the conduct of their international relations, was amended. Although the provisions defining the applicability of Article 105 — the only article of the Rules of Procedure which was not applicable from 1 July 2015 — had not yet been finalised, Article 105(10) was amended on 13 July 2016 [10] and at the same time an article was added to the Rules of Procedure of the Court of Justice. The purpose was to lay down a procedural framework ensuring that information or material pertaining to the security of the European Union or that of one or more of its Member States or to the conduct of their international relations is not returned to the party that produced it until the judicial proceedings have ended, that is to say, only after the expiry of the period for bringing an appeal against the General Court's decision or, in the event of an appeal, at the conclusion of the proceedings before the Court of Justice.

That procedural arrangement would have been incomplete if it had not been accompanied by a suitable security framework designed to ensure that information or material pertaining to the security of the European Union or of its Member States or to the conduct of their international relations is protected at the various stages of examination of the case before the General Court. Article 105(11) of the Rules of Procedure thus contains a provision empowering the Court to adopt rules enabling a global security system for the protection of such information and material to be established. The Court adopted such rules in Decision (EU) 2016/2387, [11] which was drawn up in close consultation with the Court of Justice and the department responsible within the institution for security. Publication of that decision in the *Official Journal of the European Union* on 24 December 2016, the day on which the Court of Justice published Decision (EU) 2016/2386, [12] had the effect of rendering Article 105 of the Rules of Procedure applicable from 25 December 2016.

As the department administering cases in which sensitive documents will be lodged, the Court Registry was very much involved in the drawing up of the framework intended to ensure that the handling of such documents meets the standard that is applicable to documents classified as 'EU secret', a framework which includes the establishment of procedures for granting authorisation to officials and other staff of the institution.

III. TASK OF ASSISTING THE COURT

Notwithstanding the major changes described above, the Registry performed its task of assisting the Court by handling 835 applications initiating proceedings, the 139 staff cases transferred from the Civil Service Tribunal on 1 September 2016 and 3 879 other pleadings submitted in pending cases, by entering 49 773 procedural documents in the register, by implementing decisions taken by formations of the Court, in the form of measures of organisation of procedure or measures of inquiry, and by drawing up 1 412 judicial notices in the *Official Journal of the European Union*.

The Registry also accompanied the judges and the members of their *cabinets* in their daily work at 321 chamber conferences and in connection with 244 pleaded cases.

10| OJ 2016 L 217, p. 72.

11| Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Article 105(1) or (2) of the Rules of Procedure (OJ 2016 L 355, p. 18).

12| Decision (EU) 2016/2386 of the Court of Justice of 20 September 2016 concerning the security rules applicable to information or material produced before the General Court in accordance with Article 105 of its Rules of Procedure (OJ 2016 L 355, p. 5).

The logistical support provided by the Registry in various forms (coordination assistance, documentation, management of information systems, production of statistics) is intended to enable the Court to work under the best possible conditions, in particular by contributing to the quality of the decisions taken by the President and the nine chambers of the Court and by providing assistance to the Vice-President in the performance of the task of supporting consistency of the case-law, with which he was entrusted by the Court in September 2016.

In performing its task of assisting the Court, the Registry has been able to benefit from the digitisation of almost all the stages in the judicial process, including digitisation of internal communication with the judges' *cabinets* and of external communication with the representatives of the parties.

This digitisation of procedures has most certainly enabled the Registry, in everybody's interests, to be relieved of repetitive tasks, giving it the means to personalise to a greater extent the responses expected from it and to concentrate its resources on the matters that actually so warrant.

In respect of internal communication between the Registry and the *cabinets* of the Court's judges, the success of digital transmission sheets [13] must be pointed out at the end of the second full year of their use. Internal procedures have been simplified, working methods rationalised, resources saved and time gained as a result of the immediacy of communication between the Registry and the judges' *cabinets*, contributing to optimisation of the time taken by the Court. Digitisation means, furthermore, that communications are fully traceable and that activity can be quantified. In 2016, the Registry sent 10 822 sheets to *cabinets* in connection with cases in progress.

External communication with the representatives of the parties is now for the most part carried out by means of e-Curia, [14] an application common to the institution's Courts. The success of this application is undeniable and can be seen from its rapid advance. The percentage of procedural documents lodged by means of this application has grown ceaselessly since its launch in November 2011, as has the number of lawyers and agents who have an account giving access to it. [15] In 2016, 76% of the procedural documents lodged with the General Court were lodged by this electronic means (as against 72% in 2015), corresponding to 396 072 pages (466 875 pages in 2015), and all the Member States and 3 014 lawyers and agents now have an e-Curia account. The necessary action will continue to be taken in order to attain the objective of 100% of procedural documents being lodged with the Court by e-Curia and thereby to be able to reap the full practical benefits of this application, in particular by avoiding the administration of paper and electronic formats in parallel.

The past year was the first full year of application of the Rules of Procedure which entered into force on 1 July 2015. Whilst it is not yet possible to highlight all the gains resulting from these new arrangements, it is nevertheless satisfying to state that the objectives pursued of simplification and rationalisation may already be objectively regarded as attained, given the significant decrease in the number of orders prepared by

13| Communication between the Registry and the *cabinets* of the Court's judges takes place in the form of transmission sheets intended to provide information or obtain a decision from the competent organ on a procedural question. These sheets have been in paperless form since November 2014.

14| Decision of the General Court of 14 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ 2011 C 289, p. 9).

15| Since 1 July 2015 it has no longer been possible to lodge procedural documents by email.

the Registry (241 as against 521 in 2015), [16] the completion of the first direct actions by judgment without a hearing, [17] the steep fall in the number of observations on the language of the case that were submitted in intellectual property cases (33 as against 279 in 2015) and the absence of a second exchange of pleadings for that category of cases. The percentage of applications needing to be put in order because they did not comply with the formal requirements also decreased (passing below the level of 39%), even though the rate still remains too high, in particular in respect of applications in intellectual property cases.

The necessary measures have thus been taken to enable the Court Registry to take on its responsibilities and the results of the efforts made in 2016 are tangible.

The first steps have also been taken in order that the Court may, first, meet the challenges of 2017, during which three additional judges should add to the Court's capacity to give judgment, and secondly, prepare for 2019 when, in the final stage of the reform of the institution's judicial structure, nine additional judges will enter into office.

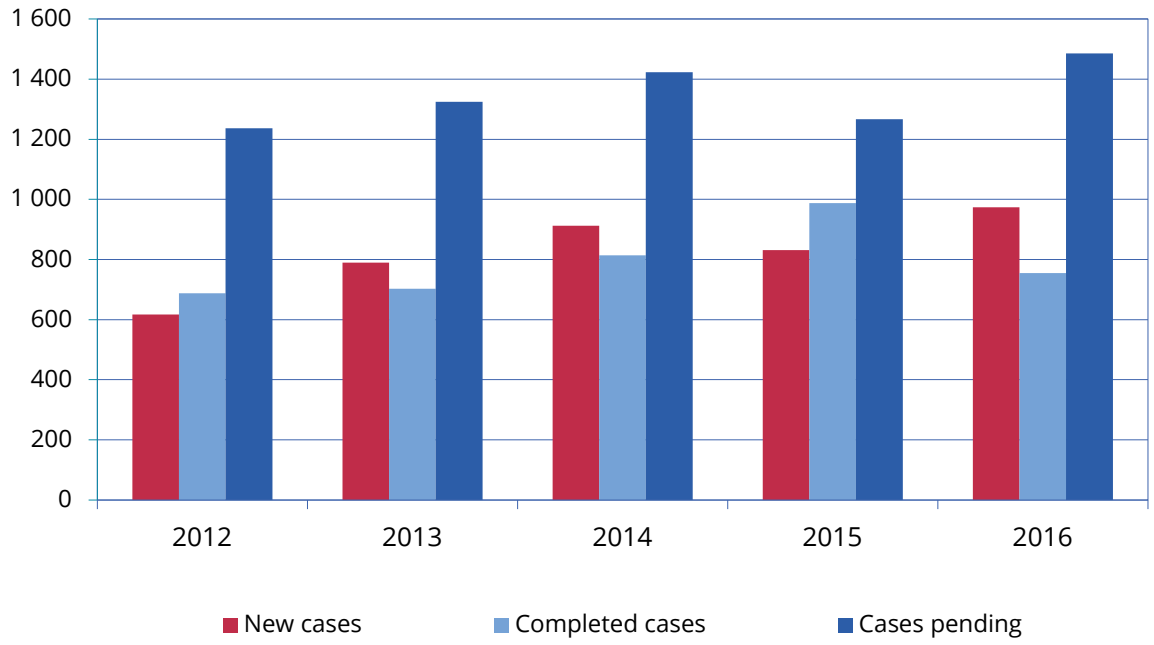
16| Since 1 July 2015 certain decisions which previously were taken in the form of an order (stay and resumption, joinder of cases, intervention by a Member State or institution where confidentiality is not raised) have been taken in the form of a simple decision which is placed on the case-file.

17| Before 1 July 2015 the possibility of adjudicating by judgment without a hearing was provided for only in respect of intellectual property cases and appeals against decisions of the Civil Service Tribunal.

D| STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE GENERAL COURT

I. GENERAL ACTIVITY OF THE GENERAL COURT

1. NEW CASES, COMPLETED CASES, CASES PENDING (2012–16)[1] [2]



	2012	2013	2014	2015	2016
New cases	617	790	912	831	974
Completed cases	688	702	814	987	755
Cases pending	1 237	1 325	1 423	1 267	1 486

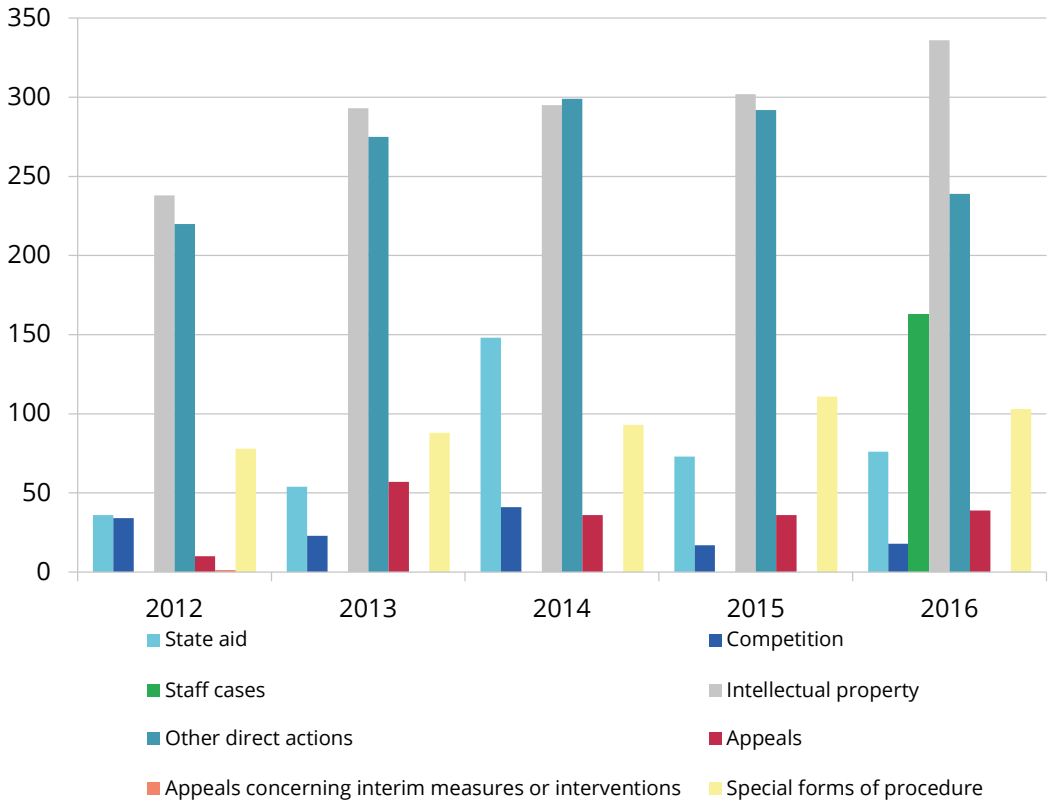
1| Unless otherwise indicated, this table and the following tables take account of special forms of procedure.

The following are considered to be 'special forms of procedure': application to set aside a judgment by default (Article 41 of the Statute of the Court of Justice; Article 166 of the Rules of Procedure of the General Court); third-party proceedings (Article 42 of the Statute of the Court of Justice; Article 167 of the Rules of Procedure); interpretation (Article 43 of the Statute of the Court of Justice; Article 168 of the Rules of Procedure); revision (Article 44 of the Statute of the Court of Justice; Article 169 of the Rules of Procedure); legal aid (Article 148 of the Rules of Procedure); rectification (Article 164 of the Rules of Procedure); and dispute concerning the costs to be recovered (Article 170 of the Rules of Procedure).

2| Unless otherwise indicated, this table and the following tables do not take account of proceedings concerning interim measures.

II. NEW CASES

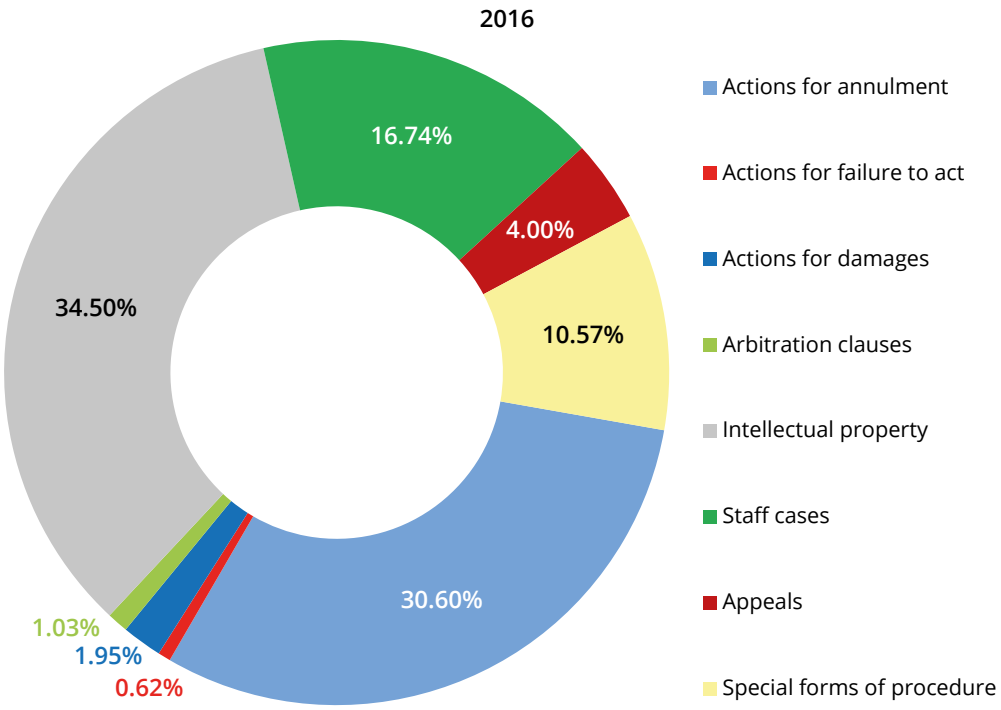
2. NATURE OF PROCEEDINGS (2012–16)



	2012	2013	2014	2015	2016
State aid	36	54	148	73	76
Competition	34	23	41	17	18
Staff cases					163
Intellectual property	238	293	295	302	336
Other direct actions	220	275	299	292	239
Appeals	10	57	36	36	39
Appeals concerning interim measures or interventions	1				
Special forms of procedure	78	88	93	111	103
Total	**617**	**790**	**912**	**831**	**974**

1 | On 1 September 2016, 123 staff cases and 16 special forms of procedure in that area were transferred to the General Court.

3. TYPE OF ACTION (2012–16)



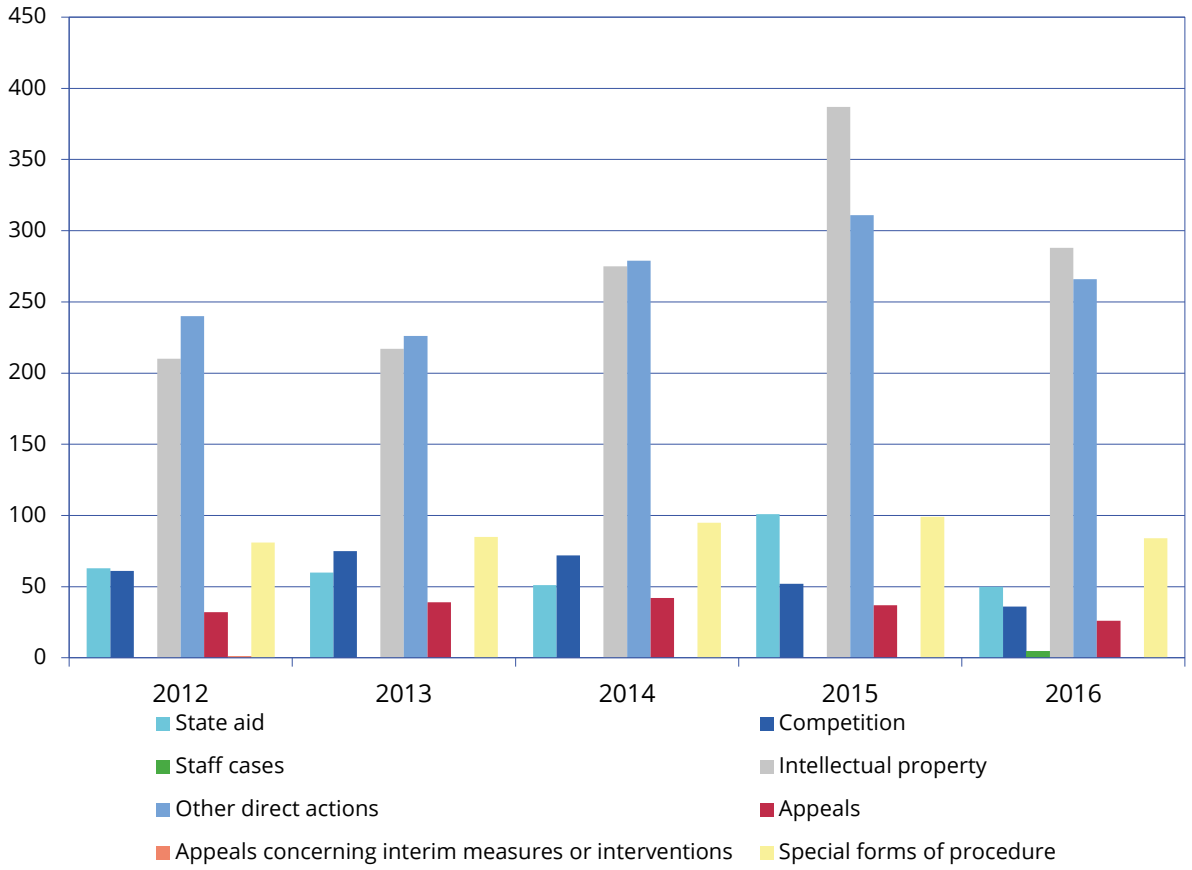
	2012	2013	2014	2015	2016
Actions for annulment	257	319	423	332	298
Actions for failure to act	8	12	12	5	6
Actions for damages	17	15	39	30	19
Arbitration clauses	8	6	14	15	10
Intellectual property	238	293	295	302	336
Staff cases					163
Appeals	10	57	36	36	39
Appeals concerning interim measures or interventions	1				
Special forms of procedure	78	88	93	111	103
Total	**617**	**790**	**912**	**831**	**974**

4. SUBJECT MATTER OF THE ACTION (2012–16)

	2012	2013	2014	2015	2016
Access to documents	18	20	17	48	19
Accession of new States		1			
Agriculture	11	27	15	37	20
Approximation of laws		13		1	1
Arbitration clause	8	6	14	15	10
Area of freedom, security and justice		6	1		7
Association of the Overseas Countries and Territories		1			
Citizenship of the Union			1		
Commercial policy	20	23	31	6	17
Common fisheries policy		3	3		1
Common foreign and security policy		2			1
Company law			1	1	
Competition	34	23	41	17	18
Consumer protection		1	1	2	1
Culture		1			1
Customs union and Common Customs Tariff	6	1	8		3
Economic and monetary policy	3	15	4	3	23
Economic, social and territorial cohesion	4	3	3	5	2
Education, vocational training, youth and sport	1	2		3	1
Employment		2			
Energy		1	3	3	4
Environment	3	11	10	5	6
External action by the European Union	1		2	1	2
Financial provisions (budget, financial framework, own resources, combating fraud)	1		4	7	4
Free movement of capital				2	1
Free movement of goods		1		2	1
Freedom of establishment			1		
Freedom of movement for persons				1	1
Freedom to provide services	1		1		1
Industrial policy			2		
Intellectual and industrial property	238	294	295	303	336
Law governing the institutions	41	44	67	53	52
Public health	12	5	11	2	6
Public procurement	23	15	16	23	9
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)	2	12	3	5	6
Research and technological development and space	3	5	2	10	8
Restrictive measures (external action)	59	41	69	55	28
Social policy	1		1		1
Social security for migrant workers		1			
State aid	36	54	148	73	76
Taxation	1	1	1	1	2
Tourism		2			
Trans-European networks		3			
Transport		5	1		
Total EC Treaty/TFEU	**527**	**645**	**777**	**684**	**669**
Staff Regulations	12	57	42	36	202
Special forms of procedure	78	88	93	111	103
OVERALL TOTAL	**617**	**790**	**912**	**831**	**974**

III. COMPLETED CASES

5. NATURE OF PROCEEDINGS (2012–16)



	2012	2013	2014	2015	2016
State aid	63	60	51	101	50
Competition	61	75	72	52	36
Staff cases					5
Intellectual property	210	217	275	387	288
Other direct actions	240	226	279	311	266
Appeals	32	39	42	37	26
Appeals concerning interim measures or interventions	1				
Special forms of procedure	81	85	95	99	84
Total	**688**	**702**	**814**	**987**	**755**

6. SUBJECT MATTER OF THE ACTION (2016)

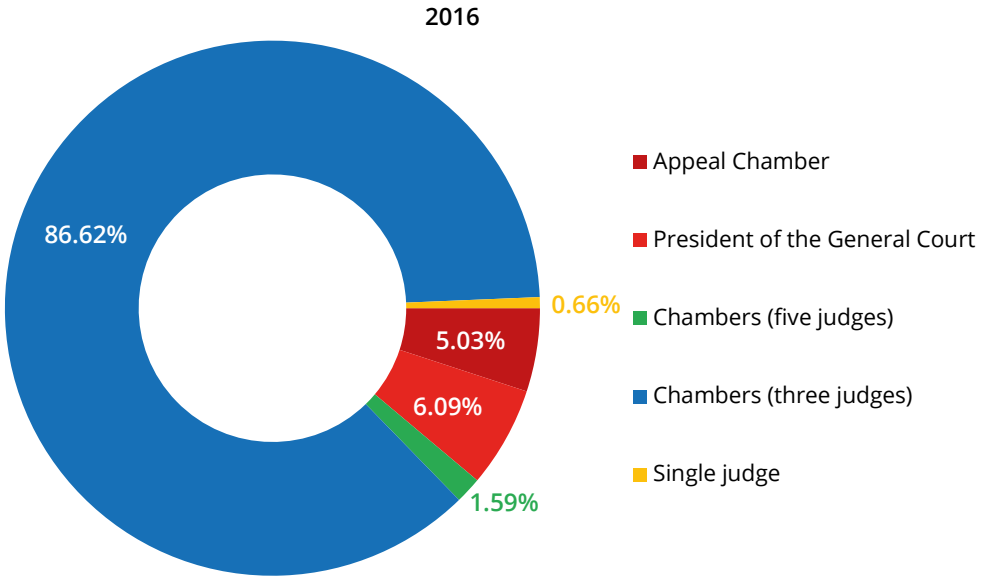
	Judgments	Orders	Total
Access to documents	9	4	13
Agriculture	14	20	34
Approximation of laws		1	1
Arbitration clause	11	6	17
Commercial policy	19	2	21
Common fisheries policy	1	1	2
Competition	35	1	36
Consumer protection	1		1
Culture	1		1
Customs union and Common Customs Tariff	2	1	3
Economic and monetary policy		2	2
Economic, social and territorial cohesion		1	1
Education, vocational training, youth and sport		1	1
Energy		3	3
Environment	2	2	4
Financial provisions (budget, financial framework, own resources, combating fraud)		1	1
Free movement of capital		1	1
Free movement of goods		1	1
Freedom to provide services		1	1
Intellectual and industrial property	224	64	288
Law governing the institutions	17	29	46
Public health	1	2	3
Public procurement	10	10	20
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)	4	4	8
Research and technological development and space	3	3	6
Restrictive measures (external action)	39	31	70
Social policy		1	1
State aid	27	23	50
Trans-European networks	1	1	2
Total EC Treaty/TFEU	**421**	**217**	**638**
Special forms of procedure		84	84
Staff Regulations	27	6	33
OVERALL TOTAL	**448**	**307**	**755**

7. SUBJECT MATTER OF THE ACTION (2012–16)

(JUDGMENTS AND ORDERS)

	2012	2013	2014	2015	2016
Access to documents	21	19	23	21	13
Accession of new States				1	
Agriculture	32	16	15	32	34
Approximation of laws			13		1
Arbitration clause	11	8	10	2	17
Area of freedom, security and justice	2	7	1		
Association of the Overseas Countries and Territories			1		
Citizenship of the Union			1		
Commercial policy	14	19	18	24	21
Common fisheries policy	9	2	15	3	2
Common foreign and security policy			2	1	
Company law				1	
Competition	61	75	72	52	36
Consumer protection				2	1
Culture					1
Customs union and Common Customs Tariff	6	9	6	4	3
Economic and monetary policy	2	1	13	9	2
Economic, social and territorial cohesion	12	14	1	6	1
Education, vocational training, youth and sport	1	1	2		1
Employment		2			
Energy		1	3	1	3
Environment	8	6	10	18	4
External action by the European Union		2		2	
Financial provisions (budget, financial framework, own resources, combating fraud)	2			5	1
Free movement of capital				2	1
Free movement of goods		1		2	1
Freedom of establishment				1	
Freedom of movement for persons	1			1	
Freedom to provide services	2		1		1
Industrial policy				2	
Intellectual and industrial property	210	218	275	388	288
Law governing the institutions	41	35	33	58	46
Public health	2	4	10	15	3
Public procurement	24	21	18	22	20
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)	1	6	3	9	8
Research and technological development and space	3	4	1	2	6
Restrictive measures (external action)	42	40	68	60	70
Social policy	1	4			1
Social security for migrant workers		1			
State aid	63	59	51	101	50
Taxation	2		2	1	
Tourism		1	1		
Trans-European networks			1		2
Transport	1		3	3	
Total EC Treaty/TFEU	**574**	**576**	**673**	**851**	**638**
Total CS Treaty		**1**			
Special forms of procedure	81	85	95	99	84
Staff Regulations	33	40	46	37	33
OVERALL TOTAL	**688**	**702**	**814**	**987**	**755**

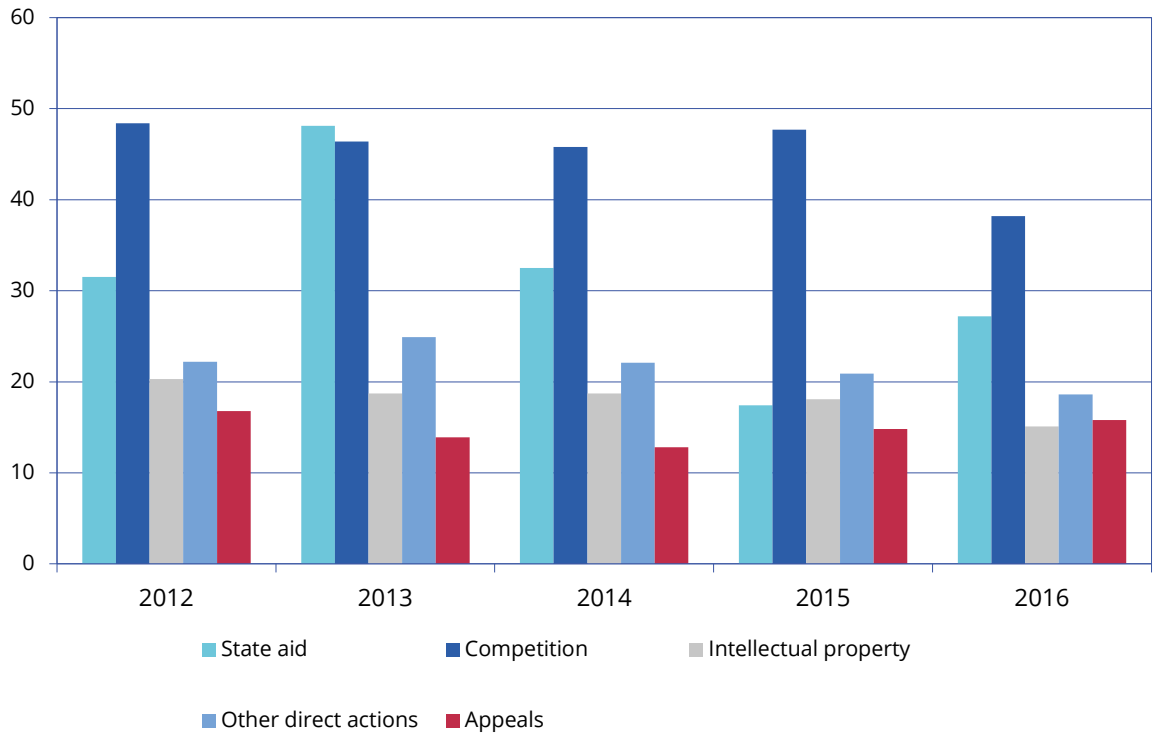
8. BENCH HEARING ACTION (2012–16)



	2012			2013			2014			2015			2016		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Appeal Chamber	17	23	40	13	47	60	21	32	53	23	14	37	25	13	38
President of the General Court		47	47		38	38		46	46		44	44		46	46
Chambers (five judges)	9		9	7	1	8	9	7	16	8	3	11	10	2	12
Chambers (three judges)	328	264	592	378	218	596	398	301	699	538	348	886	408	246	654
Single judge										1	8	9	5		5
Total	**354**	**334**	**688**	**398**	**304**	**702**	**428**	**386**	**814**	**570**	**417**	**987**	**448**	**307**	**755**

9. DURATION OF PROCEEDINGS IN MONTHS (2012–16) [1]

(JUDGMENTS AND ORDERS)



	2012	2013	2014	2015	2016
State aid	31.5	48.1	32.5	17.4	27.2
Competition	48.4	46.4	45.8	47.7	38.2
Intellectual property	20.3	18.7	18.7	18.1	15.1
Other direct actions	22.2	24.9	22.1	20.9	18.6
Appeals	16.8	13.9	12.8	14.8	15.8
All cases	**24.8**	**26.9**	**23.4**	**20.6**	**18.7**

1 | The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions. The duration of proceedings is expressed in months and tenths of months.

IV. CASES PENDING AS AT 31 DECEMBER

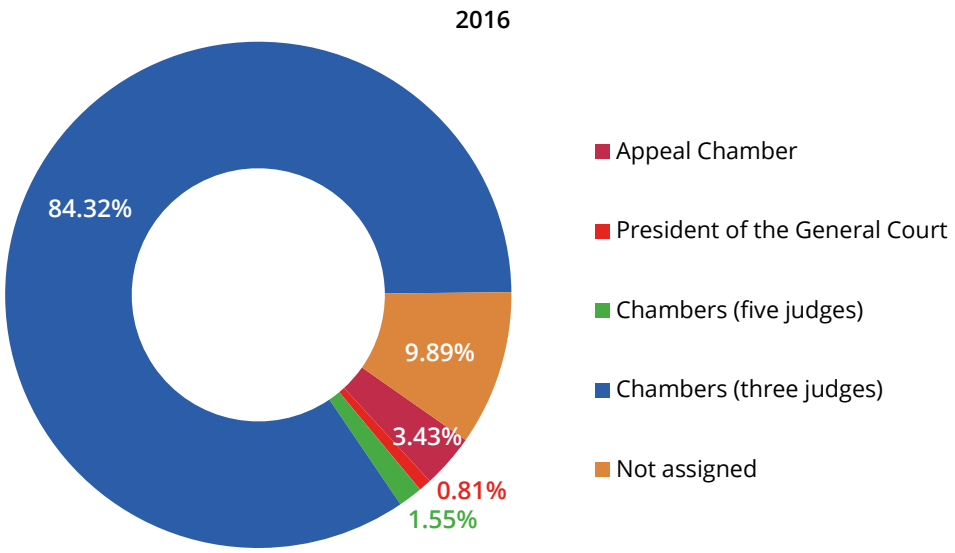
10. NATURE OF PROCEEDINGS (2012–16)

	2012	2013	2014	2015	2016
State aid	152	146	243	215	241
Competition	200	148	117	82	64
Staff cases					158
Intellectual property	389	465	485	400	448
Other direct actions	438	487	507	488	461
Appeals	25	43	37	36	49
Special forms of procedure	33	36	34	46	65
Total	**1 237**	**1 325**	**1 423**	**1 267**	**1 486**

11. SUBJECT MATTER OF THE ACTION (2012–16)

	2012	2013	2014	2015	2016
Access to documents	37	38	32	59	65
Accession of new States		1	1		
Agriculture	40	51	51	56	42
Approximation of laws		13		1	1
Arbitration clause	15	13	17	30	23
Area of freedom, security and justice	1				7
Association of the Overseas Countries and Territories		1			
Commercial policy	41	45	58	40	36
Common fisheries policy	16	17	5	2	1
Common foreign and security policy	1	3	1		1
Company law			1	1	1
Competition	200	148	117	82	64
Consumer protection		1	2	2	2
Culture		1	1	1	1
Customs union and Common Customs Tariff	15	7	9	5	5
Economic and monetary policy	4	18	9	3	24
Economic, social and territorial cohesion	24	13	15	14	15
Education, vocational training, youth and sport	1	2		3	3
Energy	1	1	1	3	4
Environment	13	18	18	5	7
External action by the European Union	3	1	3	2	4
Financial provisions (budget, financial framework, own resources, combating fraud)	1	1	5	7	10
Freedom of establishment			1		
Freedom of movement for persons					1
Industrial policy			2		
Intellectual and industrial property	389	465	485	400	448
Law governing the institutions	41	50	84	79	85
Public health	15	16	17	4	7
Public procurement	42	36	34	35	24
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)	8	14	14	10	8
Research and technological development and space	7	8	9	17	19
Restrictive measures (external action)	106	107	108	103	61
Social policy	4		1	1	1
State aid	151	146	243	215	241
Taxation		1			2
Tourism		1			
Trans-European networks		3	2	2	
Transport		5	3		
Total EC Treaty/TFEU	**1 176**	**1 245**	**1 349**	**1 182**	**1 213**
Total CS Treaty	**1**				
Special forms of procedure	27	44	40	39	208
Staff Regulations	33	36	34	46	65
OVERALL TOTAL	**1 237**	**1 325**	**1 423**	**1 267**	**1 486**

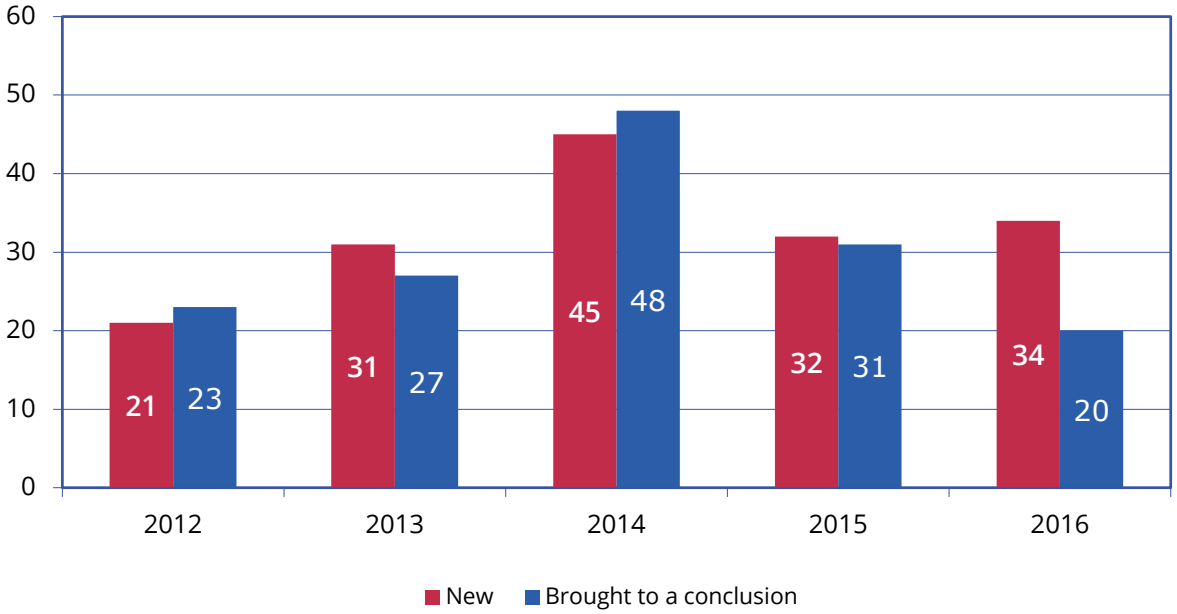
12. BENCH HEARING ACTION (2012–16)



	2012	2013	2014	2015	2016
Appeal Chamber	40	51	37	48	51
President of the General Court	1	1	1	12	12
Chambers (five judges)	10	12	15	6	23
Chambers (three judges)	1123	1146	1272	1099	1253
Single judge				1	
Not assigned	63	115	98	101	147
Total	**1 237**	**1 325**	**1 423**	**1 267**	**1 486**

V. MISCELLANEOUS

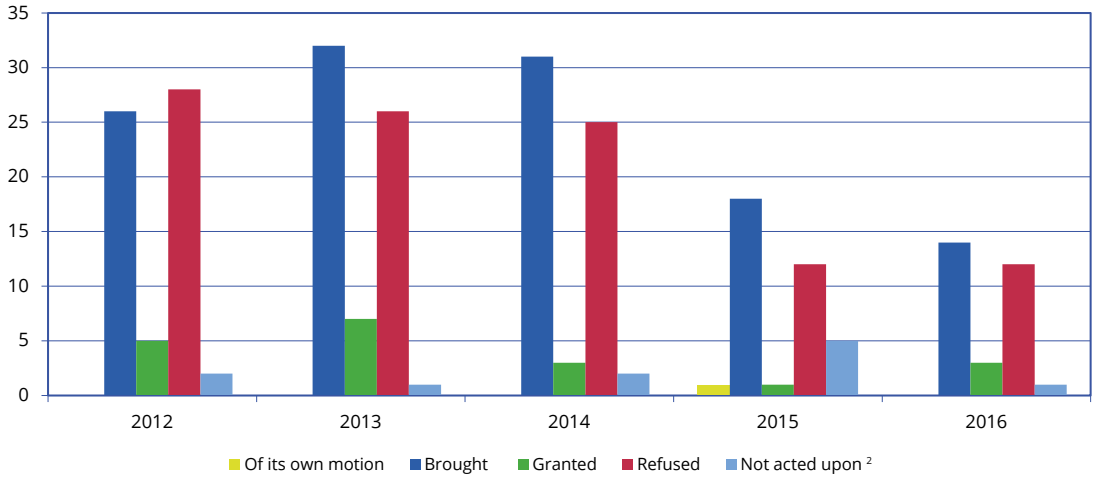
13. PROCEEDINGS FOR INTERIM MEASURES (2012–16)



2016

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Granted	Removal from the register/ no need to adjudicate	Dismissed
Access to documents	1	2	2		
Agriculture	1	3			3
State aid	3	1			1
Arbitration clause	3	1			1
Competition	1				
Financial provisions (budget, financial framework, own resources, combating fraud)	1	1			1
Law governing the institutions	7	4		1	3
Energy	2				
Registration, evaluation, authorisation and restriction of chemicals (REACH regulation)	2				
Environment	1	2			2
Free movement of goods	1	1		1	
Public procurement	4	2		1	1
Economic and monetary policy	1				
Research and technological development and space	3	2			2
Public health	1				
Staff Regulations	2	1			1
Total	**34**	**20**	**2**	**3**	**15**

14. EXPEDITED PROCEDURES (2012–16) [1]

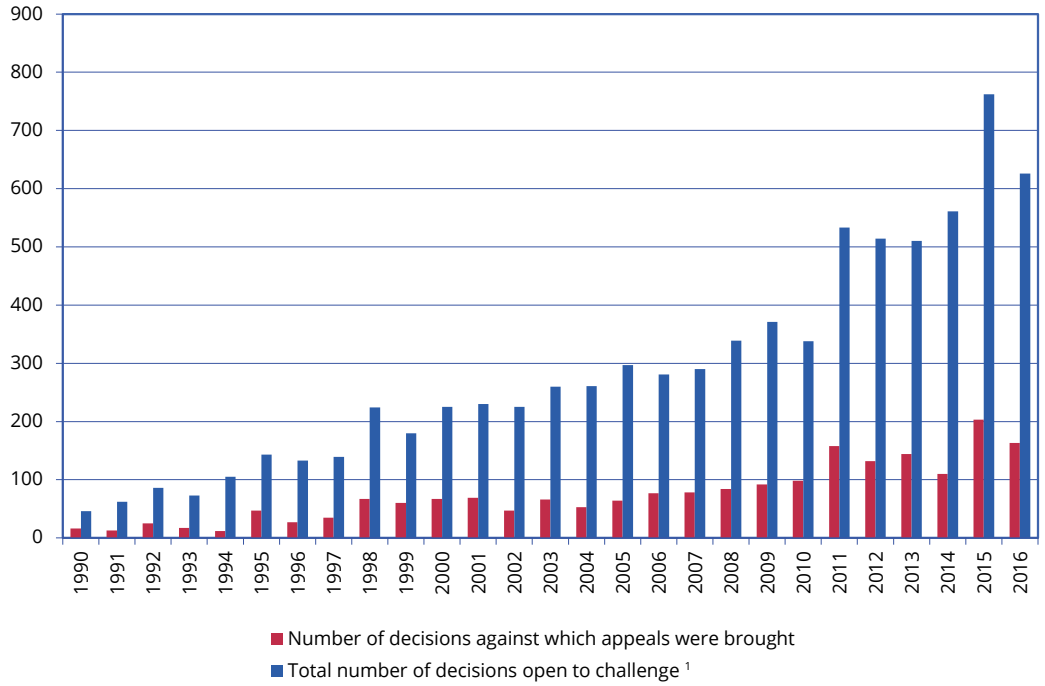


	2012					2013					2014					2015					2016				
	Of its own motion	Brought	Outcome			Of its own motion	Brought	Outcome			Of its own motion	Brought	Outcome			Of its own motion	Brought	Outcome			Of its own motion	Brought	Outcome		
			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]
Access to documents		1		2			1		1			2		2			2		2			2		2	
External action by the European Union																	1		1						
Agriculture							1		1								1		1						
State aid		2			2							13	2	10			3		2					2	
Economic, social and territorial cohesion		1		1																					
Competition		2		2			2		2			1		1								1		1	
Law governing the institutions		1		1								1			1		2			2		2		2	
Energy							1		1																
Environment							5	5				1						1							
Area of freedom, security and justice																						3	3		
Free movement of capital																	2			2					
Free movement of goods																						1			1
Public procurement							2		1			1		2		1	1			1		1		1	
Restrictive measures (external action)		10	4	16			4		4			9		9			4		4			1		1	
Commercial policy		3		2			15	2	14	1												1		1	
Economic and monetary policy																	1		1						
Public health		5	1	3			1		2			3	1	1	1							1		1	
Staff Regulations																	1		1			1		1	
Customs union and Common Customs Tariff		1		1																					
Total		**26**	**5**	**28**	**2**		**32**	**7**	**26**	**1**		**31**	**3**	**25**	**2**	**1**	**18**	**1**	**12**	**5**		**14**	**3**	**12**	**1**

1| The General Court may decide to deal with a case before it under an expedited procedure at the request of a main party or, since 1 July 2015, of its own motion.

2| The category 'Not acted upon' covers the following instances: withdrawal of the application for expedition, discontinuance of the action and cases in which the action is disposed of by way of order before the application for expedition has been ruled upon.

15. APPEALS AGAINST DECISIONS OF THE GENERAL COURT TO THE COURT OF JUSTICE (1990–2016)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge [1]	Percentage of decisions against which appeals were brought
1990	16	46	35%
1991	13	62	21%
1992	25	86	29%
1993	17	73	23%
1994	12	105	11%
1995	47	143	33%
1996	27	133	20%
1997	35	139	25%
1998	67	224	30%
1999	60	180	33%
2000	67	225	30%
2001	69	230	30%
2002	47	225	21%
2003	66	260	25%
2004	53	261	20%
2005	64	297	22%
2006	77	281	27%
2007	78	290	27%
2008	84	339	25%
2009	92	371	25%
2010	98	338	29%
2011	158	533	30%
2012	132	514	26%
2013	144	510	28%
2014	110	561	20%
2015	203	762	27%
2016	163	626	26%

1 | Total number of decisions open to challenge — judgments, orders concerning interim measures or refusing leave to intervene and all orders terminating proceedings other than those removing a case from the register or transferring a case — in respect of which the period for bringing an appeal expired or against which an appeal was brought.

16. DISTRIBUTION OF APPEALS BEFORE THE COURT OF JUSTICE ACCORDING TO THE NATURE OF THE PROCEEDINGS (2012–16)

	2012			2013			2014			2015			2016		
	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**
State aid	18	52	**35%**	16	52	**31%**	15	77	**19%**	22	75	**29%**	23	56	**41%**
Competition	24	60	**40%**	28	73	**38%**	15	44	**34%**	32	61	**52%**	17	41	**41%**
Intellectual property	41	190	**22%**	38	183	**21%**	33	209	**16%**	64	334	**19%**	48	276	**17%**
Other direct actions	47	208	**23%**	62	202	**31%**	47	231	**20%**	85	290	**29%**	75	253	**30%**
Appeals		2									2				
Special forms of procedure	2	2	**100%**												
Total	**132**	**514**	**26%**	**144**	**510**	**28%**	**110**	**561**	**20%**	**203**	**762**	**27%**	**163**	**626**	**26%**

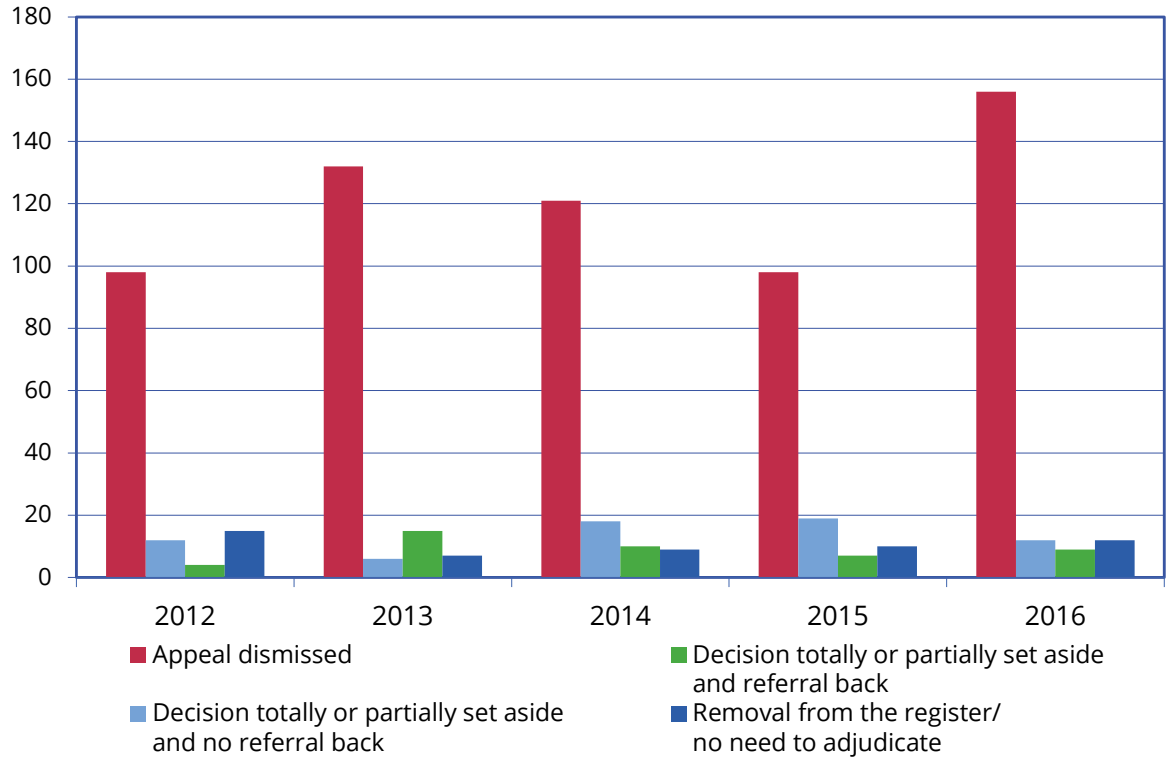
17. RESULTS OF APPEALS BEFORE THE COURT OF JUSTICE (2016)

(JUDGMENTS AND ORDERS)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/ no need to adjudicate	Total
Access to documents	3		1	1	**5**
Agriculture	4			1	**5**
Commercial policy	7				**7**
Common fisheries policy	1				**1**
Common foreign and security policy	9		1	1	**11**
Competition	18	4	1		**23**
Customs union and Common Customs Tariff	2				**2**
Economic and monetary policy	6	3			**9**
Economic, social and territorial cohesion	2			1	**3**
Environment	8				**8**
External action by the European Union		1			**1**
Intellectual and industrial property	58	2	2	6	**68**
Law governing the institutions	9			2	**11**
Procedure	3				**3**
Public health	3				**3**
Public procurement	3				**3**
Research and technological development and space	2		1		**3**
State aid	16	2	3		**21**
Trans-European networks	1				**1**
Transport	1				**1**
Total	**156**	**12**	**9**	**12**	**189**

18. RESULTS OF APPEALS BEFORE THE COURT OF JUSTICE (2012–16)

(JUDGMENTS AND ORDERS)



	2012	2013	2014	2015	2016
Appeal dismissed	98	132	121	98	156
Decision totally or partially set aside and no referral back	12	6	18	19	12
Decision totally or partially set aside and referral back	4	15	10	7	9
Removal from the register/ no need to adjudicate	15	7	9	10	12
Total	**129**	**160**	**158**	**134**	**189**

19. GENERAL TREND (1989–2016)

NEW CASES, COMPLETED CASES, CASES PENDING

	New cases [1]	Completed cases [2]	Cases pending on 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
2006	432	436	1 029
2007	522	397	1 154
2008	629	605	1 178
2009	568	555	1 191
2010	636	527	1 300
2011	722	714	1 308
2012	617	688	1 237
2013	790	702	1 325
2014	912	814	1 423
2015	831	987	1 267
2016	974	755	1 486
Total	**13 457**	**11 971**	

1| 1989: the Court of Justice referred 153 cases to the newly created Court of First Instance (now the General Court).
1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance.
1994: the Court of Justice referred 14 cases as a result of the second extension of the jurisdiction of the Court of First Instance.
2004–05: the Court of Justice referred 25 cases as a result of the third extension of the jurisdiction of the Court of First Instance.
2016: on 1 September 2016, 139 staff cases were transferred to the General Court.

2| 2005–06: the Court of First Instance referred 118 cases to the newly created Civil Service Tribunal.

VI. ACTIVITY OF THE REGISTRY OF THE GENERAL COURT

20. ACTIVITY OF THE REGISTRY OF THE GENERAL COURT (2015-16)

Type of act	2015	2016
Number of documents entered in the register of the Registry [1]	46 432	49 773
Number of applications initiating proceedings [2]	831	835
Number of staff cases transferred to the General Court [3]	–	139
Rate of regularisation of the applications initiating proceedings [4]	42.50%	38.20%
Number of written pleadings (other than applications)	4 484	3 879
Number of applications to intervene	194	160
Number of requests for confidential treatment (of data contained in procedural documents) [5]	144	163
Draft orders prepared by the Registry [6] (manifest inadmissibility before service, stay/resumption, joinder of cases, joinder of a plea of inadmissibility with the substance of the case, uncontested intervention, removal from the register, finding of no need to adjudicate in intellectual property cases, reopening of the oral part of the procedure and rectification)	521	241
Number of chamber conferences (with services of the Registry)	303	321
Number of minutes of hearings and records of delivery of judgment	873	637

1| This number is an indicator of the volume of work of the Registry, since each incoming or outgoing document is entered in the register. The number of procedural documents entered in the register must be assessed in the light of the nature of the proceedings within the Court's jurisdiction. As the number of parties to proceedings is limited in direct actions (applicant, defendant and, as the case may be, intervener(s)), service is effected only on those parties.

2| Any written pleadings lodged (including applications) must be entered in the register, placed on the case file, put in order where appropriate, communicated to the judges' chambers with a transmission sheet, which is sometimes detailed, then possibly translated and, lastly, served on the parties.

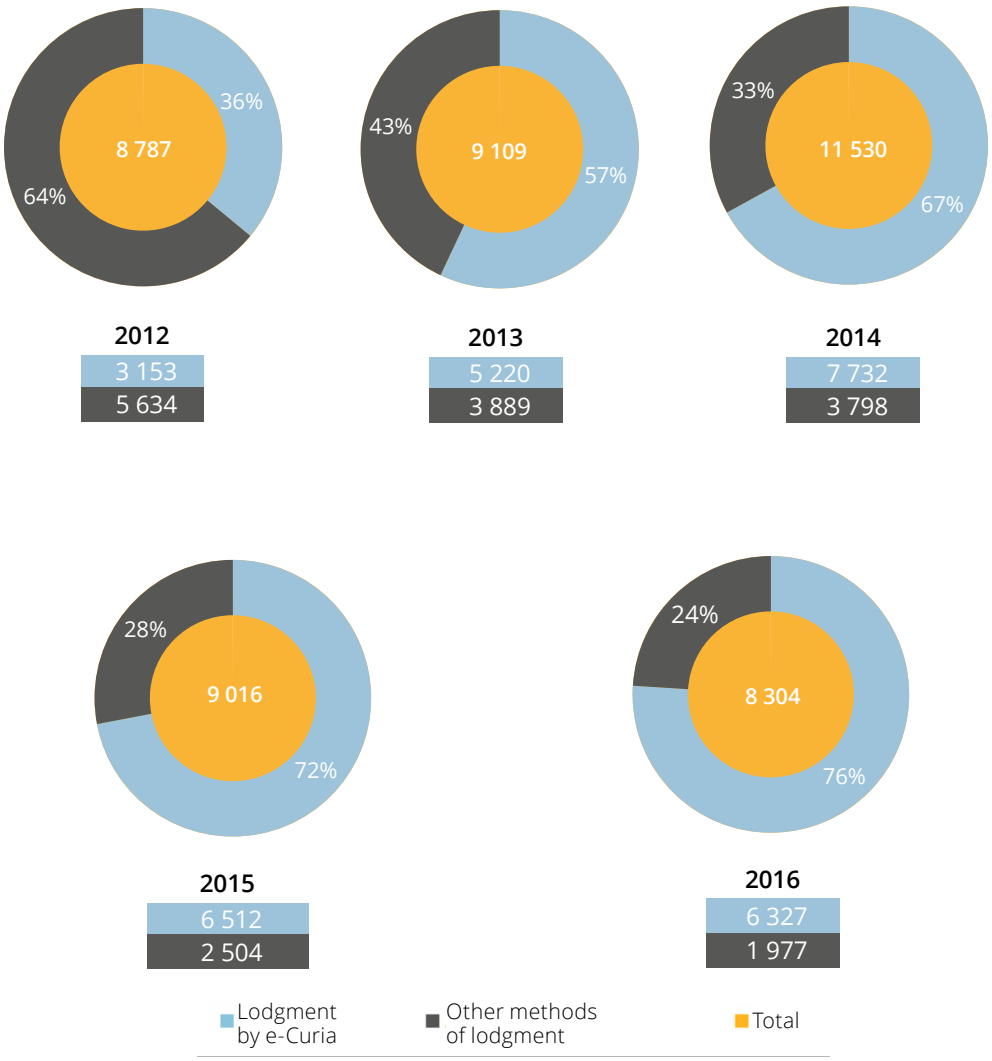
3| On 1 September 2016.

4| Where an application initiating proceedings (or any other written pleading) does not comply with certain requirements, the Registry ensures that it is put in order, as provided in the Rules of Procedure.

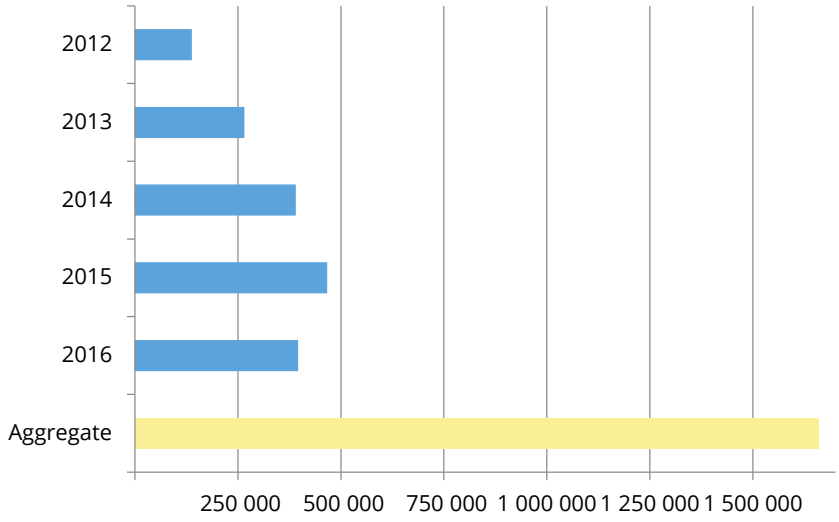
5| The number of requests for confidentiality is without prejudice to the amount of data contained in one or more pleadings for which confidential treatment is requested.

6| Since the entry into force, on 1 July 2015, of the new Rules of Procedure of the General Court, certain decisions that were previously taken in the form of orders (stay/resumption, joinder of cases, intervention by a Member State or an institution where confidentiality is not raised) have been taken in the form of a simple decision added to the case file.

21. METHODS OF LODGING PROCEDURAL DOCUMENTS BEFORE THE GENERAL COURT



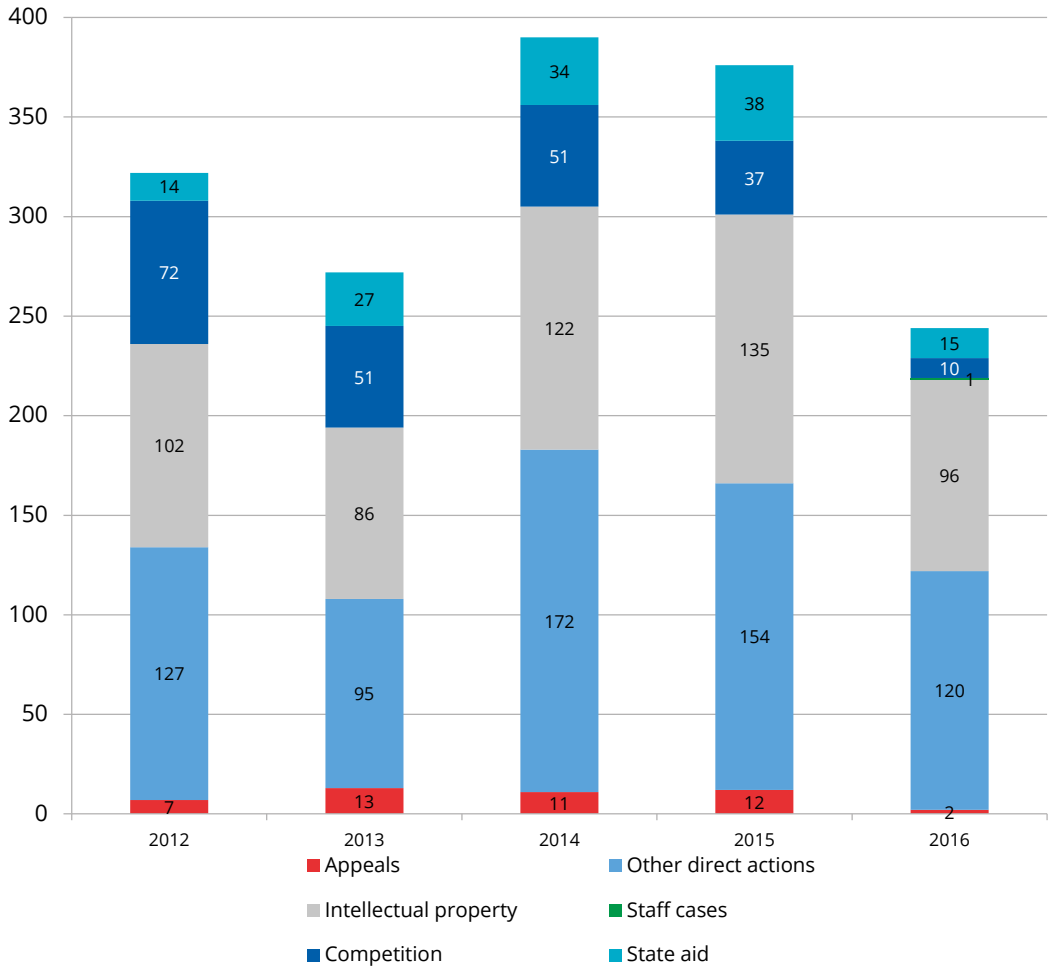
22. NUMBER OF PAGES LODGED BY E-CURIA (2012–16)



	2012	2013	2014	2015	2016	Aggregate
Number of pages lodged by e-Curia	138 182	266 048	390 892	466 875	396 072	**1 658 069**

23. NOTICES IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION (2012–16)

24. NUMBER OF CASES PLEADED (2012–16)



	2012	2013	2014	2015	2016
Total	**322**	**272**	**390**	**376**	**244**

E COMPOSITION OF THE GENERAL COURT

(order of precedence as at 31 December 2016)

First row, from left to right:

A. Dittrich, Judge; I. Labucka, Judge; A.M. Collins, President of Chamber; G. Berardis, President of Chamber; H. Kanninen, President of Chamber; M. Prek, President of Chamber; M. van der Woude, Vice-President of the Court; M. Jaeger, President of the Court; I. Pelikánová, President of Chamber; S. Frimodt Nielsen, President of Chamber; D. Gratsias, President of Chamber; V. Tomljenović, President of Chamber; S. Gervasoni, President of Chamber; S. Papasavvas, Judge; J. Schwarcz, Judge.

Second row, from left to right:

A. Marcoulli, Judge; Z. Csehi, Judge; D. Spielmann, Judge; C. Iliopoulos, Judge; L. Madise, Judge; V. Kreuschitz, Judge; E. Buttigieg, Judge; M. Kancheva, Judge; E. Bieliūnas, Judge; I. Ulloa Rubio, Judge; I.S. Forrester, Judge; L. Calvo-Sotelo Ibáñez-Martín, Judge; V. Valančius, Judge; N. Półtorak, Judge; P.G. Xuereb, Judge.

Third row, from left to right:

A. Kornezov, Judge; J. Passer, Judge; O. Spineanu-Matei, Judge; J. Svenningsen, Judge; P. Nihoul, Judge; R. Barents, Judge; I. Reine, Judge; F. Schalin, Judge; E. Perillo, Judge; R. da Silva Passos, Judge; B. Berke, Judge; U. Öberg, Judge; M.J. Costeira, Judge; K. Kowalik-Bańczyk, Judge; E. Coulon, Registrar.

1. CHANGE IN THE COMPOSITION OF THE GENERAL COURT IN 2016

FORMAL SITTING ON 13 APRIL 2016

In the context of implementing the reform of the judicial structure of the institution, which provides, inter alia, for an increase in the number of judges of the General Court, [1] by decision adopted on 23 March 2016 the representatives of the Governments of the Member States of the European Union appointed Mr Csehi, Mr Iliopoulos, Ms Marcoulli, Ms Półtorak and Mr Spielmann as judges at the General Court for the period from 3 April 2016 to 31 August 2016 and Mr Calvo-Sotelo Ibáñez-Martín and Mr Valančius as judges at the General Court for the period from 3 April 2016 to 31 August 2019.

A formal sitting took place at the Court of Justice on 13 April 2016 on the occasion of the taking of the oath and entry into office of those seven new judges of the General Court.

FORMAL SITTING ON 8 JUNE 2016

In the context of implementing the reform of the judicial structure of the institution, by decision adopted on 24 May 2016 the representatives of the Governments of the Member States of the European Union appointed Ms Reine, Mr Schalin and Mr Xuereb as judges at the General Court for the period from 29 May 2016 to 31 August 2019.

A formal sitting took place at the Court of Justice on 8 June 2016 on the occasion of the taking of the oath and entry into office of those three new judges of the General Court.

FORMAL SITTING ON 19 SEPTEMBER 2016

In the context of the partial renewal of the membership of the General Court, by decision adopted on 23 March 2016 the representatives of the Governments of the Member States of the European Union appointed Ms Kowalik-Bańczyk and Mr Nihoul as judges at the General Court for the period from 1 September 2016 to 31 August 2022, replacing Ms Wiszniewska-Białecka and Mr Dehousse respectively.

In the context of the partial renewal of the membership of the General Court, by decision adopted on 7 September 2016 the representatives of the Governments of the Member States of the European Union appointed Mr Berke, Mr da Silva Passos and Ms Spineanu-Matei as judges at the General Court for the period from 16 September 2016 to 31 August 2022, replacing Mr Czúcz, Ms Martins de Nazaré Ribeiro and Mr Popescu respectively.

In addition, in the context of implementing the reform of the judicial structure of the institution, by decision adopted on 7 September 2016 the representatives of the Governments of the Member States of the European Union appointed, as judges at the General Court, Mr Passer, for the period from 16 September 2016 to 31 August 2019, Ms Costeira, for the period from 16 September 2016 to 31 August 2022, Mr Kornezov and Mr Perillo, for the period from 1 September 2016 to 31 August 2019, and Mr Barents and Mr Svenningsen, for the period from 1 September 2016 to 31 August 2022.

1 | Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

On account of the departure from office of Mr Wetter, by decision adopted on 7 September 2016 the representatives of the Governments of the Member States of the European Union appointed Mr Öberg as a judge at the General Court for the period from 19 September 2016 to 31 August 2019.

Finally, by decisions adopted on 16 September 2015, 23 March 2016, 24 May 2016 and 7 September 2016, the representatives of the Governments of the Member States of the European Union renewed the term of office of judges at the General Court, namely Mr Jaeger, Mr van der Woude, Mr Frimodt Nielsen, Mr Kanninen, Mr Gratsias, Mr Papasavvas, Mr Schwarcz, Mr Kreuschitz, Mr Madise, Mr Iliopoulos, Mr Spielmann, Mr Csehi and Ms Marcoulli, for the period from 1 September 2016 to 31 August 2022.

A formal sitting took place at the Court of Justice on 19 September 2016 on the occasion of the partial renewal of the membership of the General Court and of the taking of the oath and entry into office of the 12 new judges of the General Court.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2016 TO 13 APRIL 2016

M. JAEGER, President of the Court
H. KANNINEN, Vice-President
M.E. MARTINS RIBEIRO, President of Chamber
S. PAPASAVVAS, President of Chamber
M. PREK, President of Chamber
A. DITTRICH, President of Chamber
S. FRIMODT NIELSEN, President of Chamber
M. van der WOUDE, President of Chamber
D. GRATSIAS, President of Chamber
G. BERARDIS, President of Chamber
F. DEHOUSSE, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA- BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
I. LABUCKA, Judge
J. SCHWARCZ, Judge
A. POPESCU, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
C. WETTER, Judge
V. TOMLJENOVIĆ, Judge
E. BIELIŪNAS, Judge
V. KREUSCHITZ, Judge
A.M. COLLINS, Judge
I. ULLOA RUBIO, Judge
S. GERVASONI, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge

E. COULON, Registrar

FROM 13 APRIL 2016 TO 8 JUNE 2016

M. JAEGER, President
H. KANNINEN, Vice-President
M.E. MARTINS RIBEIRO, President of Chamber
S. PAPASAVVAS, President of Chamber
M. PREK, President of Chamber
A. DITTRICH, President of Chamber
S. FRIMODT NIELSEN, President of Chamber
M. van der WOUDE, President of Chamber
D. GRATSIAS, President of Chamber
G. BERARDIS, President of Chamber
F. DEHOUSSE, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
I. LABUCKA, Judge
J. SCHWARCZ, Judge
A. POPESCU, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
C. WETTER, Judge
V. TOMLJENOVIĆ, Judge
E. BIELIŪNAS, Judge
V. KREUSCHITZ, Judge
A.M. COLLINS, Judge
I. ULLOA RUBIO, Judge
S. GERVASONI, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge
C. ILIOPOULOS, Judge
L. CALVO-SOTELO IBÁÑEZ-MARTÍN, Judge
D. SPIELMANN, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
A. MARCOULLI, Judge

E. COULON, Registrar

FROM 8 JUNE 2016 TO 19 SEPTEMBER 2016

M. JAEGER, President
H. KANNINEN, Vice-President
M.E. MARTINS RIBEIRO, President of Chamber
S. PAPASAVVAS, President of Chamber
M. PREK, President of Chamber
A. DITTRICH, President of Chamber
S. FRIMODT NIELSEN, President of Chamber
M. van der WOUDE, President of Chamber
D. GRATSIAS, President of Chamber
G. BERARDIS, President of Chamber
F. DEHOUSSE, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
I. LABUCKA, Judge
J. SCHWARCZ, Judge
A. POPESCU, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
C. WETTER, Judge
V. TOMLJENOVIĆ, Judge
E. BIELIŪNAS, Judge
V. KREUSCHITZ, Judge
A.M. COLLINS, Judge
I. ULLOA RUBIO, Judge
S. GERVASONI, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge
C. ILIOPOULOS, Judge
L. CALVO-SOTELO IBÁÑEZ-MARTÍN, Judge
D. SPIELMANN, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
A. MARCOULLI, Judge
P.G. XUEREB, Judge
F. SCHALIN, Judge
I. REINE, Judge

E. COULON, Registrar

FROM 21 SEPTEMBER 2016 TO 31 DECEMBER 2016

M. JAEGER, President
M. van der WOUDE, Vice-President
I. PELIKÁNOVÁ, President of Chamber
M. PREK, President of Chamber
S. FRIMODT NIELSEN, President of Chamber
H. KANNINEN, President of Chamber
D. GRATSIAS, President of Chamber
G. BERARDIS, President of Chamber
V. TOMLJENOVIĆ, President of Chamber
A.M. COLLINS, President of Chamber
S. GERVASONI, President of Chamber
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
A. DITTRICH, Judge
J. SCHWARCZ, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
E. BIELIŪNAS, Judge
V. KREUSCHITZ, Judge
I. ULLOA RUBIO, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge
C. ILIOPOULOS, Judge
L. CALVO-SOTELO IBÁÑEZ-MARTÍN, Judge
D. SPIELMANN, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
A. MARCOULLI, Judge
P.G. XUEREB, Judge
F. SCHALIN, Judge
I. REINE, Judge
E. PERILLO, Judge
R. BARENTS, Judge
R. da SILVA PASSOS, Judge
P. NIHOUL, Judge
B. BERKE, Judge
J. SVENNINGSEN, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
M.J. COSTEIRA, Judge
J. PASSER, Judge
K. KOWALIK-BAŃCZYK, Judge
A. KORNEZOV, Judge

E. COULON, Registrar

3. FORMER MEMBERS OF THE GENERAL COURT

(in order of their entry into office)

JUDGES

Donal Patrick Michael BARRINGTON (1989-96)
Antonio SAGGIO (1989-98), President (1995-98)
David Alexander Ogilvy EDWARD (1989-92)
Heinrich KIRSCHNER (1989-97)
Christos YERARIS (1989-92)
Romain Alphonse SCHINTGEN (1989-96)
Cornelis Paulus BRIËT (1989-98)
José Luis da CRUZ VILAÇA (1989-95), President (1989-95)
Bo VESTERDORF (1989-2007), President (1998-2007)
Rafael GARCÍA-VALDECASAS Y FERNÁNDEZ (1989-2007)
Jacques BIANCARELLI (1989-95)
Koen LENAERTS (1989-2003)
Christopher William BELLAMY (1992-99)
Andreas KALOGEROPOULOS (1992-98)
Virpi TIILI (1995-2009)
Pernilla LINDH (1995-2006)
Josef AZIZI (1995-2013)
André POTOCKI (1995-2001)
Rui Manuel GENS de MOURA RAMOS (1995-2003)
John D. COOKE (1996-2008)
Jörg PIRRUNG (1997-2007)
Paolo MENGOZZI (1998-2006)
Arjen W.H. MEIJ (1998-2010)
Mihail VILARAS (1998-2010)
Nicholas James FORWOOD (1999-2015)
Hubert LEGAL (2001-07)
Maria Eugénia MARTINS de NAZARÉ RIBEIRO (2003-16)
Franklin DEHOUSSE (2003-16)
Ena CREMONA (2004-12)
Ottó CZÚCZ (2004-16)
Irena WISZNIEWSKA-BIAŁECKA (2004-16)
Daniel ŠVÁBY (2004-09)
Vilenas VADAPALAS (2004-13)
Küllike JÜRIMÄE (2004-13)
Verica TRSTENJAK (2004-06)
Enzo MOAVERO MILANESI (2006-11)
Nils WAHL (2006-12)
Teodor TCHIPEV (2007-10)
Valeriu M. CIUCĂ (2007-10)
Santiago SOLDEVILA FRAGOSO (2007-13)
Laurent TRUCHOT (2007-13)
Kevin O'HIGGINS (2008-13)
Andrei POPESCU (2010-16)
Carl WETTER (2013-16)

PRESIDENTS

José Luis da CRUZ VILAÇA (1989-95)
Antonio SAGGIO (1995-98)
Bo VESTERDORF (1998-2007)

REGISTRAR

Hans JUNG (1989-2005)


CVRIA

CHAPTER III

THE CIVIL SERVICE TRIBUNAL

A | ACTIVITY OF THE CIVIL SERVICE TRIBUNAL IN 2016

By Mr **Sean VAN RAEPENBUSCH,** President of the Civil Service Tribunal

The year 2016 was the last year of the existence of the Civil Service Tribunal. The Tribunal ceased its activity on 1 September 2016, when jurisdiction at first instance in disputes between the European Union and its officials and other staff was transferred once again to the General Court. [1] That transfer of jurisdiction was accompanied by an increase of seven new posts for judges in the General Court on 1 September 2016 and forms part of the reform of the judicial system of the European Union under which the number of judges of the General Court will eventually be doubled. [2]

The year 2016 also saw the departure and replacement, in April, of two judges whose terms of office had ended in October 2014 and September 2015.

The statistics concerning the activity of the Civil Service Tribunal for 2016, or rather, from 1 January to 31 August 2016, show that 169 cases were brought to a close compared with 152 for the whole of 2015 and for 2014. The number of cases thus brought to a close in the first eight months of 2016 constitutes the second best quantitative result for the Tribunal after that achieved for the whole of 2013 (184). It includes a large number of cases concerning transfers to the pension scheme of the European Union of pension rights acquired previously, proceedings in those cases having been stayed pending decisions of the General Court which were delivered at the start of 2016.

Moreover, the number of pending cases was 139 at 31 August 2016 compared with 231 at 31 December 2015 and 216 in 2014. Those 139 cases were transferred to the General Court on 1 September 2016. Proceedings remained stayed in 46 of those cases pending decisions in cases still pending before the General Court, most concerning the implementation of the 2013 reform of the Staff Regulations of Officials of the European Union ('the Staff Regulations') and the Conditions of Employment of Other Servants of the European Union ('the CEOS'). [3] It should be pointed out that, when the Tribunal was established in 2005, 269 staff cases were pending before the then Court of First Instance.

The average duration of proceedings, not including the duration of any stay of proceedings, fell from 12.1 months in 2015 to 10 months in 2016. It should be noted that the average was 14.7 months in 2013.

During the period under consideration the President of the Tribunal also made two orders for interim measures, just as he did in 2015, which tends to confirm the long-term trend of falling numbers of applications for interim measures in staff cases.

Finally, 8 cases were brought to a close by amicable settlement under the Rules of Procedure, compared with 14 the year before. Although that represents a clear drop in numbers, the number of attempts at amicable settlement rose to 18, which is an all-time high.

The account given below will describe the most significant decisions of the Tribunal.

1 | Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

2 | Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

3 | Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (OJ 2013 L 287, p. 15).

B CASE-LAW OF THE CIVIL SERVICE TRIBUNAL IN 2016

I. PROCEDURAL QUESTIONS

1. PRE-LITIGATION PROCEDURE

In its judgment of 25 May 2016, ***GW*** v ***Commission*** (F-111/15, EU:F:2016:122), the Civil Service Tribunal recalled that, given its very purpose, which is to enable the administration to review its decision, the pre-litigation procedure is of an evolving nature, so that, in the scheme of legal remedies provided for in Articles 90 and 91 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), the administration may decide, when it rejects a complaint, to vary, in the light of that complaint, the grounds on which it had adopted the contested measure. Nonetheless, it is in fact the legality of the original act adversely affecting an official that is being examined, in the light of the reasons contained in the decision rejecting the complaint. More specifically, the Civil Service Tribunal held that, where the Settlements Office of the Joint Sickness Insurance Scheme ('the JSIS') refuses to reimburse certain medical expenses on the basis of a brief, unfavourable opinion of its medical officer and the official concerned lodges a complaint, the administration may, in response to that complaint, provide more explicit reasons during the pre-litigation procedure. Such specific reasons relating to the individual case, notified prior to the initiation of proceedings before the courts, are deemed to be identical to those for the decision to refuse reimbursement and must therefore be regarded as relevant information for assessing the lawfulness of that decision.

2. ACT ADVERSELY AFFECTING AN OFFICIAL

The case of ***Zink*** v ***Commission*** (judgment of 11 April 2016, F-77/15, EU:F:2016 :74, under appeal) gave the Tribunal an opportunity to reiterate the case-law according to which the sending of a salary statement to an official has the effect of starting the time for bringing a complaint and an appeal against an administrative decision running, only where that statement clearly shows the decision taken and its scope. In the case in question, however, the Tribunal found that the allowance had been withheld from the official concerned, not by a decision of the administration but because of a material error, in this instance, in computer encoding. In those circumstances, it was held that the salary statements in which the allowance at issue did not appear did not reflect any decision of the administration, did not change the legal position of the official concerned and did not definitively determine the position of the European Commission. Accordingly, those statements could not have the effect of setting the time running for lodging a complaint under the Staff Regulations.

3. LACK OF AUTHORITY OF THE PERPETRATOR OF AN ACT WITH ADVERSE EFFECT

In ***Opreana*** v ***Commission*** (judgment of 19 July 2016, F-67/15, EU:F:2016:153), the applicant had applied for a renewal of her contract and the only relevant document placed on the file was the refusal of the team leader in the Human Resources Unit of the Commission's Directorate-General for Health and Consumers. As that team leader did not have the authority to act in the capacity of authority empowered to conclude contracts of employment ('AECE') and in the absence of any specific information indicating that a decision not to renew the contract had in fact been taken by that authority, the Tribunal found that the team leader was not authorised to take the contested decision. In those circumstances, it was held that the decision not to

renew the contract, which was an act with adverse effect distinct from the contract in question and open to challenge in a legal action, was not adopted by the competent authority.

4. TIME LIMITS FOR BRINGING PROCEEDINGS

In its judgment of 25 January 2016, ***Darchy*** v ***Commission*** (F-47/15, EU:F:2016:3), the Tribunal recalled that the time limits for lodging a complaint and bringing an action are intended to safeguard within the EU institutions the legal certainty which is essential for their successful operation, by preventing EU measures which involve legal effects from being called into question indefinitely. Therefore, the Tribunal refused to accept that, in response to a request for review by the official concerned lodged after expiry of those time limits, the latter could receive retrospective payment of allowances previously denied him, as that situation would be likely to give rise to considerable legal uncertainty, with the risk of the institutions accumulating debts with regard to their officials.

5. COSTS

In an order of 17 March 2016 (***Grazyte*** v ***Commission***, F-76/11 DEP, EU:F:2016:67), the Tribunal held, in the light of the first subparagraph of Article 6(1) TEU, that rules of lesser mandatory force than the Charter of Fundamental Rights of the European Union must be interpreted as far as possible in such a way that they are able to be applied in accordance with the Charter and also that the Rules of Procedure of the Tribunal must be interpreted in accordance with Article 47 of the Charter, which guarantees the right to an effective remedy before a court or tribunal. More specifically, having regard to Article 52(3) of the Charter, the Tribunal recalled that, according to the case-law of the European Court of Human Rights, the imposition of a considerable financial burden, even after the proceedings are concluded, may constitute a restriction on the right of access to a court. It held, therefore, in line with the case-law of that court, that the amount of costs must be assessed in the light of the particular circumstances of a given case, including the applicant's solvency. Moreover, again in the light of the case-law of the European Court of Human Rights, the Tribunal observed that the right to a fair trial concerns courts of first instance to begin with and that account should therefore also be taken of the fact that, in the main proceedings, it was the first court to which the applicant had access.

In addition, the Tribunal observed, also in its order of 17 March 2016 (***Grazyte*** v ***Commission***, F-76/11 DEP, EU:F:2016:67), that it is apparent from Article 80 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1) and from Article 91 of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation [No 966/2012] (OJ 2012 L 362, p. 1) that the possibility of establishing a timetable for the settlement of a debt or not is merely an option offered to the creditor institution. In that connection it held that the right of access to a court would not be properly safeguarded if the prospect of a party having, or not having, to bear sizeable costs at the outcome of the proceedings were left solely to the discretion of his opponent and that it is, on the contrary, the court which must, where difficulties arise, be responsible for fixing the costs taking account of circumstances such as the party's solvency.

6. RES JUDICATA

By an order of 7 June 2016, ***Verile*** v ***Commission*** (F-108/12, EU:F:2016:125), the Tribunal recalled that the principle of *res judicata* is of fundamental importance in the legal order of the EU. In order to guarantee both the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become final following exhaustion of all available remedies or following expiry of the time limits provided for such remedies can no longer be called into question. Here, the General Court, ruling on appeal, by its judgment of 13 October 2015, ***Commission*** v ***Verile and Gjergji*** (T-104/14 P, EU:T:2015:776), had redefined the subject matter of the main action as being, not themeasure contested at first instance, but another decision. That other decision was precisely the one which was the subject matter of the action registered as Case F-108/12. Thus, since the judgment in T-104/14 P had become *res judicata* and, following the abovementioned reclassification, the judgment of the General Court and the action in Case F-108/12 had the same subject matter and the same parties, the Tribunal held that the latter case had become devoid of purpose and there was no longer any need to adjudicate on it.

II. QUESTIONS OF SUBSTANCE

GENERAL CONDITIONS FOR VALIDITY OF MEASURES AND FUNDAMENTAL RIGHTS

1. SCOPE OF A PREAMBLE

In its judgment of 2 March 2016, ***Frieberger and Vallin*** v ***Commission*** (F-3/15, EU:F:2016:26, under appeal), the Tribunal recalled that the function of the preamble to an act of general scope is to set out the reasons for it, indicating, as a rule, first, the overall situation which led to its adoption and, second, the general objectives which it proposes to achieve. Consequently, the preamble to such an act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or, a fortiori, as a basis for claiming them to be illegal.

2. FORMAL STATEMENT OF GROUNDS

In ***Frieberger and Vallin*** v ***Commission*** (judgment of 2 March 2016, F-3/15, EU:F:2016:26, under appeal), the Tribunal held that where the competent appointing authority considers that the grounds for the original decision are both well founded and sufficient to respond to the allegations made in the complaint, it need not depart from that statement of reasons by substituting another but may, in those circumstances, reject the complaint, reproducing, in the rejection decision, the same grounds as those given in the original decision. In addition, the Tribunal held that, in a specific situation where complaints have been drafted in the same terms, the appointing authority cannot be criticised for providing a standardised response to them. On the contrary, that approach is consistent with the principle of sound administration and guarantees equal treatment between complainants.

3. TEMPORAL APPLICABILITY OF THE PROVISIONS OF THE NEW STAFF REGULATIONS

In ***Stips*** v ***Commission*** (judgment of 19 July 2016, F-131/15, EU:F:2016:154), the Tribunal looked at the system of reclassification established by the Commission for members of the temporary staff engaged under Article 2(d) of the Conditions of Employment of Other Servants of the European Union ('the CEOS') who had a contract of indefinite duration. The Tribunal held that, when it adopted a decision on the reclassification of a member of the temporary staff after the entry into force of the new Staff Regulations on 1 January 2014, even where that decision concerns the reclassification exercise for 2013, the Commission is required to apply, by analogy, the provisions of the new Staff Regulations, in particular, Article 45 and Annex I, Section A, point 1, which limit the career progression of officials in the administrators' group to Grade AD 12 where they were not previously classified in one of the types of post allowing progression beyond that grade. In this case, the Tribunal found that, as at 1 January 2014, the date of entry into force of the new Staff Regulations, the applicant was eligible only to be reclassified, without having any acquired right to reclassification at a higher grade than AD 12, so that the Commission had in no way called into question the rights acquired by the applicant before that date.

4. RE-EXAMINATION OF ADMINISTRATIVE MEASURES

In its judgment of 25 January 2016, ***Darchy*** v ***Commission*** (F-47/15, EU:F:2016:3), the Tribunal took the view that the administration is required to review the situation of an official and to reconsider, at least for the future, the refusal to grant him a continuous benefit, such as the dependent child allowance, if it is established that the person concerned was entitled to payment of that benefit and, therefore, that the previous refusal to grant it to him was unlawful, even if that refusal had become definitive through the expiry of the time limits for complaint and action. The principle of legal certainty cannot, in such circumstances, justify the administration's allowing an unlawful situation to persist. On the other hand, neither the duty to have regard for the welfare of officials nor the principle of sound administration require the administration to set aside the time limits for lodging a complaint or an action, which, being mandatory, are not at its discretion, or compel it to review, in respect of the past, a decision that has become final. The same is true of the principle of legal certainty, which provides the basis for the above finding.

5. RELIANCE ON THE PRINCIPLES IN THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

By a judgment of 2 March 2016, ***Frieberger and Vallin*** v ***Commission*** (F-3/15, EU:F:2016:26, under appeal), the Tribunal pointed out that Article 27 of the Charter of Fundamental Rights provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices, so that this article cannot be fully effective unless it is given more specific expression. Therefore, the Tribunal held that, from the point of view of procedure, Article 27 of the Charter cannot, on its own, provide the basis for a claim.

6. DUTY OF SINCERE COOPERATION WITH NATIONAL COURTS

In its judgment of 19 July 2016, ***Earlie*** v ***Parliament*** (F-130/14, EU:F:2016:156), the Tribunal recalled that any institution is required, by virtue of its duty of sincere cooperation with the national courts, to respond to requests to execute an order adopted by the national court, such as an order setting out an obligation for a former official to pay maintenance to his ex- wife. Where that order, in accordance with its terms, has been communicated to the institution concerned, that duty of sincere cooperation implies that, even if it is not the direct addressee of such a court ruling, an institution, as the employer of the official owing the maintenance allowance, must comply with the terms of that ruling by refusing to grant a request from the debtor official which clearly runs counter to the obligations directly imposed on that official by the court ruling at issue. Thus, where an order of a national court requires a former official to ask his employer, namely an EU institution, to withhold from his pension the amount of the maintenance allowance owed to his ex-wife and to pay that amount to her, that institution may refuse to act on a request by the former official for the cessation of those payments running counter to the terms of that order.

7. RIGHT TO BE HEARD

In a case which was the subject of a judgment of 5 February 2016, ***GV*** v ***EEAS*** (F-137/14, EU:F:2016:14), the Tribunal, first, recalled its case-law to the effect that the observation of the rights of the defence in staff cases and, more specifically, the right of a member of the contract staff to be heard in relation to matters which might be relied on to his detriment as the basis of a decision adversely affecting him, constitute an essential procedural requirement, breach of which may be raised by the court of its own motion. In this case, the Tribunal pointed out that the EEAS had dismissed a member of staff without first having heard him, although it would have been relatively easy for it to perform its obligations deriving from the principle of sound ministration by informing that person, in writing, of the grounds on which it intended to dismiss him and by giving him the opportunity to adopt a position in this regard, within a reasonable time, in writing and/or orally. Against that background, it was held that the EEAS could not rely on internal circumstances specific to its administration, such as difficulties in its decision-making process, including resistance on the part of certain departments, to justify a failure to observe obligations arising from norms of primary EU law.

In another case in which the fixed-term contract of a member of the temporary staff was not renewed even though the person concerned was not given an opportunity to put forward his views effectively before the decision was adopted (judgment of 19 July 2016, ***Opreana*** v ***Commission***, F-67/15, EU:F:2016:153), the Tribunal considered that the sole argument put forward by the defendant in that connection, namely that the reply given to the applicant demonstrated that she had been informed 'beforehand' of that decision, given the use of the expression 'as I said to you before', was not at all persuasive. When questioned on that point at the hearing, the defendant failed to indicate the precise moment, the place or the details of this alleged prior information.

8. RIGHT TO SOUND ADMINISTRATION

The Tribunal held, in its judgment of 19 July 2016, ***Stips*** v ***Commission*** (F-131/15, EU:F:2016:154), which concerned the system of reclassification established by the Commission for members of the temporary staff engaged under Article 2(d) of the CEOS who had a contract of indefinite duration, that, by not adopting its decision not to reclassify the applicant at Grade AD 13 in the 2013 reclassification exercise until 21 January 2015, that is to say, more than a year after the end of the exercise, without having taken steps to attempt to conclude it before 31 December 2013, the Commission had breached the right to sound

administration and, in particular, the right of its staff to be treated fairly. According to the Tribunal, if the Commission had not delayed in organising the 2013 reclassification exercise and if it had taken all the steps to proceed with due diligence to compare the merits of the few members of the temporary staff already eligible for reclassification in grade in 2013, it could have drawn up the list of members of the temporary staff who were reclassified in the 2013 reclassification exercise before the entry into force, on 1 January 2014, of the new Article 45 and Annex I, Section A, point 1 of the Staff Regulations, which now limit the career progression of administrators, such as the applicant, to Grade AD 12 if they were not previously classified in one of the types of post allowing progression beyond that grade. In this case, the Tribunal also held that the Commission could not hide behind the rule that the protection of the rights and interests of officials is always subject to compliance with the rules in force, as to accept such an argument in the present case would mean that it would be enough for the administration to stagger, as it chose, the organisation and conclusion of a reclassification exercise and derive an advantage from the passage of time so as to apply new provisions regarding reclassification which were less favourable to the persons concerned.

In ***Bulté and Krempa*** v ***Commission*** (judgment of 5 February 2016, F-96/14, EU:F:2016:10), which concerned the decision to modify, with retroactive effect, the pensions paid to the applicants in their capacity as the surviving dependents of a deceased former official and to recover the sums overpaid to them, the Tribunal concluded that the condition relating to the obviousness of the overpayment to which recovery of undue payments is subject under Article 85 of the Staff Regulations was not fulfilled. The Tribunal held, inter alia, that the errors made by the Commission were on such a scale that they could only derive from a breach of its obligation to examine the applicants' files carefully, as required by the principle of sound administration.

9. DUTY TO HAVE REGARD FOR THE WELFARE OF STAFF

In an action (judgment of 19 July 2016, ***Opreana*** v ***Commission***, F-67/15, EU:F:2016:153), which concerned the non-renewal of a fixed-term contract of a member of the temporary staff whom the defendant knew to be pregnant, after she had made an application for renewal of her contract, the Tribunal concluded that the defendant had manifestly breached its duty to have regard for the welfare of staff by reason of the fact that the interests of the applicant were not taken into account in any way. It did not appear from the file that the defendant had heard the applicant or invited her to put her views regarding her interest in retaining her job. In addition, the defendant had failed to advise her of the imminent publication of a notice of vacancy for her post and had handled her application for renewal of her contract summarily, or even precipitately. Moreover, it did not take account of the interest of the applicant and her insecure position in the light of the fact that she was pregnant and due to give birth imminently, which prevented her, for a certain time, from actively seeking another post and rejoining the job market.

10. RIGHT OF AN OFFICIAL OR STAFF MEMBER TO ACCESS TO HIS FILE

In the case which was the subject of the judgment of 12 May 2016, ***FS*** v ***EESC*** (F-102/15, EU:F:2016:117), the President of the EESC instructed a former president of the institution to conduct a mediation procedure in the course of which he interviewed a number of people and drew up a confidential report for the President. The applicant requested access to that report, but the defendant justified its refusal on the basis of the protection of the confidentiality of correspondence between members of an institution and of professional secrecy. However, the Tribunal held that the content of that report confirmed that it did not consist of professional or private correspondence between two members of the body in question concerning that body's activities but, on the contrary, that it was a document directly concerning the applicant within the

meaning of Article 41(2)(b) of the Charter and that it had been brought to the attention of the President of the body in order to enable him, if appropriate, to exercise the powers of the AECE in disciplinary proceedings against the person concerned.

EMOLUMENTS AND SOCIAL SECURITY BENEFITS OF OFFICIALS

1. SOCIAL SECURITY

It is common ground, according to the Tribunal, that, although a member of the JSIS may legitimately consider that his medical expenses will, in principle, be reimbursed up to the ceilings laid down in Article 72(1) of the Staff Regulations, the reimbursement of certain costs may, however, lawfully be refused by the Settlements Office concerned if the Office considers that those costs relate to treatment or services whose scientific validity is unproven. From this point of view, the Tribunal observed that medical advances and modern techniques now make it possible to offer outpatient treatment for medical services which previously required hospitalisation and that it is, therefore, the JSIS member's responsibility to be mindful of these developments and to provide evidence of the need for hospitalisation where that need is disputed (judgment of 25 May 2016, ***GW*** v ***Commission***, F-111/15, EU:F:2016:122).

In addition, and still on the subject of the costs of hospitalisation, the Tribunal held, in the light of Title II, Chapter 2, point 1.1 of the general implementing provisions for the reimbursement of medical expenses that the costs of a hospital stay which are reimbursable are those connected with a medical treatment itself (judgment of 25 May 2016, ***GW*** v ***Commission***, F-111/15, EU:F:2016:122).

In the same judgment, the Tribunal recalled that the medical officer, the Medical Council and the administration must conduct a specific and thorough examination of the situation presented to them and that it is for the administration to establish that an assessment of this nature has been made. In addition, it made clear that, although the medical officers, Medical Council and the administration must take a decision on the basis of the scientific literature, since an examination of whether or not a treatment or hospitalisation has a function is a medical question, they must also take full account of the actual state of health of the person concerned. Moreover, the obligation to take account of the personal situation of the JSIS member is dictated by the duty to have regard for the welfare of staff (judgment of 25 May2016, ***GW*** v ***Commission***, F-111/1 5, EU:F:2016:122).

In addition, the Tribunal held that the Medical Council has merely advisory powers, as is clear from Article 41 of the Joint rules on sickness insurance for officials of the European Union and concluded that its recommendations do not constitute rules enforceable against officials but presumptions which can be rebutted in the light of the facts of each individual case (judgment of 25 May 2016, ***GW*** v ***Commission***, F-111/15, EU:F:2016:122).

Finally, after observing that opinions expressed unilaterally by medical officers under Article 72 of the Staff Regulations do not provide the same level of safeguard with regard to the balance between the parties as those produced by the Medical Committee or the Invalidity Committee on the basis of Article 73 of the Staff Regulations, the Tribunal took the view that to hold, as the Commission suggested it should, that medical reports provided a posteriori are not conclusive as such would amount to denying JSIS members a basic means of defence capable of leading the administration to review its initial position and to reimburse medical expenses (judgment of 25 May 2016, ***GW*** v ***Commission***, F-111/15, EU:F:2016:122).

2. PENSIONS

In a case brought in the wake of the 2013 reform of the Staff Regulations, the Tribunal held that Article 83(2) and Article 83a(1), (3) and (4) of the Staff Regulations must be interpreted as meaning that the pension scheme is in balance, in the actuarial sense laid down in Annex XII to the Staff Regulations, if the level of the contributions to be paid each year by officials in active service is sufficient to finance one third of the future amount of the rights which those officials acquired during the same year. It follows that the contribution by officials of one third of the sum needed to finance the pension scheme must be understood from the actuarial point of view described above and over the long term, and therefore that distortions of calculation cannot be ruled out (judgment of 2 March 2016, ***Frieberger and Vallin*** v ***Commission***, F-3/15, EU:F:2016:26, under appeal, Case T-232/16 P).

Also in that judgment the Tribunal held that the retirement age fixed by Article 22 of Annex XIII to the Staff Regulations and which the 2013 reform raised, is only one factor which interacts with estimates of the future value of a number of parameters set out in that annex (interest rate, mortality, salary progression, etc.) to ensure the actuarial balance of the EU pension scheme. Consequently, the EU pension scheme is organised on the basis of the principle of solidarity and is not designed so that the contributions of each official create an individual entitlement to a pension representing their exact equivalent, so that officials cannot claim the reimbursement of any surplus resulting from the raising of their retirement age and the fact that they now pay contributions for a longer period than previously (judgment of 2 March 2016, ***Frieberger and Vallin*** v ***Commission***, F-3/15, EU:F:2016:26, under appeal, Case T-232/16 P).

Finally, in the same judgment, it was held that there is nothing in the wording of Article 26(5) of Annex XIII to the Staff Regulations to prevent an official, after a first recalculation of the bonus to his pension rights following the first increase in the retirement age under the 2004 reform, from obtaining a second recalculation taking account of the changes made to Article 22 of Annex XIII to the Staff Regulations in the 2013 reform, which again increased the retirement age under the Staff Regulations.

3. SEVERANCE GRANT

In its judgment of 2 March 2016, ***FX*** v ***Commission*** (F-59/15, EU:F:2016:27), the Tribunal held that the severance grant provided for in Article 39 of the CEOS is not an end-of-service allowance to which the staff member concerned is automatically entitled at the time when his contract is terminated or expires, but is a financial measure coming under provisions of the Staff Regulations on social security. The termination or expiry of a temporary contract does not, therefore, in itself, automatically grant entitlement to a severance grant. According to the relevant provisions of the pension scheme, and in particular Article 39 of the CEOS and Article 12(2) of Annex VIII to the Staff Regulations, a temporary staff member is entitled to a severance grant where he no longer holds a contract of employment because it has been terminated or has expired, and he does not intend to take up another post within the European Union, but he does not at that point satisfy the conditions for receiving an immediate or deferred retirement pension or the conditions laid down in Article 12(1)(b)(i) to (iv) of Annex VIII to the Staff Regulations.

In the same case, it was also stated that the concept of termination of service in Article 12(2) of Annex VIII to the Staff Regulations, applied by analogy to the case of a member of the temporary staff, must be interpreted on a case-by-case basis depending on the individual circumstances, precisely in order to prevent, as far as possible, payment of a severance grant to a member of the European Union's staff who, at the time when he requests that grant, is well aware that, even though his contract of employment has come to an end, he might be re-employed by the services of the European Union. From that point of view, the automatic payment of

the severance grant simply because the staff member's contract of employment has been terminated or has expired would be contrary not only to the purpose of that provision, but also to the general principle of the sound administration of the European Union's finances.

4. ADVANCEMENT IN STEP

Recalling that provisions giving rise to entitlement to financial benefits must be interpreted and applied strictly by the institutions, the Tribunal held, in its judgment of 12 May 2016, ***FS*** v ***EESC*** (F-50/15, EU:F:2016:119), that the advancement in step provided for in the second paragraph of Article 44 of the Staff Regulations should be granted only where the official is appointed head of unit, director or director-general 'in the same grade' as he held in his previous post and that, moreover, the Staff Regulations did not, before 1 January 2014, provide for the application of that provision by analogy to members of the temporary staff.

CAREERS OF OFFICIALS AND OTHER STAFF

1. PROMOTION OF STAFF PLACED AT THE DISPOSAL OF A TRADE UNION OR STAFF ASSOCIATION

Ruling on the legality of the failure to promote a trade union representative, the Tribunal held, in its judgment of 2 March 2016, ***Loescher*** v ***Council*** (F-84/15, EU:F:2016:29), an official cannot call for an institution to adopt rules specifically organising procedures and methods for comparing the merits of officials according to their respective situations under the Staff Regulations and, therefore, the failure to establish an ad hoc assessment system for officials performing activities at the disposal of a trade union or staff association does not entail any discrimination. Moreover, although the performance of certain staff representation duties, such as those of chairman of a staff committee or chairman of a trade union or staff association, may, in certain cases, give grounds for assuming that, in themselves, those representation duties involve a high level of responsibilities it is for the official placed at the disposal of such an organisation to prove the existence, level and duration of the responsibilities which he has actually and specifically held.

2. DISCIPLINARY PROCEEDINGS

Ruling on the legality of a decision by which the administration, following untruthful statements by the member of staff concerned, decided that the member of staff concerned would, when her contract came to an end, be barred from recruitment by the institution for a period of six years, the Tribunal held, in its judgment of 20 July 2016, ***HC*** v ***Commission*** (F-132/15, EU:F:2016:158), that such a measure, given its clearly coercive objective, was nothing less than a penalty imposed by the administration for the conduct complained of. The contested decision was therefore annulled on the grounds, first, that it was not adopted on the basis of the provisions on disciplinary proceedings under the Staff Regulations and, second, that there was, in any event, no provision for it amongst the penalties which may be imposed under those provisions of the Staff Regulations.

In addition, in the judgment of 17 February 2016, ***Kerstens*** v ***Commission*** (F-23/15, EU:F:2016:65, under appeal), the Tribunal took the view that, in the procedure applicable at the Commission concerning disciplinary matters, the general implementing provisions adopted by the Commission concerning the conduct of administrative enquiries and disciplinary proceedings establish the requirement to conduct

an administrative enquiry prior to initiating disciplinary proceedings. Where the Commission initiates disciplinary proceedings without having conducted an administrative enquiry, it infringes its obligations under those general implementing provisions.

3. RELOCATION OF TEMPORARY AND CONTRACT STAFF ON THE TRANSFER OF THE SEAT OF AN AGENCY FROM ONE MEMBER STATE TO ANOTHER

In implementation of the decision of the Council of the European Union to transfer the seat of the European Police College (CEPOL) to Budapest (Hungary) following the refusal of the United Kingdom to continue to host the agency in its territory, the director of that agency asked members of staff to take up their duties in the new seat and stated that a refusal would be construed as resignation. In an action brought by several groups of staff members, some of whom remained in the United Kingdom and some of whom went to work at the new seat, the Tribunal held, in its judgment of 11 April 2016, ***FN and Others*** v ***CEPOL*** (F-41/15 DISS II, EU:F:2016:70), that the fact that a member of staff does not report to his place of work may be regarded as the expression by that member of staff of conduct of a person who has resigned which is, therefore, tantamount to resignation for the purposes of Article 47 of the CEOS. Recalling, inter alia, that, at any time, the EU legislature or the Heads of State or governments of the Member States may change the seats of the various institutions and agencies of the European Union and that, pursuant to Article 20 of the Staff Regulations, applicable by analogy to temporary and contract staff by virtue of Articles 11 and 81 of the CEOS, EU officials and members of staff are to reside either in the place where they are employed or at no greater distance therefrom than is compatible with the proper performance of their duties, the Tribunal also confirmed that the AECE may also decide to assign members of the temporary and contract staff and reassign them to a place of work in another Member State, since only local staff, who are specifically recruited under contract in a particular place, are entitled to object to a change in their place of employment because for them the continuity of their place of work is part of their actual conditions of employment.

4. INTERRUPTION OF THE CAREER PATH OF A MEMBER OF STAFF

In a judgment of 17 February 2016, ***DE*** v ***EMA*** (F-58/14, EU:F:2016:16), the Tribunal applied the judgment of 16 September 2015 which the General Court delivered in ***EMA*** v ***Drakeford*** (T-231/14 P, EU:T:2015:639). Under that judgment, where it falls to be determined whether the second renewal of the contract of a member of the temporary staff within the meaning of Article 2(a) of the CEOS is to be for an indefinite period, the words 'any further renewal' appearing in the third sentence of the first paragraph of Article 8 of the CEOS must be taken to refer to any process that leads to a temporary staff member under Article 2(a) of the CEOS, at the end of his engagement for a fixed period, continuing, in that capacity, his employment relationship with his employer, even if such renewal is accompanied by grade progression or a change in the duties performed. Still according to that judgment of the General Court, the situation could be otherwise only if the new contract were to be covered by a different legal regime or if it were to mark an interruption of the career path, as shown, for instance, by a material change in the nature of the duties performed by the staff member concerned. In this case, the European Medicines Agency, having renewed the applicant's contract as a member of the temporary staff once, offered him a new contract. After comparing the duties performed by the applicant under his first contract with those performed under the second contract, the Tribunal found that the nature of the applicant's duties had undergone significant changes as regards his tasks and responsibilities, his management and supervision tasks and his position within the agency as reflected in the establishment plan.

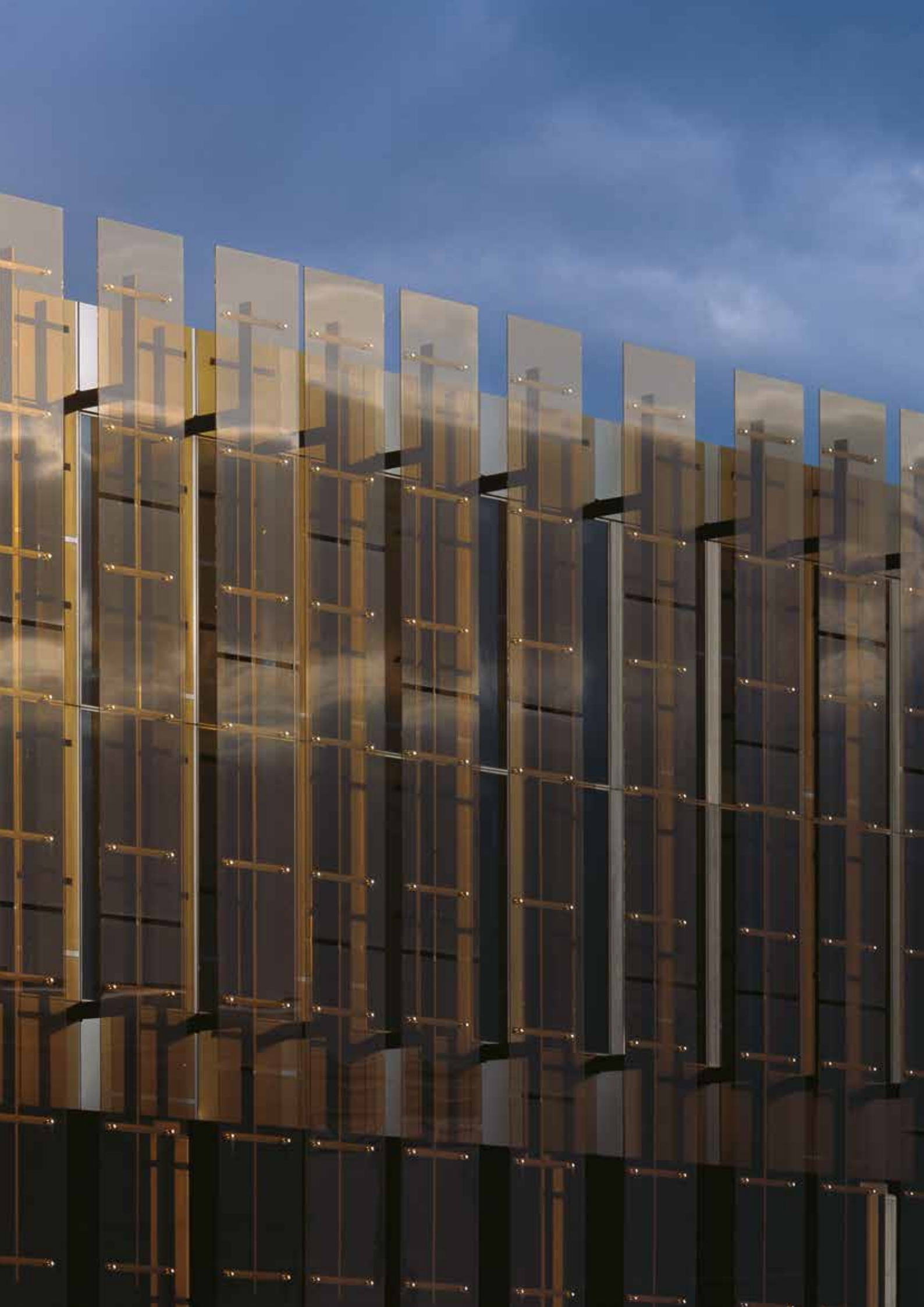
The Tribunal held that those facts constituted an interruption of his career path within the meaning of the interpretation upheld by the General Court in the judgment cited above.

WHISTLEBLOWER

Ruling in a case referred back after annulment concerning an official who, in accordance with Articles 12a and 22a of the Staff Regulations, alerted his superiors to harassment or other facts giving rise to a presumption of the existence of possible illegal activity detrimental to the interests of the European Union, the Tribunal held, in its judgment of 2 June 2016, ***Bermejo Garde*** v ***EESC*** (F-41/10 RENV, EU:F:2016:123), that, both in the case of an official who considers himself to have been the victim of harassment within the meaning of Article 12a of the Staff Regulations and in that of an official who, pursuant to Article 22a of the Staff Regulations, alerts his superiors within the institution, or the European Anti-Fraud Office ('OLAF') directly, the facts reported must in any case be communicated to the relevant institution in a manner which is compatible with the general obligations laid down in Articles 11 and 12 of the Staff Regulations.

In the same judgment, the Tribunal first found that any complaint of psychological or sexual harassment against a superior will, in most cases, involve a breakdown in the relation of administrative trust between the officials concerned. In that connection, the Tribunal held, however, that Article 12a of the Staff Regulations confers 'special protection' on an official who has been the victim of such harassment, in order to combat such instances of harassment effectively by providing that such an official, where he has made a complaint under that article and in accordance with the general obligations laid down in Articles 11 and 12 of the Staff Regulations, is not, in principle, to be caused to suffer any adverse effects by the institution, especially where the relationship of administrative trust no longer subsists, forexample, where the alleged harasser is the direct superior of the victim.

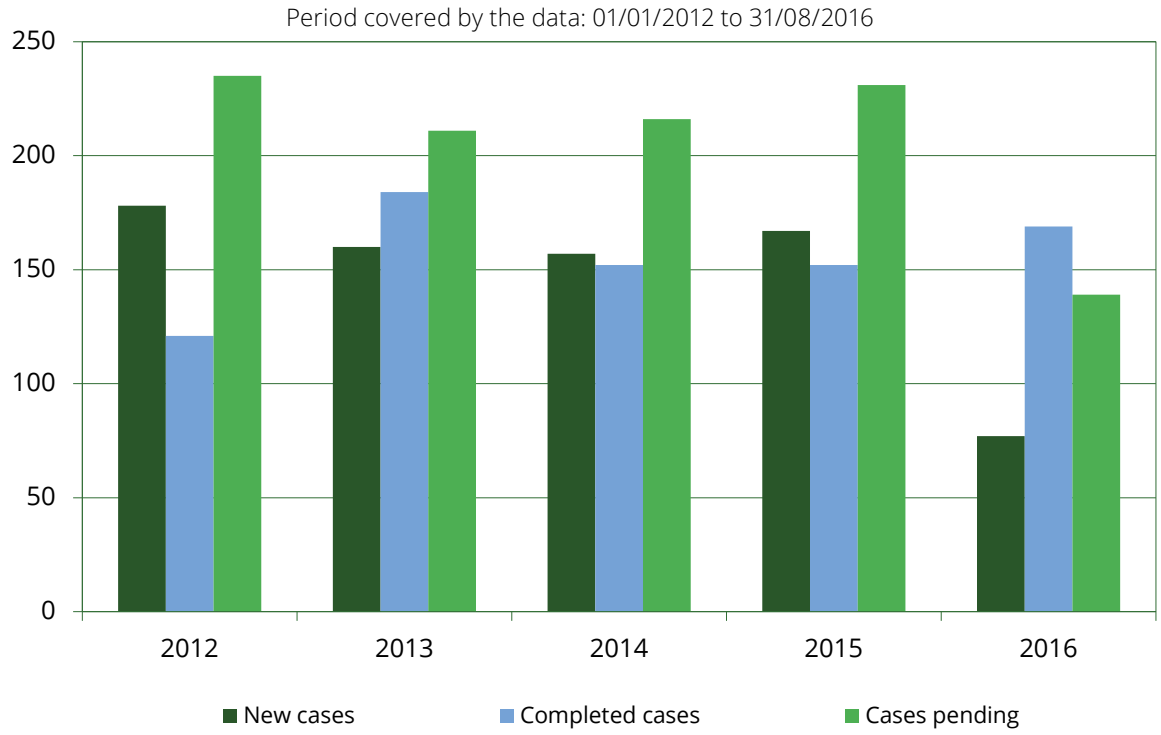
As regards the assessment of the good faith of the official who blows the whistle, in the light of the three criteria for assessment set out by the General Court in its judgment referring the case back to the Tribunal (judgment of 8 October 2014, ***Bermejo Garde*** v ***EESC***, T-530/12 P, EU:T:2014:860), namely the serious nature of the facts complained of, the authentic or plausible nature of the information transmitted and the means of communication used, the General Court held that Article 22a of the Staff Regulations did not require the person concerned to establish a 'presumption of the existence of illegal activity or serious failure to comply with obligations' because that is a fairly complex operation in law which is, therefore, not within reach of all officials or staff of the European Union. Article 22a of the Staff Regulations is limited to a provision that any official who has knowledge of facts which 'could give rise to a presumption' of the existence of conduct 'which may constitute a serious failure to comply with the obligations of officials' under the Staff Regulations is to inform his immediate superiors 'without delay'. Thus, Article 22a(2) of the Staff Regulations then imposes on the immediate superiors of the whistleblower the obligation to transmit 'without delay' to OLAF 'any evidence' which they are aware of regarding the existence of the irregularities reported to them.



C | STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE CIVIL SERVICE TRIBUNAL

I. GENERAL ACTIVITY OF THE CIVIL SERVICE TRIBUNAL

1. NEW CASES, COMPLETED CASES, CASES PENDING (JANUARY 2012 – AUGUST 2016)



	2012	2013	2014	2015	2016
New cases	178	160	157	167	77
Completed cases	121	184	152	152	169 [1]
Cases pending	235	211	216	231	139 [2]

The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

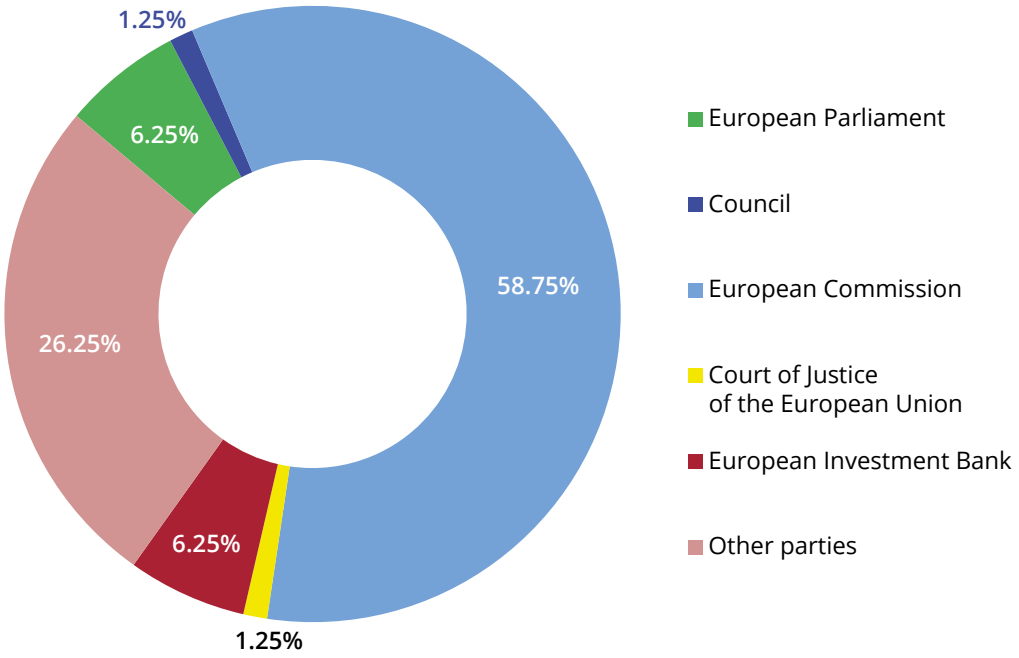
1 | Including two joined cases.

2 | Including 46 cases in which proceedings were stayed and 4 joined cases

II. NEW CASES

2. PERCENTAGE OF THE NUMBER OF CASES PER PRINCIPAL DEFENDANT INSTITUTION

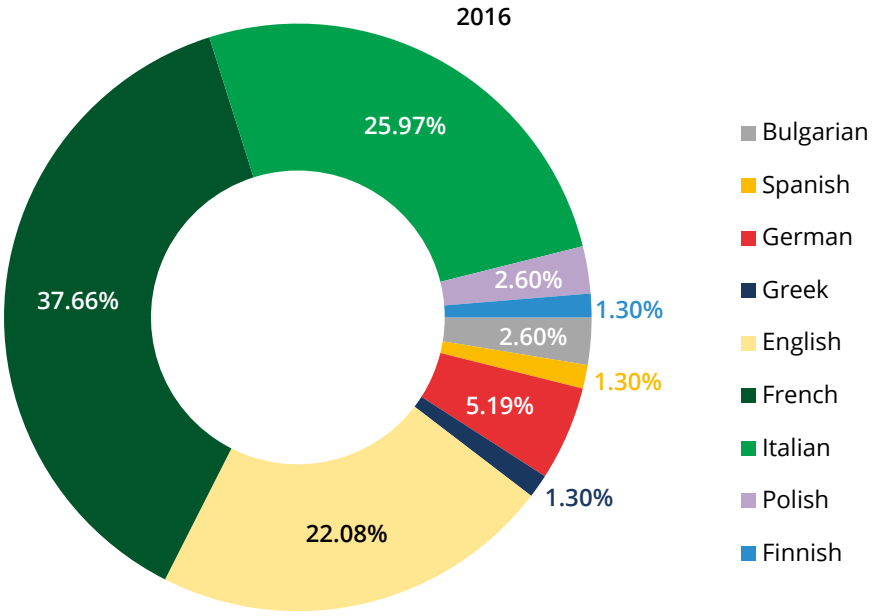
Percentage of number of new cases brought in 2016
Period covered by the data: 01/01/2012 to 31/08/2016



	2012	2013	2014	2015	2016
European Parliament	6.11%	5.66%	11.80%	8.38%	6.25%
Council	3.89%	3.77%	8.70%	5.99%	1.25%
European Commission	58.33%	49.69%	45.96%	52.69%	58.75%
Court of Justice of the European Union		0.63%		1.80%	1.25%
European Central Bank (ECB)	1.11%	1.89%	1.24%	2.40%	
Court of Auditors	2.22%	0.63%	1.24%	0.60%	
European Investment Bank (EIB)	4.44%	5.03%	1.24%	3.59%	6.25%
Other parties	23.89%	32.70%	29.81%	24.55%	26.25%
Total	**100%**	**100%**	**100%**	**100%**	**100%**

3. LANGUAGE OF THE CASE

Period covered by the data: 01/01/2012 to 31/08/2016



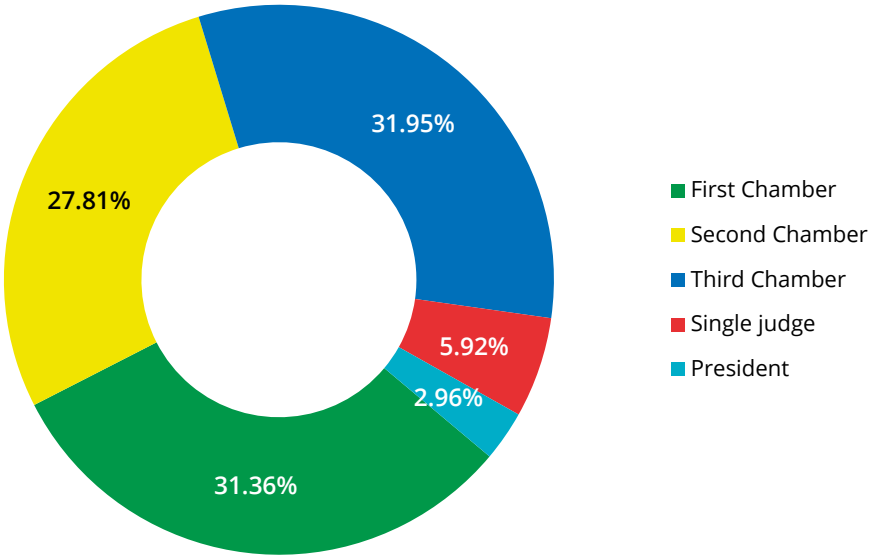
Language of the case	2012	2013	2014	2015	2016
Bulgarian	2				2
Spanish	3		2	5	1
German	5	2	9	7	4
Greek	1	4	2	1	1
English	14	26	23	20	17
French	108	95	113	122	29
Italian	35	21	8	8	20
Dutch	6	12		2	
Polish	2				2
Romanian	2				
Finnish					1
Swedish				2	
Total	**178**	**160**	**157**	**167**	**77**

The language of the case corresponds to the language in which the proceedings were brought and not to the applicant's mother tongue or nationality.

III. COMPLETED CASES

4. JUDGMENTS AND ORDERS – BENCH HEARING ACTION

Period covered by the data: 01/01/2016 to 31/08/2016



	Judgments	Orders for removal from the register, following amicable settlement [1]	Other orders terminating proceedings	Total
Full court				
First Chamber	6		47	53
Second Chamber	18	1	28	47
Third Chamber	21	4	29	54
Single judge	7	3		10
President			5	5
Total	**52**	**8**	**109**	**169**

1 | In the course of 2016, there were also 10 unsuccessful attempts to bring cases to a close by amicable settlement on the initiative of the Civil Service Tribunal.

5. OUTCOME

Period covered by the data: 01/01/2016 to 31/08/2016

	Judgments		Orders				Total
	Actions upheld in full or in part	Actions dismissed in full, no need to adjudicate	Actions/applications (manifestly) inadmissible or unfounded	Amicable settlements following intervention by the bench hearing the action	Removal from the register on other grounds, no need to adjudicate or referral	Applications upheld in full or in part (special forms of procedure)	
Assignment/Reassignment	2	1					**3**
Competitions	1		2	1			**4**
Working conditions/Leave		1					**1**
Appraisal/Promotion		9	2		1		**12**
Pensions and invalidity allowances	5	5	34		44		**88**
Disciplinary proceedings	1	4					**5**
Recruitment/Appointment/ Classification in grade	2	1	2	1			**6**
Remuneration and allowances	2	4		1	2		**9**
Termination or non-renewal of a contract as a member of staff	3	4	2	2	1		**12**
Social security/Occupational disease/Accidents	4		2	2			**8**
Other	3		4	1	1	12	**21**
Total	**23**	**29**	**48**	**8**	**49**	**12**	**169**

6. APPLICATIONS FOR INTERIM MEASURES (2012-16)

Applications for interim measures brought to a conclusion		Outcome		
		Granted in full or in part	Dismissal	Removal from the register
2012	**11**		10	1
2013	**3**		3	
2014	**5**	1	4	
2015	**2**		2	
2016	**2**		2	
Total	**23**	**1**	**21**	**1**

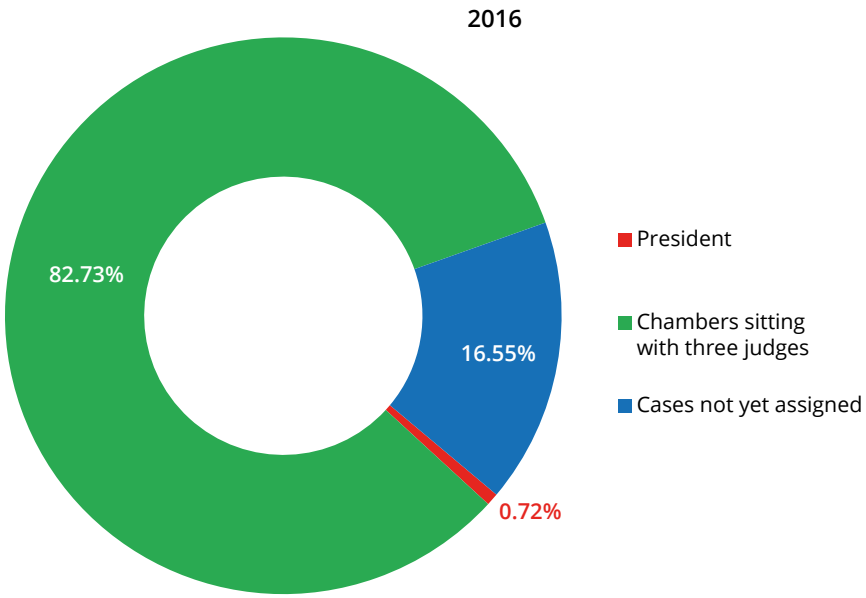
7. DURATION OF PROCEEDINGS IN MONTHS (2016)

Completed cases		Average duration	
		Duration of full procedure	Duration of procedure, not including duration of any stay of proceedings
Judgments	52	11.3	11.2
Orders	117	24.3	9.4
Total	**169**	**20.3**	**10.0**

The durations are expressed in months and tenths of months.

IV. CASES PENDING AS AT 31 DECEMBER

8. BENCH HEARING ACTION (2012–16)



	2012	2013	2014	2015	2016
Full court	1	1			
President		2	1	2	1
Chambers sitting with three judges	205	172	201	219	115
Single judge	8	3	2	1	
Cases not yet assigned	21	33	12	9	23
Total	**235**	**211**	**216**	**231**	**139**

9. NUMBER OF APPLICANTS

The pending cases with the greatest number of applicants in 2016

Number of applicants	Fields
486	Staff Regulations — EIB — Remuneration — Annual adjustment of salaries Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
484	Staff Regulations — Remuneration — Reform of the system of remuneration and salary increments at the EIB Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
451	Staff Regulations — EIB — Remuneration — New performance system — Allocation of bonuses Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
394 (three cases)	Staff Regulations — EIB — Remuneration — Annual adjustment of salaries Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
34	Staff Regulations — Referral back following review of the judgment of the General Court — EIB — Pensions — Reform of 2008 Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
32	Staff Regulations — EIB — Pensions — Reform of the pension scheme Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
32 (eight cases)	Staff Regulations — Staff Regulations of officials — Reform of the Staff Regulations of 1 January 2014 — New rules for the calculation of travel expenses from place of employment to place of origin — Link between the grant of this benefit and expatriate status Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
30	Staff Regulations — European Investment Fund — Remuneration — Annual adjustment of salaries Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
29	Staff Regulations — European Investment Fund — Remuneration — Reform of the system of remuneration and salary increments at the EIF Staff Regulations — Members of the contract staff — Member of the temporary staff — Conditions of engagement — Duration of contract
26 (four cases)	Staff Regulations — Staff Regulations of officials — Reform of the Staff Regulations of 1 January 2014 — New rules for the calculation of travel expenses from place of employment to place of origin — Link between the grant of this benefit and expatriate status — Abolition of travelling time

The term 'Staff Regulations' means the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.

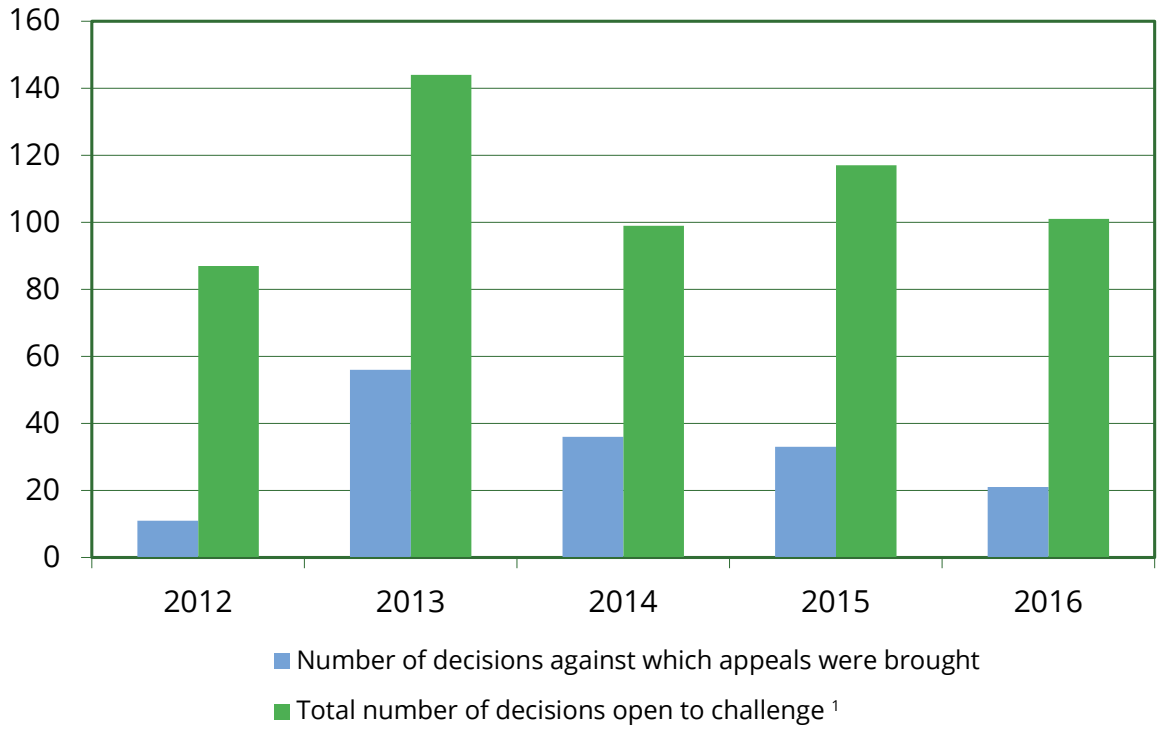
Total number of applicants for all pending cases (2012–16)

	Total applicants	Total pending cases
2012	1 086	235
2013	1 867	211
2014	1 902	216
2015	2 333	231
2016	2 211	139

V. MISCELLANEOUS

10. APPEALS AGAINST DECISIONS OF THE CIVIL SERVICE TRIBUNAL TO THE GENERAL COURT

Period covered by the data: 01/01/2012 to 31/08/2016

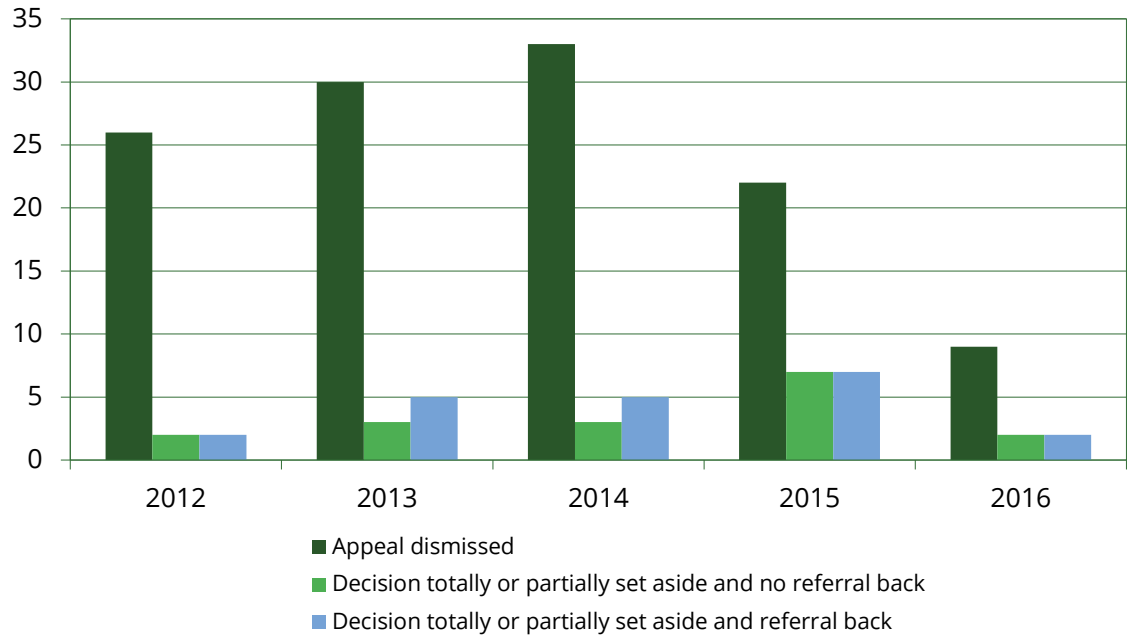


	Number of decisions against which appeals were brought	Total number of decisions open to challenge [1]	Percentage of decisions appealed [2]
2012	11	87	12.64%
2013	56	144	38.89%
2014	36	99	36.36%
2015	33	117	28.21%
2016	21	101	20.79%

1 | Judgments, orders — declaring the action inadmissible, manifestly inadmissible or manifestly unfounded, orders for interim measures, orders that there is no need to adjudicate and orders refusing leave to intervene — made or adopted during the reference year.

2 | For a given year this percentage may not correspond to the decisions subject to appeal given in the reference year, since the period allowed for appeal may span two years.

11. RESULTS OF APPEALS BEFORE THE GENERAL COURT (2012–16)



	2012	2013	2014	2015	2016
Appeal dismissed	26	30	33	22	9
Decision totally or partially set aside and no referral back	2	3	3	7	2
Decision totally or partially set aside and referral back	2	5	5	7	2
Removal from the register/no need to adjudicate	3		1	1	
Total	**33**	**38**	**42**	**37**	**13**

D | COMPOSITION OF THE CIVIL SERVICE TRIBUNAL

(order of precedence as at 31 August 2016)

From left to right:

J. Sant'Anna, Judge; E. Perillo, Judge; R. Barents, President of Chamber; S. Van Raepenbusch, President of the Tribunal; K. Bradley, President of Chamber; J. Svenningsen, Judge; A. Kornezov, Judge; W. Hakenberg, Registrar.

1. CHANGE IN THE COMPOSITION OF THE CIVIL SERVICE TRIBUNAL IN 2016

By decision of 22 March 2016, the Council of the European Union appointed Mr João Sant'Anna and Mr Alexander Kornezov as judges at the European Union Civil Service Tribunal for the period from 13 April 2016 to the date on which the Tribunal's jurisdiction would be transferred to the General Court of the European Union.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2016 TO 13 APRIL 2016

S. VAN RAEPENBUSCH, President of the Tribunal
R. BARENTS, President of Chamber
K. BRADLEY, President of Chamber
H. KREPPEL, Judge
M.I. ROFES i PUJOL, Judge
E. PERILLO, Judge
J. SVENNINGSEN, Judge

W. HAKENBERG, Registrar

14 APRIL 2016 TO 31 AUGUST 2016

S. Van RAEPENBUSCH, President of the Tribunal
R. BARENTS, President of Chamber
K. BRADLEY, President of Chamber
E. PERILLO, Judge
J. SVENNINGSEN, Judge
J. SANT'ANNA, Judge
A. KORNEZOV, Judge

W. HAKENBERG, Registrar

FORMER MEMBERS OF THE CIVIL SERVICE TRIBUNAL

(in order of their entry into office)

JUDGES

Horstpeter KREPPEL (2005-16)
Paul J. MAHONEY (2005-11)
Irena BORUTA (2005-13)
Heikki KANNINEN (2005-09)
Haris TAGARAS (2005-11)
Sean Van RAEPENBUSCH (2005-16), President from 2011 to 2016
Stéphane GERVASONI (2005-11)
Maria Isabel ROFES i PUJOL (2009-16)
Ezio PERILLO (2011-16)
René BARENTS (2011-16)
Kieran BRADLEY (2011-16)
Jesper SVENNINGSEN (2013-16)
João SANT'ANNA (2016)
Alexander KORNEZOV (2016)

PRESIDENTS

Paul J. MAHONEY (2005-11)
Sean Van RAEPENBUSCH (2011-16)

REGISTRAR

Waltraud HAKENBERG (2005-16)

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