



COURT OF JUSTICE
OF THE EUROPEAN UNION

A photograph of a modern building interior with a staircase and large windows, overlaid with a large gold triangle.

2017

ANNUAL REPORT

JUDICIAL ACTIVITY

COURT OF JUSTICE OF THE EUROPEAN UNION



ANNUAL REPORT 2017

JUDICIAL ACTIVITY

Synopsis of the judicial activity of the Court of Justice and the General Court

Luxembourg, 2018

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Koen LENAERTS

President of the Court of Justice
of the European Union

Transparency and cooperation were the hallmarks of 2017.

The 'Judicial Network of the European Union' (JNEU) was launched last April under the aegis of the Court of Justice, as a follow-up to the Meeting of Judges held a month earlier to mark the 60th anniversary of the Treaty of Rome, which brought together the judges of the institution and the Presidents of the Constitutional and Supreme Courts of the Member States on the topic 'The European justice network: a guarantee of high-quality justice'. That network, which has been in operation since 3 January 2018, seeks to strengthen the cooperation between the Court of Justice and the national courts by means of a multilingual platform enabling them to share, in a perfectly secure environment, information and documents intended to promote mutual understanding of the case-law of the Union and that of the Member States and to deepen preliminary ruling dialogue between the Court of Justice and the national courts.

I would like to take this opportunity to thank in particular the Directorate for Information Technology, the Research and Documentation Directorate, and the Communications and Translation Directorates, whose commitment and efficiency have greatly contributed to the interest and enthusiasm generated by this initiative among the 67 participating constitutional and supreme courts.

At the institutional level, the first two of the three phases of the reform of the judicial structure of the European Union adopted by the EU legislature in December 2015 have practically been completed. Although a final appointment is still to be made to complete the first phase of the doubling of the number of judges at the General Court by 2019, the second phase of that reform, by contrast, was completed with the entry into office of two additional judges in June and October 2017, respectively.

In parallel, and while the considerable reduction in the duration of proceedings before the General Court constitutes the first tangible benefit of that significant reform, the Court, in response to an invitation by the EU legislature, sent the European Parliament, the Council and the Commission a report on 14 December 2017 in which it concludes that it is not necessary, at this stage, to transfer part of its jurisdiction for requests for a preliminary ruling to the General Court, but calls for a wider reflection on the division of jurisdiction between the Court of Justice and the General Court, in particular as regards direct actions and the handling of appeals by the Court of Justice.

The year 2017 was also characterised, internally, by a reorganisation of the administrative services of the institution which, in the context of budgetary constraints, the continual increase in the workload and rapid technological advancement, aims to bring about considerable synergies and better to align the Court's services with the requirements of its judicial activity. A further aim of that restructuring, which took effect on 1 January 2018, is to enable the institution to become more open and to enhance cooperation with its various interlocutors, especially at the national level.

More specifically, the administrative structure of the institution has been restructured around three directorates-general — replacing the hitherto four — namely a Directorate-General for Administration, a Directorate-General for Multilingualism — a first for the EU institutions — and a Directorate-General for Information, while the Research and Documentation Directorate and the Terminology Projects and Coordination Unit have been attached directly to the Registrar of the Court.

As regards statistics, 2017 was another year of unflagging activity. The overall number of cases brought before the courts comprising the institution (1 656) was higher than in 2016 (1 604). That increase applies in particular to the Court of Justice, before which a record number of cases was brought over the past year (739). The number of cases closed in 2017 remained very significant (1 594, compared with 1 628 in 2016).

This report provides a full record of changes concerning the institution and of its work in 2017. As in previous years, a substantial part is devoted to succinct but exhaustive accounts of the main judicial activity of the Court of Justice and the General Court. Separate statistics for each court, preceded by a brief introduction, supplement and illustrate the analysis.

I would like to take this opportunity to express my warmest thanks to my colleagues and the entire staff for their commitment and the outstanding work carried out by them for our institution and, through it, the European project. In October 2017, the Award for 'Concord' of the Princess of Asturias Foundation was bestowed on the European Union for its 'unique model of supranational integration' which has achieved 'the longest period of peace in modern Europe' and disseminated 'values such as freedom, human rights and solidarity' to the world. This must serve as a reminder to us, in a Europe in which terrorism, the migration crisis and nationalist tendencies are all too present, of the need to reaffirm tirelessly the paramount importance of those founding values and to subscribe to them unreservedly.

A handwritten signature in blue ink, reading "K. Lenaerts". The signature is written in a cursive style with a long horizontal flourish at the end.



CHAPTER I

THE COURT OF JUSTICE



A/ THE COURT OF JUSTICE IN 2017: 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 2017. It begins, in this first 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 composition of the Court in that no judges or Advocates General departed or entered into office in the course of 2017.

1.2. As regards the functioning of the institution, the implementation 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), which is set to double the number of judges at the General Court by 2019, continued over the past year. Although one nomination is still to be made in order to complete the first phase of that reform, the second phase thereof was completed with the entry into office of two additional judges in formal sittings held on 8 June and 4 October 2017.

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; 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 brought before the Court in 2017. 739 cases were registered before the Court over the course of the year, which sets a new record in the history of the institution, eclipsing the 713 cases registered in 2015. That record number is due in particular to the rise in the number of requests for a preliminary ruling (533, namely a 13% increase on the previous record set in 2016), which can largely be explained by the lodging of a series of similar cases (43) seeking an interpretation of Regulation (EC) No 261/2004¹ concerning compensation to air passengers. In parallel, the number of actions for failure of a Member State to fulfil obligations continued to rise (41 in 2017, compared with 31 in 2016). As regards appeals, the number lodged before the Court in 2017 (141) was lower than in the two previous years (206 in 2015 and 168 in 2016).

Another striking trend of the past year relates to the total number of cases completed by the Court: with 699 cases completed, the Court's productivity in 2017 was practically on a par with that of 2016 (704). Account being taken of the joining of the 'airline' cases referred to above, 2017 was thus a balanced year (697 cases lodged and 699 cases closed).

^{1/} Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

So far as concerns the average duration of proceedings before the Court, the average duration of proceedings regarding requests for a preliminary ruling, although slightly up on 2016 (15 months, which was the lowest average duration recorded in the history of the Court), remained less than 16 months (15.7 months), which is still noteworthy in the light of the complexity of some of the legislation recently referred to the Court for interpretation. The increase was more pronounced with regard to the average duration of appeal proceedings (17.1 months compared with 12.9 months in 2016), which can be largely explained by the completion over the past year of complex competition law cases, of which 14 were appeal proceedings in a very large cartel case concerning bathroom fittings and fixtures manufacturers.

B/CASE-LAW OF THE COURT OF JUSTICE IN 2017

I. FUNDAMENTAL RIGHTS

In 2017, 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 Special mention must be made in this section of Opinion 1/15 as well as the judgments in *G4S Secure Solutions* (C-157/15), *Boungaoui and ADDH* (C-188/15), *Florescu* (C-258/14) and *Jyske Finans* (C-668/15).

In *Opinion 1/15* (EU:C:2017:592) of 26 July 2017, the Court, sitting as the Grand Chamber, ruled on the compatibility with the provisions of the Treaties and, for the first time, with those of the Charter of Fundamental Rights of the European Union, of an international agreement, namely the agreement negotiated between Canada and the European Union on the transfer and processing of Passenger Name Record data, signed in 2014. The envisaged agreement permits the systematic and continuous transfer of the Passenger Name Record data (PNR data) of all air passengers travelling between Canada and the European Union to the competent Canadian authorities with a view to that data being used and retained, and possibly transferred subsequently to other authorities and to other non-member countries, for the purpose of combating terrorism and forms of serious transnational crime.

In the light of the various forms of processing to which PNR data may be subject under the envisaged agreement, the Court found that such processing affects the fundamental right to respect for private life, guaranteed in Article 7 of the Charter, and also falls within the scope of Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article. As regards possible justification for such interferences, the Court pointed out that the objective pursued by the envisaged agreement, namely to ensure public security by means of a transfer of PNR data to Canada and the use of that data within the framework of the fight against terrorist offences and serious transnational crime, constitutes an objective of general interest of the European Union that is capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter, provided that those interferences are limited to what is strictly necessary.

However, in the case of the possible transfer to Canada of sensitive data, such as racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or data concerning a passenger's health or sex life, the Court held that, having regard to the risk of data being processed contrary to the prohibition on discrimination enshrined in Article 21 of the Charter, a transfer of such data requires a precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime. The Court considered that, in this instance, there was no such justification.

^{1/} The following judgments are included: judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448), presented in Section I 'Fundamental rights'; judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354), presented in Section II 'Citizenship of the Union'; judgments of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127); of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173); of 15 March 2017, *Al Chodor and Others* (C-528/15, EU:C:2017:213); of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805); of 26 July 2017, *Jafari* (C-646/16, EU:C:2017:586); and of 6 September 2017, *Slovakia and Hungary v Council* (C-643/15 and C-647/15, EU:C:2017:631), presented in Section VIII.1 'Asylum Policy'; judgments of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174), and of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373), presented in Section XII 'Fiscal provisions'; judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914), presented in Section XV 'Social policy'; judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987), presented in Section XVII.4 'Aarhus Convention'; and judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), presented in Section XX 'Common foreign and security policy'.

It concluded that the provisions of the agreement on the transfer of sensitive data and on the processing and retention of that data were incompatible with fundamental rights.

By contrast, the Court took the view that, as regards data other than sensitive data, the provisions of the envisaged agreement did not exceed the limits of what is strictly necessary in so far as they permit the transfer of the PNR data of all air passengers to Canada. The automated analysis of PNR data is intended to identify the risk to public security that persons who are not known to the competent services may potentially present, and who may, on account of that risk, be subject to further examination at borders. That processing of data facilitates and expedites the security checks to which, in accordance with Article 13 of the Chicago Convention,² all air passengers who wish to enter or depart from Canada are subject, those passengers being required to comply with the conditions on entry and departure laid down by the Canadian law in force. For the same reasons, for as long as the passengers are in Canada or are due to leave that non-member country, the necessary connection between that data and the objective pursued by the envisaged agreement exists, so that that agreement does not exceed the limits of what is strictly necessary merely because it permits the systematic retention and use of their PNR data.

However, as regards the use of PNR data during the air passengers' stay in Canada, the Court pointed out that, since following verification of their PNR data the air passengers have been allowed to enter the territory of that non-member country, the use of that data during their stay in Canada must be based on new circumstances justifying that use. That use therefore requires rules laying down the substantive and procedural conditions governing such use in order, *inter alia*, to protect the data in question against the risk of abuse. Such rules must be based on objective criteria in order to define the circumstances and conditions under which the Canadian authorities referred to in the envisaged agreement are authorised to use that data. In order to ensure that those conditions are fully respected in practice, the use of retained PNR data during the air passengers' stay in Canada must, as a general rule, except in cases of validly established urgency, be subject to a prior review carried out by a court or by an independent administrative body, the decision of that court or body being made following a reasoned request by the competent authorities submitted, *inter alia*, within the framework of procedures for the prevention, detection or prosecution of crime.

Furthermore, the continued storage of the PNR data of all air passengers after their departure from Canada, which the envisaged agreement permits, is not limited to what is strictly necessary. As regards air passengers in respect of whom no risk has been identified as regards terrorism or serious transnational crime on their arrival in Canada and up to their departure from that country, there would not appear to be, once they have left, a connection — even a merely indirect connection — between their PNR data and the objective pursued by the envisaged agreement which would justify that data being retained. By contrast, the storage of the PNR data of air passengers in respect of whom there is objective evidence from which it may be inferred that they may present such a risk even after their departure from Canada is permissible beyond their stay in Canada, even for a period of five years.

Since the interferences which the envisaged agreement entails are not all limited to what is strictly necessary and are therefore not entirely justified, the Court concluded that the envisaged agreement may not be concluded in its current form.

^{2/} The Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (*United Nations Treaty Series*, Vol. 15, No 102).

In the cases that gave rise to the judgments in **G4S Secure Solutions** (C-157/15, [EU:C:2017:203](#)) and **Bougnaoui and ADDH** (C-188/15, [EU:C:2017:204](#)), delivered on 14 March 2017, the Court, sitting as the Grand Chamber, was called upon to adjudicate on the compatibility with Directive 2000/78³ of the prohibition, by an employer, of the visible wearing of religious signs in the workplace. In those judgments, that directive was, in particular, interpreted in the light of Article 10(1) of the Charter, laying down the right to freedom of conscience and religion.

The first case concerned a female employee who had been dismissed because, notwithstanding the existence of an internal rule at the undertaking where she worked prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, she had expressed her intention on several occasions to wear an Islamic headscarf during working hours. In the second case, a female employee had been dismissed after her employer, following a complaint from a client to whom she had been assigned, asked her not to wear a veil in the future in observance of the principle of the need for neutrality as regards its customers.

The Court recalled that the right to freedom of conscience and religion guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. In so far as the ECHR and, accordingly, the Charter use the term 'religion' in a broad sense, in that they include it in the freedom of persons to manifest their religion, the Court found that that concept should be interpreted for the purpose of Article 1 of Directive 2000/78 as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.

In the first case, since the internal rule at issue refers to the wearing of visible signs of political, philosophical or religious beliefs and thus covers any manifestation of such beliefs without distinction, the Court held that the rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs. In those circumstances, the Court first of all ruled that the prohibition on wearing an Islamic headscarf which arises from an internal rule does not constitute direct discrimination based on religion or belief within the meaning of Article 2(2)(a) of Directive 2000/78. By contrast, the Court found that such an internal rule may constitute indirect discrimination within the meaning of Article 2(2)(b) of that directive if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which is a matter for the national court to ascertain.

In the second case, the Court also pointed out that it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement. That concept refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out and does not cover subjective considerations, such as the employer's willingness to take account of the particular wishes of a customer. The Court concluded, in consequence, that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

^{3/} 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).

In its judgment in **Jyske Finans** (C-668/15, [EU:C:2017:278](#)), delivered on 6 April 2017, the Court ruled on *the prohibition on any direct or indirect discrimination based on ethnic origin* provided for in Article 2(2)(a) and (b) of Directive 2000/43.⁴ In this case, the person concerned, who was born in Bosnia and Herzegovina, resided in Denmark and had acquired Danish nationality in 2000. When purchasing a second-hand car with his Danish partner by means of a loan, the credit company had asked him to provide additional proof of his identity in the form of a copy of his passport or residence permit, since his driving licence indicated a country of birth other than a Member State of the European Union or of the European Free Trade Association (EFTA). No such request was made to his partner, born in Denmark. The person concerned took the view that the credit company's practice was discriminatory and referred the matter to the Danish Equal Treatment Board, which awarded him compensation on grounds of indirect discrimination. The credit company — appearing as applicant before the referring court — considered that it had complied with its obligations under the rules on the prevention of money laundering⁵ and challenged the categorisation of its practice as discriminatory.

In its examination, in the first place, of whether the practice at issue amounted to direct discrimination based on ethnic origin, the Court considered whether a person's country of birth had to be regarded as directly or inextricably linked to his specific ethnic origin. It observed that ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective, such as common nationality, religious faith, language, cultural and traditional origins and background. Accordingly, the Court held that a person's country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts. It cannot therefore be concluded that the requirement to provide additional proof of identification at issue is directly based on ethnic origin and, in consequence, that that practice entails different treatment that is directly based on ethnic origin.

In the second place, the Court examined whether the practice at issue, although on the face of it neutral, constituted indirect discrimination based on ethnic origin which may put persons of a given racial or ethnic origin at a particular disadvantage compared with other persons. It stated that for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question. The Court rejected the argument that the use of the criterion at issue in the main proceedings, namely a person's country of birth, is generally more likely to affect persons of a 'given ethnicity' than 'other persons'. To the same effect, it rejected the argument that the use of that criterion would place at a disadvantage persons whose ethnic origin is that of a country other than a Member State of the European Union or the EFTA.

Since the practice at issue in the main proceedings was neither directly nor indirectly linked to the ethnic origin of the person concerned, the Court held that Article 2(2)(a) and (b) of Directive 2000/43 did not preclude that practice.

On 13 June 2017, in the judgment in **Florescu and Others** (C-258/14, [EU:C:2017:448](#)), the Grand Chamber of the Court ruled on the interpretation of the Memorandum of Understanding concluded in 2009 *between the European Union and Romania*, point 5 of which provides that the disbursement of every instalment of the financial assistance granted by the European Union to Romania is to be carried out subject to the satisfactory implementation of structural reforms to its public finances. It also ruled *on the interpretation of several provisions of EU primary law*,

^{4/} Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

^{5/} 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).

particularly Article 17 of the Charter of Fundamental Rights. The main proceedings concerned *Romanian legislation prohibiting the combining of a net public sector retirement pension with income from activities carried out in public institutions if the amount of that pension exceeds a certain threshold.* The applicants in the main proceedings had, at the same time as holding judicial office, taught at university. At the time of their retirement from the judiciary, they were entitled, initially, to combine their retirement pension with the income derived from their university teaching activities. However, following the adoption of the national legislation at issue, such combining was prohibited. The applicants in the main proceedings brought an action before a national court claiming that the legislation was contrary to EU law, particularly the provisions of the Treaty on European Union (EU Treaty) and the Charter, notwithstanding the fact that it had been adopted in order to comply with the Memorandum of Understanding.

The Court considered that the Memorandum of Understanding is based in law on Article 143 TFEU, which gives the European Union the power to grant mutual assistance to a Member State whose currency is not the euro and which faces difficulties or is seriously threatened with difficulties as regards its balance of payments. It thus ruled that since the Memorandum of Understanding gives concrete form to an agreement between the European Union and a Member State on an economic programme, it must be regarded as an act of an EU institution, within the meaning of Article 267 TFEU, which may, therefore, be subject to interpretation by the Court. It observed that the Memorandum of Understanding, although mandatory, contains no specific provision requiring the adoption of national legislation such as that at issue. It is consequently for the national authorities, within the limits of the criteria stipulated in the Memorandum of Understanding, to decide what measures are most likely to attain the objectives pursued.

Next, the Court examined the conformity of the national legislation at issue with Article 6 TEU and Article 17 of the Charter, concerning the right to property. In that regard, the Court stated, in the first place, that the objective of that legislation is to implement the undertakings given by Romania in the Memorandum of Understanding, with the result that the Charter, particularly Article 17 thereof, is applicable to the main proceedings. However, it pointed out that the legislation is of an exceptional nature and is intended to be temporary. It also found that the legislation does not call into question the very principle of the right to a pension, but restricts its exercise in well-defined and limited circumstances. Thus, the legislation is consistent with the essential content of the right to property enjoyed by the applicants in respect of their pensions. In the second place, the Court noted that the objectives of that legislation, namely to reduce public sector wage costs and reform the pension system in an exceptional context of financial and economic crisis in Romania, are objectives of general interest. Lastly, as regards the suitability and necessity of the legislation at issue, the Court stated that, given the particular economic context, Member States have a broad discretion when adopting economic decisions and are in the best position to determine the measures likely to achieve the objective pursued. The Court therefore concluded that EU law did not preclude the national legislation at issue.

II. CITIZENSHIP OF THE UNION

As regards European citizenship, mention must be made of three judgments. The first concerns the conditions under which a citizen can be the subject of an expulsion decision by a Member State other than the State of origin, while the second and third relate to the derived right of residence of third country nationals who are family members of a Union citizen.

In its judgment in **Petrea** (C-184/16, [EU:C:2017:684](#)), delivered on 14 September 2017, the Court ruled on *the application of Directive 2004/38*⁶ where a person who is the subject of an order excluding him from a Member State re-enters the Member State concerned in infringement of that order. In the instant case, the Greek authorities had issued an expulsion decision accompanied by an entry ban against a Romanian national in 2011 on the ground that he constituted a serious threat to public policy and public security. In 2013, the person concerned returned to Greece where he submitted an application for a certificate of registration as a Union citizen, which was granted to him. After discovering that the person concerned was still subject to an exclusion order, the Greek authorities decided to withdraw that certificate and, again, order his return to Romania. The person concerned challenged that decision.

The Court recalled that the grant of a residence permit to a national of a Member State is to be regarded not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of EU law. Only a declaratory character attaches, therefore, to such a registration certificate, with the result that the issue of that document cannot, in itself, give rise to a legitimate expectation on the part of the person concerned in his right to stay on the territory of the Member State concerned. Furthermore, Member States are able, under Article 27(1) of Directive 2004/38, to restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. According to the Court, it follows from the very nature of an exclusion order that it remains in force as long as it has not been lifted. Consequently, the mere finding that it has been infringed allows the competent authorities to adopt a new expulsion decision. The Court therefore held that Directive 2004/38 and the protection of legitimate expectations do not preclude the withdrawal of the person concerned's residence permit or the taking of a further expulsion decision against him in the circumstances of the case.

The Court also ruled on whether the principle of effectiveness precludes a legal practice according to which a national of a Member State who is subject to a return order may not rely, in support of an action against that order, on the unlawfulness of the exclusion order previously adopted against him. The Court recalled that, in the absence of EU rules, the Member States are responsible for determining the rules of procedure governing court actions, but those rules must not be such as to render virtually impossible or excessively difficult the exercise of those rights. In the instant case, EU law in no way precludes national legislation from providing that it is not possible to rely, against an individual measure, such as a return decision, on the unlawfulness of an exclusion order which has become final, either because the time limit for bringing an action against that order expired or because the action brought against it was dismissed. However, the Court made clear that the person concerned must have had the possibility to contest effectively that order in good time in the light of the provisions of Directive 2004/38.

^{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).

Lastly, as regards the question whether Article 30 of Directive 2004/38 requires a decision adopted under Article 27(1) of that directive to be notified to the person concerned in a language he understands, although he did not bring an application to that effect, the Court stated that the Member States are required to take every appropriate measure to ensure that the person concerned understands the content and implications of a decision restricting his rights of entry or residence for reasons of public policy, public security or public health. However, it does not require that decision to be notified to him in a language he understands or which it is reasonable to assume he understands, even though he did not bring an application to that effect.

On 10 May 2017, in the judgment in *Chavez-Vilchez and Others* (C-133/15, [EU:C:2017:354](#)), the Court, sitting as the Grand Chamber, provided clarification on *the derived right of residence on which a third country national may rely, on the basis of Article 20 TFEU, as the parent of a minor who is a Union citizen*. The reference for a preliminary ruling was concerned with the situation of several third country nationals who were mothers of one or more children with Netherlands nationality whose fathers also have Netherlands nationality. Those children lived in the Netherlands mainly or exclusively with their mothers. The persons concerned had made applications for social assistance and child benefit which had been rejected by the competent Dutch authorities on the ground that they did not have a right of residence in the Netherlands. Proceedings having been brought before it in relation to those applications, a court of the Netherlands asked the Court whether the applicants could, as mothers of children who are Union citizens, acquire a right of residence under Article 20 TFEU.

The Court recalled its case-law that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members — third country nationals — of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status.⁷ In this case, if the mothers were compelled to leave the territory of the EU, that could deprive their children of the genuine enjoyment of the substance of those rights by compelling those children to leave the territory of the EU, which is a matter for the national court to determine. In order to assess that risk, it is important to determine which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, according to the Court, the national authorities must take account of the right to respect for family life, as laid down in Article 7 of the Charter, and the best interests of the child, as recognised in Article 24(2) thereof.

The Court also stated that the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium. As regards the burden of proof, the Court considered that it is for the third-country national parent to provide evidence on the basis of which it can be assessed whether a decision to refuse that person a right of residence would deprive the child of the genuine enjoyment of the substance of the rights attached to the status of Union citizen by obliging the child to leave the territory of the EU. However, it pointed out that the national authorities must ensure that national legislation on the burden of proof does not undermine the effectiveness of Article 20 TFEU.

⁷ Judgments of the Court of 8 March 2011, *Ruiz Zambrano* (C-34/09, [EU:C:2011:124](#)), and of 6 December 2012, *O. and S.* (C-356/11 and C-357/11, [EU:C:2012:776](#)).

On 14 November 2017, by its judgment in **Lounes** (C-165/16, [EU:C:2017:862](#)), the Court, sitting as the Grand Chamber, ruled on *the derived right of residence on which a third country national may rely, on the basis of Article 21 TFEU, as a family member of a Union citizen, in the Member State in which that citizen resided before acquiring the nationality of that Member State in addition to the nationality of origin*. In this case, the applicant, an Algerian national, had entered the United Kingdom on a six-month visitor visa and had subsequently remained illegally in British territory. There, he met a Spanish national who had become a naturalised British citizen while retaining her Spanish nationality. Following their marriage, the applicant applied to the United Kingdom for a residence card as a family member of a national of the European Economic Area (EEA). The United Kingdom authorities refused that application on the basis that, under the UK legislation transposing Directive 2004/38,⁸ his wife had ceased to be regarded as an 'EEA national' following her acquisition of British citizenship and that the applicant could not therefore claim a residence card as a family member of an EEA national. Proceedings having been brought before it by the applicant in relation to that refusal, a UK court asked the Court whether that decision and the UK legislation were compatible with EU law.

In the first place, the Court noted that Directive 2004/38, which lays down the conditions governing the exercise of the right of Union citizens to move and reside freely within the territory of the Member States, is not intended to govern the residence of a Union citizen in the Member State of which he is a national, since, under a principle of international law, he enjoys an unconditional right of residence there. Accordingly, in the Court's view, Directive 2004/38 ceased to govern the residence in the United Kingdom of the applicant's wife when she acquired British nationality. Consequently, her husband — the applicant — cannot benefit from a derived right of residence in the United Kingdom on the basis of the directive.

In the second place, the Court considered whether the applicant could be accorded a derived right of residence in that Member State on the basis of Article 21(1) TFEU, which provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States. The Court stated that if the rights conferred on Union citizens by that provision — in particular the right to lead a normal family life, together with their family members, in the host Member State — are to be effective, citizens in a situation such as that of the applicant's wife must be able to continue to enjoy that right in the host Member State, after they have acquired the nationality of that Member State in addition to their nationality of origin, and must be able to build a family life with their third-country national spouse. Thus, the Court held that a third country national in the applicant's situation is eligible for a derived right of residence in the host Member State, under Article 21(1) TFEU, subject to conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

^{8/} Cited above, see footnote 6.

III. INSTITUTIONAL PROVISIONS

1. POWERS OF THE EU INSTITUTIONS

By its judgment of 26 July 2017, *Czech Republic v Commission* (C-696/15 P, [EU:C:2017:595](#)), the Court confirmed on appeal the judgment of the General Court⁹ dismissing two actions for annulment against Delegated Regulations No 885/2013¹⁰ and No 886/2013¹¹ supplementing Directive 2010/40,¹² adopted in the area of transport policy. In its actions, the Czech Republic had argued in particular that by adopting the contested regulations, *the Commission had exceeded its delegated powers* by imposing on Member States an obligation to establish supervisory bodies to assess compliance with the requirements set out in those regulations. In the judgment under appeal, the General Court had found that the Commission had observed the limits of its power under Article 290 TFEU and the limits of the authority laid down in Directive 2010/40.

The Court pointed out that a delegation of power under Article 290 TFEU enables the Commission to supplement or amend non-essential elements of a legislative act. In accordance with that provision, however, the legislative act must explicitly define not only the objectives, but also the content, scope and duration of the delegation of power, and the EU judicature is not able to make up for the absence of the limits required by that provision. As for determining which elements of a legislative act must be categorised as ‘essential’, the Court recalled that this is not for the assessment of the EU legislature alone, but must be based on objective factors amenable to judicial review. Thus, an element is essential in particular if, in order to be adopted, it requires political choices falling within the responsibilities of the EU legislature, or if it means that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required.

In accordance with those principles, the Court confirmed that, in the instant case, Directive 2010/40 provided the Commission with an adequate legal basis for establishing the disputed national supervisory bodies and that such establishment was not an essential element of the matter in question.

^{9/} Judgment of the General Court of 8 October 2015, *Czech Republic v Commission* (T-659/13 and T-660/13, [EU:T:2015:771](#)).

^{10/} Commission Delegated Regulation (EU) No 885/2013 of 15 May 2013 supplementing ITS Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of information services for safe and secure parking places for trucks and commercial vehicles (OJ 2013 L 247, p. 1).

^{11/} Commission Delegated Regulation (EU) No 886/2013 of 15 May 2013 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to data and procedures for the provision, where possible, of road safety-related minimum universal traffic information free of charge to users (OJ 2013 L 247, p. 6).

^{12/} Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport (OJ 2010 L 207, p. 1).

2. LEGAL ACTS OF THE EUROPEAN UNION

2.1. Legal form of acts

In the judgment in *Commission v Council (C-MR15)* (C-687/15, [EU:C:2017:803](#)) of 25 October 2017, the Grand Chamber of the Court upheld an action for annulment brought by the Commission against the conclusions of the Council adopted on 26 October 2015 concerning the World Radiocommunication Conference 2015 (C-MR15) of the International Telecommunication Union (ITU) on the ground that the Council had infringed the essential procedural requirements under Article 218(9) TFEU.

As regards, in the first place, the form of the contested act, the Court recalled that Article 13(2) TEU provides that each EU institution is to act within the limits of the powers conferred on it in the Treaties and in conformity with the procedures, conditions and objectives set out therein. It held that 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, and that the Treaties alone may, in particular cases, empower an institution to amend a decision-making process established by the Treaties. As regards the legal form of the acts to be adopted under Article 218(9) TFEU, the Court pointed out that the fact that an EU institution derogates from the legal form laid down by the Treaties (in the instant case, the adoption of a decision) constitutes an infringement of essential procedural requirements that is such as to require the annulment of the act concerned, since that derogation is likely to create uncertainty as to the nature of that act or as to the procedure to be followed for its adoption, thereby undermining legal certainty, in breach of the essential procedural requirements set out in that provision.

As regards, in the second place, the fact that the contested act makes no reference to the legal basis on which it was adopted, the Court drew attention to its case-law that the choice of the appropriate legal basis has constitutional significance, since, having only conferred powers, the European Union must link the acts which it adopts to provisions of the Treaty on the Functioning of the European Union (TFEU) which actually empower it to adopt such acts. Accordingly, the derogation from the legal form laid down by Article 218(9) TFEU and the failure to indicate the legal basis are the source of confusion as to the legal nature and scope of the contested act and as to the procedure that had to be followed for its adoption, a confusion that was apt to weaken the European Union in the defence of its position at the World Radiocommunication Conference 2015.

2.2. Procedures for the adoption of acts

Reference should be made to three judgments under this heading. The first concerns the obligation to consult the European Parliament during the EU legislative procedure. The second deals with a proposed European citizens' initiative. The third is the judgment in *Slovakia and Hungary v Council* (C-643/15 and C-647/15, [EU:C:2017:631](#)) relating to provisional measures of a mandatory nature to relocate asylum applicants.¹³

^{13/} That judgment is presented under Section VIII.1 'Asylum policy'.

In its judgment in **RPO** (C-390/15, [EU:C:2017:174](#)), delivered on 7 March 2017, the Court, sitting as the Grand Chamber, confirmed *the validity of the provisions of Directive 2006/112* ¹⁴ allowing Member States to apply a reduced rate of value added tax (VAT) to printed publications such as books, newspapers and periodicals, while excluding digital publications from that specific scheme, with the exception of digital books supplied on a physical support. In the dispute in the main proceedings, the Polish Constitutional Court, hearing an action for a declaration that national provisions precluding the application of a reduced rate of VAT to digital publications were contrary to the Polish constitution, entertained doubts as to whether the corresponding provisions of Directive 2006/112, as amended by Directive 2009/47, ¹⁵ were lawful. It asked the Court, first, whether the Parliament had been sufficiently involved in the legislative procedure for the adoption of Directive 2009/47, which amended the provisions of Directive 2006/112 to allow a reduced rate of VAT to be applied to printed publications, and, secondly, whether the relevant provisions of Directive 2006/112 infringed the principle of equal treatment. ¹⁶

As regards the legislative procedure for the adoption of Directive 2009/47, the Court — after noting that the final version of that directive differed from the proposal on the basis of which the Parliament had been consulted — recalled that due consultation of the Parliament in the cases provided for by the Treaties constitutes an essential procedural requirement disregard of which renders the measure concerned void. That obligation to consult the Parliament means that it must be consulted afresh whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except where the amendments substantially correspond to a wish of the Parliament itself. However, since the final version of the contested provision of Directive 2009/47 was only a simplification of the drafting of the text which was set out in the proposal for a directive on which the Parliament had been consulted and the substance of which had been fully preserved, the Court found that the Council was not required to consult the Parliament afresh before adopting that directive.

In the judgment of 12 September 2017, **Anagnostakis v Commission** (C-589/15 P, [EU:C:2017:663](#)), the Court, sitting as the Grand Chamber, ruled on an appeal brought against the judgment of the General Court ¹⁷ dismissing an action for annulment against a *decision of the Commission refusing to register a proposed European citizens' initiative (ECI)* submitted on the basis of Article 4(2)(b) of Regulation No 211/2011. ¹⁸ The proposed ECI sought, in particular, to enshrine in EU legislation the 'principle of the state of necessity', under which the public debt of countries whose financial and political existence is threatened by the debt itself may be written off.

As regards the Commission's obligation to inform the organisers of the reasons for the refusal to register their proposed ECI, as provided for in Article 4(3) of Regulation No 211/2011, the Court, first of all, pointed out that given the importance of the ECI as a mechanism enabling citizens to participate in the democratic life of the European Union, the Commission is required to provide a clear statement of reasons for such a refusal.

^{14/} Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ 2009 L 116, p. 18).

^{15/} Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ 2009 L 116, p. 18).

^{16/} The Court's answer to the second question is presented in Section XII 'Fiscal provisions'.

^{17/} Judgment of the General Court of 30 September 2015, **Anagnostakis v Commission** (T-450/12, [EU:T:2015:739](#)).

^{18/} 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).

However, in the light of the fact that the proposed ECI at issue was very brief and lacked clarity, the Court confirmed the General Court's finding that the Commission's refusal decision was sufficiently reasoned in this case.

Secondly, the Court noted that the decision on the registration of a proposed ECI must be taken in accordance with the principle of good administration, which entails, in particular, the obligation for the competent institution to conduct a diligent and impartial examination which takes into account all the relevant features of the case. The condition relating to the registration of proposed ECIs set out in Article 4(2)(b) of Regulation No 211/2011, which provides that a proposed ECI must not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act, must be interpreted and applied by the Commission in such a way as to ensure easy accessibility to that mechanism. Consequently, it is only if a proposed ECI, in view of its subject matter and objectives, is manifestly outside the scope of the Commission's powers that the Commission is entitled to refuse to register it. The Court nonetheless confirmed that the provisions of the TFEU invoked in this case by the organiser of the proposed ECI in support of his action for annulment, namely Articles 122(1) and (2) TFEU and Article 136(1) TFEU, could not serve as the legal basis for the adoption of the 'principle of the state of necessity' referred to in the proposal.

3. ACCESS TO DOCUMENTS

In 2017, the Court had the opportunity to deliver a number of important judgments in the area of access to documents. Those decisions allowed the Court, in particular, to provide further clarification on the concept of existing document for the purposes of Regulation No 1049/2001¹⁹ in the context of electronic databases, on the application of that regulation to the written submissions of the Member States in judicial proceedings, on the application of the general presumption of confidentiality to documents relating to an EU Pilot procedure and, lastly, on the concept of investigation. The Court also ruled on the interpretation of Regulation No 1049/2001 in the context of the application of the Aarhus Convention.²⁰

First of all, in its judgment in *Typke v Commission* (C-491/15 P, [EU:C:2017:5](#)), delivered on 11 January 2017, which confirms the judgment under appeal of the General Court,²¹ the Court ruled on *the concept of existing document in relation to electronic databases*. In this case, the applicant had applied to the European Personnel Selection Office (EPSO) for access to a 'table' comprising a series of data contained in various documents held by EPSO in electronic form which could not be extracted from its database by means of a normal search.

The Court considered that while it was true that an electronic database may enable the extraction of any information it contains, the possibility that a document may be created from such a database does not lead to the conclusion that the document exists for the purposes of Regulation No 1049/2001. The Court recalled that the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and that Regulation No 1049/2001 cannot therefore be relied upon to oblige an institution to create a document which does not exist.

^{19/} 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).

^{20/} Also see Section XVII.4 'Aarhus Convention'.

^{21/} Judgment of the General Court of 2 July 2015, *Typke v Commission* (T-214/13, [EU:T:2015:448](#)).

The Court held that all information which can be extracted from an electronic database by general use through preprogrammed search tools, even if that information has not previously been displayed in that form or ever been the subject matter of a search by the staff of the institutions, must be regarded as an existing document. Accordingly, in order to satisfy the requirements of Regulation No 1049/2001, the institutions may be led to establish a document from information contained in a database by using existing search tools. On the other hand, any information whose extraction from a database calls for a substantial investment must be regarded as a new document. Accordingly, any information which would, in order to be obtained, require an alteration either to the organisation of an electronic database or to the search tools currently available for the extraction of information must be considered to be a new document.

Next, in the judgment in **Commission v Breyer** (C-213/15 P, [EU:C:2017:563](#)), delivered on 18 July 2017, which confirms the judgment under appeal of the General Court,²² the Court, sitting as the Grand Chamber, ruled on whether a request addressed to an institution — a party to proceedings — seeking access to the written submissions lodged by a Member State in judicial proceedings falls within the scope of Regulation No 1049/2001. In the instant case, the respondent had asked the Commission in March 2011 to grant him access to the written submissions that the Republic of Austria had lodged with the Court of Justice in infringement proceedings brought by the Commission against Austria for failing to transpose a directive. Those judicial proceedings were concluded by a judgment of the Court in 2010. The Commission had refused access to those submissions, of which it held copies, on the ground that, in its view, they did not fall within the scope of Regulation No 1049/2001. An action for annulment having been brought before it, the General Court annulled the Commission's decision to refuse access.

In the first place, the Court recalled that the scope of Regulation No 1049/2001 is defined by reference to the institutions listed in the regulation, not by reference to particular categories of documents or the author of the document held by one of those institutions. Thus, the fact that documents held by one of the institutions referred to in Regulation No 1049/2001 were drawn up by a Member State and are linked to court proceedings cannot exclude such documents from the scope of the regulation. In addition, the Court found that the fact that neither the Statute of the Court of Justice nor the Rules of Procedure of the EU Courts provide for a right of access by third parties to written submissions filed in court proceedings cannot have the consequence that the regulation does not apply to applications for access to written submissions that have been drawn up by a Member State for the purpose of court proceedings before the EU Courts and are in the possession of an institution. It therefore considered that the written submissions at issue fell within the scope of Regulation No 1049/2001 as documents held by an institution subject to that regulation.

In the second place, in its examination of the general scheme and objectives of Article 15(3) TFEU, the Court concluded that the non-applicability of the system of access to documents to the Court when it exercises judicial functions, provided for in the fourth subparagraph of Article 15(3) TFEU, does not preclude the application of that system to documents lodged with the Court in the context of judicial proceedings. Furthermore, since Regulation No 1049/2001 allows for access to documents connected with proceedings before the EU Courts to be refused if appropriate in order to protect such court proceedings, the fourth subparagraph of Article 15(3) TFEU need not be interpreted as excluding all the written submissions at issue from the scope of Regulation No 1049/2001. The Court therefore concluded that the General Court was right to hold that those submissions were not excluded, any more than those drawn up by the Commission itself, from the right of access to documents set out in the fourth subparagraph of Article 15(3) TFEU.

^{22/} Judgment of the General Court of 27 February 2015, **Breyer v Commission** (T-188/12, [EU:T:2015:124](#)).

Furthermore, by its judgment in **Sweden v Commission** (C-562/14 P, [EU:C:2017:356](#)) of 11 May 2017, the Court confirmed, on appeal, the judgment of the General Court²³ dismissing an action brought by several citizens for the annulment of a decision of the Commission refusing to grant them access, under Regulation No 1049/2001, to two requests for information sent by that institution to the Federal Republic of Germany as part of an EU Pilot procedure intended to prepare or avoid a procedure for failure to fulfil obligations against a Member State.

The Court considered that, so long as, during the pre-litigation stage of an inquiry carried out as part of an EU Pilot procedure, there is a risk of affecting the nature of the infringement procedure, altering its progress or undermining the objectives of that procedure, the application of the general presumption of confidentiality of the documents exchanged between the Commission and the Member State concerned is justified. It also stated that that risk exists until the EU Pilot procedure is closed and there is a definitive decision not to open a formal infringement procedure against the Member State. During that period, the Commission can therefore rely on a general presumption of confidentiality to refuse to grant access, without conducting a specific and individual examination of the documents requested. Nonetheless, that general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying the disclosure of the document concerned by virtue of the last clause of Article 4(2) of Regulation No 1049/2001.

In its judgment in **France v Schlyter** (C-331/1 P, [EU:C:2017:639](#)), delivered on 7 September 2017, which confirms the judgment under appeal of the General Court,²⁴ the Court ruled on whether a detailed opinion issued by the Commission in the context of the procedure for the provision of information relating to technical regulations, provided for in Directive 98/34,²⁵ forms part of an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

In the first place, the Court considered that a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the TEU and TFEU constitutes an investigation. It made clear that that procedure does not necessarily have to have the purpose of detecting or pursuing an offence or irregularity and that the concept of 'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation. It is not necessary for the Commission's position in performing its functions to take the form of a decision within the meaning of the fourth paragraph of Article 288 TFEU. Such a position could take the form, inter alia, of a report or a recommendation.

The Court took the view that, in the instant case, the detailed opinion delivered by the Commission, in so far as it constitutes an official measure clarifying the legal position of that institution in relation to the compatibility of draft technical regulations notified by a Member State with, inter alia, the free movement of goods and the freedom of establishment of operators, falls under an 'investigation' procedure.

^{23/} Judgment of the General Court of 25 September 2014, **Spirlea v Commission** (T-306/12, [EU:T:2014:816](#)).

^{24/} Judgment of the General Court of 16 April 2015, **Schlyter v Commission** (T-402/12, [EU:T:2015:209](#)).

^{25/} Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18).

In the second place, the Court held that since none of the provisions of Directive 98/34 provides for the confidentiality of detailed opinions delivered under Article 9(2) of that directive, the requirement of transparency underlying the directive applies to those detailed opinions as a matter of course. It also made clear that the requirement of transparency does not, however, prevent the Commission, on the basis of the circumstances of the particular case, from relying on the third indent of Article 4(2) of Regulation No 1049/2001 in order to deny access to a detailed opinion delivered under Article 9(2) of that directive, provided that it demonstrates that access to the detailed opinion in question would specifically and actually undermine the objective of preventing a technical regulation that is incompatible with EU law being adopted.

Lastly, in the judgment in ***Saint-Gobain Glass Deutschland v Commission*** (C-60/15 P, [EU:C:2017:540](#)), delivered on 13 July 2017, the Court upheld the appeal lodged by Saint-Gobain Glass Deutschland against the judgment of the General Court ²⁶ dismissing its action for annulment of the *decision of the Commission refusing full access to a document communicated to the Commission by the Federal Republic of Germany* in the course of the procedure for the allocation of greenhouse gas emission allowances under Article 10a of Directive 2003/87. ²⁷ That refusal was based on the first subparagraph of Article 4(3) of Regulation No 1049/2001, ²⁸ under which access to a document is to be refused if its disclosure would seriously undermine a decision-making process in progress.

In its judgment, the Court set aside the judgment under appeal, finding that the General Court had erred in law in its interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001. It also annulled the Commission's decision to refuse access to the documents. The Court considered that the exception relating to the 'decision-making process' set out in that provision must be interpreted in a restrictive way, taking into account the public interest served by disclosure of the documents at issue and the fact that the information requested related to emissions into the environment. The Court also made clear that that exception must be construed as relating to decision-making, without covering the entire administrative procedure which led to the decision. Therefore, as regards documents directly relating to the matters dealt with in an administrative procedure, the mere reference to a risk of negative repercussions as a result of disclosure and to the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of internal documents would seriously undermine the decision-making process in progress.

Furthermore, the Court pointed out that the requirement for a restrictive interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001 is all the more compelling where the documents communication of which is requested contain environmental information. However, Article 4(4)(a) of the Aarhus Convention provides that a request for environmental information may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, and not the entire administrative procedure at the end of which those authorities hold their proceedings. Accordingly, the fact that the administrative procedure at issue had not yet been closed on the date of adoption of the contested decision does not in itself establish that disclosure of the documents requested would seriously undermine the Commission's decision-making process.

^{26/} Judgment of the General Court of 11 December 2014, ***Saint-Gobain Glass Deutschland v Commission*** (T-476/12, [EU:T:2014:1059](#)).

^{27/} 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).

^{28/} 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).

4. NON-CONTRACTUAL LIABILITY OF THE EUROPEAN UNION

In its judgment of 4 April 2017, **Ombudsman v Staelen** (C-337/15 P, [EU:C:2017:256](#)), the Court, sitting as the Grand Chamber, ruled, in the context of an appeal, on *the non-contractual liability of the European Union on account of a breach of the duty to act diligently by the European Ombudsman in her handling of a complaint*. In the judgment under appeal,²⁹ the General Court had found that some breaches of the duty to act diligently, committed by the European Ombudsman in her handling of a complaint concerning the European Parliament's management of a list of suitable candidates in an open competition, amounted per se to sufficiently serious breaches of EU law, within the meaning of the case-law defining the conditions under which the European Union may incur non-contractual liability. As a consequence of those breaches, the General Court had awarded the complainant, who appeared on the list at issue as a successful candidate, EUR 7 000 as damage for her loss of confidence in the office of the Ombudsman and her feeling of wasted time and energy.

After recalling the duties and obligations of the Ombudsman, the Court first of all held that the General Court had erred in law by ruling that a 'mere' breach by the Ombudsman of the principle of diligence amounts to a sufficiently serious breach that could result in non-contractual liability being incurred by the European Union. According to the Court, in order for it to be concluded that there is a such a breach, it is necessary to establish that, by failing to act with all the requisite care and caution, the Ombudsman gravely and manifestly disregarded the limits on her discretion in the exercise of her powers of investigation. As regards the finding of damage made by the General Court, the Court also ruled that the General Court had erred in law by characterising the loss of confidence in the institution of the Ombudsman alleged by the complainant as non-material damage that may be compensated. Since there was no legal basis for the General Court's decision to order the Ombudsman to pay compensation, that decision was set aside by the Court.

However, since the state of the proceedings permitted a final judgment in the case, the Court held that it was apparent from the documents before it that the Ombudsman had indeed committed several sufficiently serious breaches of her duty to act diligently in the conduct of her investigations, causing the complainant actual and certain non-material loss. Thus, the Court again ordered the Ombudsman to pay EUR 7 000 in damages in order to compensate that non-material loss in relation, in essence, to the feeling of 'psychological harm' which the complainant claimed to have experienced as a result of the way in which her complaint was dealt with.

In the judgment in **Safa Nicu Sepahan v Council** (C-45/15 P, [EU:C:2017:402](#)), delivered on 30 May 2017, the Court, sitting as the Grand Chamber, ruled on *the right to receive compensation for damage caused by a decision to freeze funds adopted under the common foreign and security policy*. By that judgment, the Court dismissed the appeals lodged by the Iranian company Safa Nicu Sepahan and the Council against the judgment of the General Court of 25 November 2014,³⁰ which, after annulling the restrictive measures for the freezing of funds to which the applicant was subject,³¹ had awarded that company compensation in the amount of EUR 50 000 in respect of non-material damage sustained on account of the annulled measures, while dismissing its claims for compensation in respect of material damage caused. In its appeal, Safa Nicu Sepahan challenged both the dismissal of its claims

^{29/} Judgment of the General Court of 29 April 2015, **Staelen v Ombudsman** (T-217/11, [EU:T:2015:238](#)).

^{30/} Judgment of the General Court of 25 November 2014, **Safa Nicu Sepahan v Council** (T-384/11, [EU:T:2014:986](#)).

^{31/} Those restrictive measures had been adopted by the Council against Iran to prevent nuclear proliferation pursuant to Council Implementing Regulation (EU) No 503/2011 of 23 May 2011 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran (OJ 2011 L 136, p. 26) and 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).

for compensation in respect of material damage and the amount of compensation awarded in respect of non-material damage.

As regards the compensation awarded in respect of non-material damage sustained, the Court concluded that the General Court had been right to consider that the infringement by the Council, for a period of almost three years, of its obligation to provide *Safa Nicu Sepahan* with the information and evidence substantiating the reasons for the adoption of the restrictive measures at issue against it constituted a sufficiently serious breach that could result in non-contractual liability being incurred by the European Union under the second paragraph of Article 340 TFEU. Although the annulment of unlawful restrictive measures is capable of constituting a form of reparation for non-material damage, it does not follow from this that that form of reparation is necessarily sufficient, in every case, to ensure full reparation for such damage. The Court therefore found that the General Court had been right to assess *ex aequo et bono* the amount, as fixed, of the compensation in respect of non-material damage to which *Safa Nicu Sepahan* was entitled.

In the second place, as regards the non-recognition by the General Court of liability on the part of the European Union in relation to the material damage allegedly sustained, the Court recalled that any damage for which compensation is sought under the second paragraph of Article 340 TFEU must be actual and certain and must flow sufficiently directly from the unlawful conduct of the institutions. Since it is for the party seeking to establish the European Union's liability to adduce conclusive proof as to the existence and extent of the damage it alleges and the existence of the causal link between that damage and the restrictive measures adopted, the Court found that the General Court had been right to conclude that *Safa Nicu Sepahan's* claims were not substantiated to a sufficient degree.

IV. EU LAW AND NATIONAL LAW

On 10 October 2017, in its judgment in *Farrell* (C-413/15, [EU:C:2017:745](#)), the Court, sitting as the Grand Chamber, provided clarification on the conditions governing whether the provisions of the Third Directive 90/232³² capable of having direct effect can be relied on against a private law body on which a Member State has conferred the task that is the subject of Article 1(4) of the Second Directive 84/5,³³ consisting in paying compensation for damage to property or personal injury caused by an unidentified vehicle or vehicle for which the obligation to have compulsory motor vehicle liability insurance has not been satisfied. The dispute in the main proceedings concerned *the payment of compensation, by the competent national body (the Motor Insurers Bureau of Ireland) for personal injuries suffered by the applicant in the main proceedings in a motor vehicle accident.*

This judgment follows on from a previous judgment, *Farrell*, of 19 April 2007,³⁴ arising from the same main proceedings, in which the Court held that Article 1 of the Third Directive 90/232, first, precludes national legislation whereby compulsory motor vehicle liability insurance does not cover liability in respect of personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating

^{32/} Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33).

^{33/} Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17), as amended by the Third Council Directive 90/232/EEC of 14 May 1990 (OJ 1990 L 129, p. 33).

^{34/} Judgment of the Court of 19 April 2007, *Farrell* (C-356/05, [EU:C:2007:229](#)).

accommodation for passengers, and, secondly, satisfies all the conditions necessary for it to produce direct effect and accordingly confers rights upon which individuals might rely directly before the national courts. The Court nonetheless considered in that judgment that it was for the national court to determine whether that provision might be relied upon against a body such as that in issue in the main proceedings.

Following that judgment, the first referring court took the view that the competent national body in question was an emanation of the State and that, consequently, the applicant in the main proceedings had a right to obtain compensation from it. The competent national body subsequently brought an appeal against that judgment before the referring court in this case, contending that it was not an emanation of the State and that, accordingly, the provisions of a directive, even those having direct effect, which had not been transposed into national law could not be relied on against it. It was against that background that a further request for a preliminary ruling was submitted to the Court seeking clarification as regards the criteria set out in *Foster and Others*³⁵ for determining which types of bodies may be regarded as an emanation of the State.

The Court stated that those criteria, under which unconditional and sufficiently precise provisions of a directive may be relied on by an individual against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals, cannot be conjunctive. Article 288 TFEU, concerning the legal acts of the Union, must therefore be interpreted as not precluding the possibility that provisions of a directive that are capable of having direct effect may be relied on against a body that does not fulfil all the criteria listed in *Foster and Others*, cited above.

As regards the question whether that is the case for the body at issue in the main proceedings, the Court found that provisions of a directive that are capable of having direct effect may be relied on against a private law body on which a Member State has conferred a task in the public interest, such as the payment of compensation for damage to property or personal injury caused by an unidentified vehicle or vehicle for which the obligation to have compulsory motor vehicle liability insurance has not been satisfied, and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it.

On 5 December 2017, in the judgment in ***M.A.S. and M.B.*** (C-42/17, [EU:C:2017:936](#)), the Court, sitting as the Grand Chamber, ruled on a request for a preliminary ruling from the Italian Constitutional Court seeking *clarification on the scope of the obligation, established by the Court in *Taricco and Others* (C-105/14, EU:C:2015:555)*,³⁶ requiring national courts to disapply national provisions on limitation periods in the event of a finding of infringement of Article 325 TFEU.

In ***Taricco and Others***, the Court had found that the Italian rules on limitation periods in respect of proceedings in criminal matters, which provide that the limitation period applicable to tax offences in the field of VAT, if interrupted, is extended by only one quarter of the original period, are liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if those national rules prevent the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provide for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union. The Court thus held that it was for the national courts, in such cases, to give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law.

^{35/} Judgment of the Court of 12 July 1990, ***Foster and Others*** (C-188/89, [EU:C:1990:313](#)).

^{36/} Judgment of the Court of 8 September 2015, ***Taricco and Others*** (C-105/14, [EU:C:2015:555](#)).

By its reference for a preliminary ruling, the Constitutional Court raised the question of a possible breach of the principle that offences and penalties must be defined by law which might follow from fulfilment of that obligation by national courts. In that connection, it referred, first, to the substantive nature of the limitation rules in the Italian legal system, which means that those rules must be reasonably foreseeable by individuals at the time when the alleged offences are committed and cannot be retroactively altered *in peius*, and, secondly, to the requirement that any national rules on criminal liability must be founded on a legal basis that is precise enough to delimit and guide the national court's assessment.

The Court held, with reference to paragraph 53 of the judgment in *Taricco and Others*, that the competent national courts, when they have to decide to disapply the national provisions at issue, are required to ensure that the fundamental rights of persons accused of committing criminal offences are observed, including — where the imposition of criminal penalties is concerned — the rights of defendants flowing from the principle that offences and penalties must be defined by law.

It stated, in the first place, that the principle that offences and penalties must be defined by law, enshrined in Article 49 of the Charter and forming part of the constitutional traditions common to the Member States, must be observed by the Member States when they implement EU law, which is the case where, in the context of their obligations under Article 325 TFEU, they provide for the application of criminal penalties for infringements relating to VAT. In the second place, the Court recalled that the right guaranteed in Article 49 of the Charter has the same meaning and scope as the right guaranteed by the ECHR, as interpreted by the European Court of Human Rights, which has held, in relation to the requirements that follow from the principle that offences and penalties must be defined by law, that provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty. In addition, the Court ruled that the requirement that the applicable law must be precise means that the law must clearly define offences and the penalties which they attract, and that the principle of non-retroactivity of the criminal law means in particular that a court cannot, in the course of criminal proceedings, impose a criminal penalty for conduct which is not prohibited by a national rule adopted before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought.

The Court also made clear that if the national court were to come to the view that the obligation to disapply the provisions of the Criminal Code at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with it allowed a national situation incompatible with EU law to be remedied. It is for the national legislature, in such a case, to take the measures necessary to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU.

V. PROCEEDINGS OF THE EUROPEAN UNION

As regards proceedings of the European Union, reference should be made to one judgment relating to the prohibition on the EU Courts from adjudicating *ultra petita*. Furthermore, the judgments in **A and Others** (C-158/14) and **Rosneft** (C-72/15), which are concerned in particular with the admissibility of a request for a preliminary ruling on the validity of measures adopted in the field of the common foreign and security policy, are worthy of note.³⁷

By its judgment in **British Airways v Commission** (C-122/16 P, [EU:C:2017:861](#)), delivered on 14 November 2017, the Court, sitting as the Grand Chamber, was called upon to provide clarification on *the prohibition on the EU Courts from adjudicating ultra petita*. In the judgment under appeal,³⁸ which forms part of a dispute between the airline British Airways and the Commission, the General Court had raised of its own motion a plea involving a matter of public policy to the effect that the decision at issue was vitiated by a failure to state adequate reasons.³⁹ According to the General Court, the Commission had referred, in its statement of reasons, to one single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Swiss Agreement. On the other hand, according to the operative part of the decision, there had been a separate single and continuous infringement for each of those articles. Nevertheless, the General Court had held that that finding could not lead to the complete annulment of the decision at issue, since the annulment could not go beyond the form of order set out in the application initiating the action, which sought only annulment in part.

The Court confirmed the General Court's judgment. It recalled that since it would be *ultra vires* for the EU judicature to rule *ultra petita*, the scope of the annulment granted may not go further than that sought by the applicant. The Court stated that although the authority of *res judicata* exerted by an annulling judgment attaches to both the operative part and the reasoning that constitutes the *ratio decidendi* of the judgment, it cannot entail annulment of an act or of part of an act not challenged before the EU judicature but alleged to be vitiated by the same illegality. Moreover, the fact that the court reviewing legality has jurisdiction to raise of its own motion a plea involving a matter of public policy does not mean for that matter that it is entitled to amend of its own motion the form of order sought by the applicant. Indeed, while the pleas raised by the applicant constitute the essential basis of the form of order sought in an application, they are, nonetheless, separate from the form of order sought, which defines the limits of the dispute on which the EU courts are asked to rule.

Accordingly, by raising of their own motion a plea involving a matter of public policy which, a priori, has not been put forward by the parties, the EU courts do not go beyond the scope of the dispute that has been brought before them or, in any way, infringe the rules of procedure relating to the presentation in the application of the subject matter of the dispute and the pleas in law. The position would be different if, following their substantive examination of the contested measure, those courts, on the basis of a plea raised of their own motion, were to annul a measure to an extent that went beyond the annulment sought in the form of order they were duly requested to make, on the ground that such an annulment was necessary to remedy the unlawfulness established of their own motion in carrying out their substantive analysis.

^{37/} Those two judgments are presented in Section XX 'Common foreign and security policy'.

^{38/} Judgment of the General Court of 16 December 2015, **British Airways v Commission** (T-48/11, [EU:T:2015:988](#)).

^{39/} Commission Decision C(2010) 7694 final of 9 November 2010 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 — Airfreight).

While observing that it was not disputed that the defective reasoning identified by the General Court in the instant case had undermined British Airways' rights of defence, the Court ruled that the fact that the General Court declined to review of its own motion the whole of the contested decision did not contravene the principle of effective judicial protection provided for in Article 47 of the Charter. Although the judicial review provided for under Article 263 TFEU, together with the unlimited jurisdiction in respect of the amount of the fine provided for under Article 31 of Regulation (EC) No 1/2003,⁴⁰ involves review by the EU courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine, the fact that the judicial review carried out by the EU courts is limited to the claims of the parties, as set out in the forms of order sought in their written pleadings, is not contrary to the principle of effective judicial protection, as that principle does not require those courts to extend their review to cover aspects of a decision that have not been put in issue in the dispute before them.

VI. AGRICULTURE

The judgment in **APVE and Others** (C-671/15, [EU:C:2017:860](#)), delivered on 14 November 2017, afforded the Court the opportunity, sitting as the Grand Chamber, to rule on *how the common agricultural policy (CAP) interacts with EU competition law*. At issue in the main proceedings was a decision by the French Competition Authority finding that practices implemented by producer organisations (POs) and associations of producer organisations (APOs), among others, in the endive production and marketing sector were anticompetitive and imposing financial penalties in that regard. An appeal having been brought before it against the judgment of the Court of Appeal varying that decision, the Court of Cassation enquired whether Article 101 TFEU, read in conjunction with a number of specific provisions of secondary law adopted in relation to the CAP,⁴¹ had to be interpreted as meaning that practices whereby POs, APOs and the other organisations concerned collectively fix minimum sale prices, concert on the quantities placed on the market and exchange strategic information, are excluded from the scope of the prohibition on agreements, decisions and concerted practices laid down in that article.

The Court recalled, first of all, that in pursuit of the objectives linked to the introduction of the CAP and the establishment of a system of undistorted competition, Article 42 TFEU recognises that the CAP takes precedence over the objectives of the Treaty in the field of competition as well as the EU legislature's power to exclude from the scope of competition law practices which, outside the scope of the CAP, would have to be regarded as anticompetitive. In particular, in the light of the provisions of EU law relating to the fruit and vegetables sector, the necessary practices for POs and APOs to achieve one or more of the objectives assigned to them under the CAP (namely, ensuring that production is planned and adjusted to demand, concentrating supply and placing the products produced on the market, optimising production costs and stabilising producer prices) escape the prohibition on agreements, decisions and concerted practices laid down in Article 101(1) TFEU. However, the

^{40/} 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).

^{41/} See Article 2 of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition, 1959-1962 (I), p. 129); Article 11(1) of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1); Article 2 of Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products (OJ 2006 L 214, p. 7); Article 3(1) of Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector (OJ 2007 L 273, p. 1); and the first paragraph of Article 122, Article 175 and Article 176 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1).

scope of those exclusions is to be construed strictly and the common organisations of the markets in agricultural products are not a competition-free zone. Furthermore, practices that pursue the objectives of the CAP are subject to the principle of proportionality.

With regard to practices agreed between producers that are members of the same PO or APO recognised by a Member State within the framework of the implementation of the CAP, the Court noted that only forms of coordination or concertation between the members of the same PO or APO that are actually and strictly connected to the pursuit of the objectives assigned to the PO or APO concerned can escape the prohibition on agreements, decisions and concerted practices. That may be the case, *inter alia*, of exchanges of strategic information, the coordination of the quantities of agricultural products put on the market and the coordination of the pricing policy of individual agricultural producers, if those practices in fact seek to achieve, and are strictly proportionate to, those objectives. By contrast, the collective fixing of minimum sale prices within a PO or an APO may not be regarded as necessary for the sound operation of the common organisation of the market concerned, or as proportionate to the objectives of stabilising prices and concentrating supply, where it does not allow producers selling their own products themselves to do so at a lower price than the minimum prices and has the effect of reducing the already low level of competition in the markets for agricultural products.

VII. FREEDOMS OF MOVEMENT

1. FREEDOM OF MOVEMENT FOR WORKERS

In its judgment in *Erzberger* (C-566/15, [EU:C:2017:562](#)), delivered on 18 July 2017, the Grand Chamber of the Court ruled on *the compatibility with the freedom of movement for workers, guaranteed by Article 45 TFEU, of a number of restrictions provided for in German legislation on employee participation which applied to participation in the elections of workers' representatives to the supervisory board of a company*. Specifically, by restricting the right to vote and to stand as a candidate in those elections to employees of establishments located in the national territory, that legislation deprives of those rights employees who, in particular, leave their employment in an establishment located in Germany to take up employment with a subsidiary belonging to the same group located in another Member State, namely workers exercising their right under Article 45 TFEU.

The Court held that the loss of the abovementioned rights, incurred by those workers, cannot be held to constitute an impediment to the freedom of movement for workers. EU primary law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in social terms, since, given the disparities between the Member States' schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard. Therefore, the freedom of movement for workers does not grant to that worker the right to rely, in the host Member State, on the conditions of employment which he enjoyed in the Member State of origin under the national legislation of the latter. Consequently, EU law does not, in the field of representation and collective defence of the interests of workers in the management or supervisory bodies of a company established under national law — a field which, to date, has not been harmonised or even coordinated at Union level — prevent a Member State from providing that the legislation it has adopted be applicable only to workers employed by establishments located in its national territory.

2. FREEDOM OF ESTABLISHMENT

On 14 September 2017, the Court gave judgment in ***Trustees of the P Panayi Accumulation & Maintenance Settlements*** (C-646/15, [EU:C:2017:682](#)), in which it ruled that *the provisions of the TFEU relating to freedom of establishment preclude the imposition of tax, such as that provided for under UK law in the main proceedings, on unrealised gains in value of assets held in trust on the transfer of the place of residence of the majority of the trustees to another Member State.*

In the instant case, UK law trusts had been created in 1992 by a Cypriot national for the benefit of his children and other family members. When the trusts were created, the Cypriot national resided with his family in the United Kingdom, as did the initial trustees. In 2004, the Cypriot national and his spouse resigned as trustees and three new trustees were appointed as replacements, all resident in Cyprus. Since the majority of the trustees no longer resided in the United Kingdom, the UK tax authorities considered that the administration of the trusts had moved to Cyprus. They took the view that such relocation was tantamount to an immediate disposal, before the relocation date, of the assets comprised in the trust and their immediate reacquisition at market value, which was liable to give rise to a charge to tax on unrealised gains in value.

As regards the compatibility of such taxation with EU law, the Court first confirmed that the trusts at issue may rely on freedom of establishment in so far as they fall within the scope of ‘other legal persons’ within the meaning of the second paragraph of Article 54 TFEU. After also confirming that the freedom of establishment applies in a situation where a Member State taxes gains in value of assets held in trust by reason of the transfer of the place of administration of the trust to another Member State, the Court examined whether the contested taxation was compatible with that freedom. In that connection, the Court first of all found that there was a restriction on freedom of establishment, since the difference in tax treatment between trusts which retain their place of administration in the United Kingdom and those whose place of administration is transferred to another Member State is, in particular, capable of deterring such transfers. As regards the possible justification for that restriction by reasons in the public interest, the Court considered, secondly, that although the legislation at issue is a suitable means of ensuring the preservation of the allocation of powers of taxation between the Member States, it nevertheless goes beyond what is necessary to achieve the objective of preserving the allocation of national powers of taxation in so far as it provides only for the immediate payment of the tax concerned. That legislation was therefore considered to constitute an unjustified restriction on freedom of establishment.

In its judgment in ***Polbud-Wykonawstwo*** (C-106/16, [EU:C:2017:804](#)), delivered on 25 October 2017, the Grand Chamber of the Court held that *Articles 49 and 54 TFEU apply to the transfer of the only registered office of a company incorporated under the law of one Member State to the territory of another Member State, even if that company conducts its main, if not entire, business in the first Member State and retains its real head office there.* At issue in the main proceedings was the decision to refuse the application submitted by Polbud-Wykonawstwo (‘Polbud’), a limited liability company governed by Polish law, to remove it from the Polish commercial register following the transfer of its registered office to Luxembourg. Polish legislation provides for the mandatory liquidation of a national company when it transfers its registered office abroad. The removal of Polbud from the Polish commercial register had therefore been refused on the ground that the documents relating to its liquidation had not been submitted. Polbud challenged that refusal arguing that it had not lost its legal personality and continued to exist as a company incorporated under Luxembourg law. The Sąd Najwyższy (Polish Supreme Court) therefore referred a question to the Court for a preliminary ruling concerning the applicability of freedom of establishment to the instant case and the compatibility of the Polish legislation with EU law.

First of all, the Court noted that Articles 49 and 54 TFEU extend the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered

office, central administration or principal place of business within the European Union. The Court made clear that this fundamental freedom encompasses the right of a company, like Polbud, formed in accordance with the legislation of a Member State to convert itself into a company governed by the law of another Member State, provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter State to determine the connection of a company to its national legal order is satisfied.

Secondly, the Court ruled that Articles 49 and 54 TFEU preclude national legislation, such as that at issue here, whereby the transfer of the registered office of a company is dependent on its mandatory liquidation. According to the Court, such legislation is liable to impede, if not prevent, the cross-border conversion of a company and therefore constitutes a restriction on freedom of establishment. The Court accepted that such a restriction may, as a rule, be justified by overriding reasons in the public interest. However, it considered that the Polish legislation at issue goes beyond what is necessary to achieve the objectives of protecting the interests of creditors, minority shareholders and employees. In particular, the Court pointed out that that legislation prescribes, in general, mandatory liquidation, there being no consideration of the actual risk of detriment to those interests and no possibility of choosing less restrictive measures capable of protecting them.

Lastly, the Court rejected the justification based on the objective of preventing abusive practices. In its view, the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse. Moreover, the mere fact that a company transfers its registered office from one Member State to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty. In this case, the Court took the view that the general obligation to implement a liquidation procedure amounts to establishing such a presumption, with the result that the national legislation is disproportionate in the light of that objective.

3. FREEDOM TO PROVIDE SERVICES

On 13 June 2017, in the judgment in *The Gibraltar Betting and Gaming Association* (C-591/15, [EU:C:2017:449](#)), the Grand Chamber of the Court ruled on the interpretation of Articles 56 and 355(3) TFEU. This judgment was delivered in the context of proceedings in which a trade association of Gibraltar-based gambling operators had challenged the compatibility with EU law, particularly the provisions on the freedom to provide services, of a new tax regime adopted by the United Kingdom targeting, inter alia, remote gambling. In order to determine whether or not Article 56 TFEU could be relied on in this case, the Court was invited to determine *whether the provision of gambling services by operators established in Gibraltar to customers in the United Kingdom concerned, under EU law, a 'purely internal situation'*.

The Court first of all pointed out that Gibraltar is a European territory for whose external relations a Member State is responsible, namely the United Kingdom. EU law applies to that territory under Article 355(3) TFEU, subject to the exclusions expressly provided for in the 1972 Act of Accession, which do not, however, cover freedom to provide services.

Next, the Court examined whether the provision of services at issue constitutes a 'purely internal situation', that is to say a situation which is confined in all respects within a single Member State. In that regard, it considered that although it is true that Gibraltar does not form part of the United Kingdom, that fact is not decisive in determining whether two territories must, for the purposes of the applicability of the provisions on the four freedoms, be treated as a single Member State. Furthermore, to treat trade between Gibraltar and the United Kingdom in the same way as trade between Member States would be tantamount to denying the connection,

recognised in Article 355(3) TFEU, between that territory and that Member State. It follows, in the Court's view, that the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, under EU law, a purely internal situation to which the provisions of the TFEU on freedom to provide services do not apply.

Lastly, the Court made clear that that interpretation of Article 355(3) TFEU, in conjunction with Article 56 TFEU, has no effect on the status of the territory of Gibraltar under international law and cannot, therefore, be understood as undermining the separate and distinct status of Gibraltar.

In its judgment in **Asociación Profesional Elite Taxi** (C-434/15, [EU:C:2017:981](#)), delivered on 20 December 2017, the Grand Chamber of the Court ruled on whether *an intermediation service to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys falls within the scope of Article 56 TFEU on the freedom to provide services and Directives 2006/123⁴² and 2000/31. ⁴³ In this case, a professional taxi drivers' association had brought proceedings seeking a declaration from a Spanish court that the activities of Uber Systems Spain SL infringed national legislation on unfair competition. Taking the view that Uber's practices cannot be regarded as unfair practices if its activities fall within the scope of Directive 2006/123 or Directive 98/34,⁴⁴ the national court decided to refer a question to the Court for a preliminary ruling concerning the classification of the activities of Uber at issue in the main proceedings in the light of those directives as well as Article 56 TFEU.*

At the outset, the Court pointed out those activities are more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his own vehicle with a person who wishes to make an urban journey. The provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, in particular, through software tools and whose general operation it organises for the benefit of persons who wish to accept that offer. The service is based on the selection of non-professional drivers, to whom Uber provides an application without which, first, those drivers would not be led to provide transport services and, secondly, persons who wish to make an urban journey would not use the services provided by those drivers. Furthermore, Uber exercises decisive influence over the conditions under which those services are provided, particularly over the maximum fare and the quality of the vehicles and drivers.

The intermediation service at issue in the main proceedings must therefore be regarded as forming an integral part of an overall service whose main component is a transport service. It follows, according to the Court, that the service is not an 'information society service' within the meaning of Directive 98/34, to which Directive 2000/31 refers, but 'a service in the field of transport' within the meaning of Article 58(1) TFEU, under which the free movement of such services is governed by the provisions of the title relating to transport and of Article 2(2)(d) of Directive 2006/123, which provides that that directive does not apply to services in the field of transport. The Court therefore concluded that such an intermediation service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

^{42/} 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).

^{43/} 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).

^{44/} Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18).

It also follows that since the EU legislature has not adopted, on the basis of the title relating to transport, common rules relating to non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue, as EU law currently stands, it is for the Member States to regulate the conditions under which such intermediation services are to be provided in conformity with the general rules of the TFEU.

VIII. BORDER CONTROLS, ASYLUM AND IMMIGRATION

1. ASYLUM POLICY

On account of the magnitude of the global migration crisis which has been holding sway for some years now and, in consequence, the arrival of an exceptionally high number of applicants for international protection in the European Union, the Court has had to deal with numerous cases relating to EU asylum policy. Nine such cases merit special attention: one concerning Directive 2004/83⁴⁵ and eight concerning Regulation No 604/2013⁴⁶ ('the Dublin III Regulation'). Specifically, the judgment interpreting Directive 2004/83 deals with the clause excluding persons from refugee status on account of their participation in acts contrary to the purposes and principles of the United Nations. As regards the judgments interpreting the Dublin III Regulation, the first deals with whether the Member States are under an obligation to issue a visa on humanitarian grounds, with a view to the subsequent submission of an application for international protection on its territory. In six other cases, applicants for international protection sought to challenge, on various grounds, the decision of the competent authorities of one Member State to transfer them to another Member State so that their application for international protection could be examined there. The last case concerns the lawfulness of provisional measures adopted by the Council in order to relocate asylum applicants in unprecedented circumstances.

1.1. Refugee status

In its judgment in *Lounani* (C-573/14, [EU:C:2017:71](#)) of 31 January 2017, the Grand Chamber of the Court examined, in the light of Article 12(2)(c) and Article 12(3) of Directive 2004/83, *the conditions under which an applicant may be excluded from refugee status on account of his participation in acts contrary to the purposes and principles of the United Nations*. In the main proceedings, a Moroccan national had been convicted in Belgium for having participated in the activities of a terrorist group, as a member of its leadership. The conviction was based in particular on the fact that, although the person concerned had not committed, attempted to commit or threatened to commit a

^{45/} Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

^{46/} 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).

terrorist act himself, he had nevertheless provided logistical support to the group and had actively participated in the organisation of a network for sending volunteers to Iraq. Following that conviction, the person concerned applied for asylum, claiming that he feared persecution if he were to return to his country of origin due to the likelihood of being regarded in the future as a radical Islamist and jihadist by the Moroccan authorities. Against that background, the referring court enquired whether the refugee status exclusion clause, provided for in Article 12 of Directive 2004/83, could apply to such an asylum applicant.

In its judgment, the Court first of all found that the concept of 'acts contrary to the purposes and principles of the United Nations' is not confined to the commission of terrorist acts. Indeed, clarification of that concept can be found *inter alia* in the resolutions of the United Nations relating to measures combating terrorism. Pursuant to those resolutions, the application of the exclusion from refugee status on account of such acts can also extend to those who engage in activities consisting in the recruitment, organisation, transportation or equipment of individuals who travel to a State other than their State of residence or nationality for the purpose of, among other things, the perpetration, planning or preparation of terrorist acts. Furthermore, it is not necessary for the applicant for international protection to have been convicted of one of the terrorist offences referred to in Article 1 of Framework Decision 2002/475,⁴⁷ which aims to approximate the definition of terrorist offences in all the Member States.

Secondly, the Court recalled that the final assessment of an application for international protection falls to the competent national authorities, subject to review by the national courts, and that those authorities are required to conduct, for each individual case, an assessment of the specific facts brought to their attention with a view to determining whether there are serious reasons for considering that the acts committed by the applicant for international protection fall within the scope of that particular exclusion. As to the factors to be taken into consideration in the instant case, the Court drew attention to the fact that the person concerned was a member of the leadership of a terrorist group that operated internationally. The fact that that group may not have perpetrated any terrorist acts was irrelevant. The Court also highlighted the particular importance to be attached to the existence of a final conviction by the courts of a Member State on a charge of participation in the activities of a terrorist group.

To conclude, the Court ruled that acts such as those of which the person concerned had been convicted may justify his exclusion from refugee status, even though it is not established that he committed, attempted to commit or threatened to commit a terrorist act.

1.2. Handling of applications for international protection

In the judgment in **C. K. and Others** (C-578/16 PPU, [EU:C:2017:127](#)), delivered on 16 February 2017, the Court provided clarification *on the discretionary clause laid down in Article 17(1) of the Dublin III Regulation which, by way of exception, allows a Member State to examine an application for international protection lodged with it even if such examination is not its responsibility under the criteria laid down in that regulation*. In this case, a Syrian national and an Egyptian national had entered the territory of the European Union by means of a visa issued by Croatia, before submitting an application for asylum in Slovenia. The Slovenian authorities subsequently sent a request to the Croatian authorities to take charge of the persons concerned because Croatia was the Member State responsible for examining their applications for international protection, pursuant to Article 12(2) of the Dublin III Regulation. Croatia complied with that request. However, since the Syrian national was pregnant, the transfer of the persons

⁴⁷ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3).

concerned was postponed until the birth of the child. Those persons subsequently objected to their transfer to Croatia, arguing that it would have negative consequences for the state of health of the Syrian national (who had had a high-risk pregnancy and had suffered psychiatric difficulties since giving birth), also likely to affect the well-being of her newborn child, and that they had been victims of racially motivated remarks and abuse in Croatia. In the light of, in particular, the state of health of the Syrian national, the Court ruled under the urgent procedure.

The Court first of all stated that the question of the application, by a Member State, of the discretionary clause is not governed solely by national law and the interpretation given to it by the constitutional court of that Member State, but is a question concerning the interpretation of EU law, within the meaning of Article 267 TFEU.

Applying the case-law in *N. S. and Others*,⁴⁸ the Court found that even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an applicant can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, prohibited under Article 4 of the Charter of Fundamental Rights. The Court also stated that the transfer of an applicant for asylum with particularly serious mental or physical illness would amount to such treatment if the transfer were to entail a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned. According to the Court, it is for the authorities of the Member State having to carry out the transfer and, if necessary, its courts to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned by taking the necessary precautions for the transfer to take place in conditions enabling appropriate and sufficient protection of that person's state of health. If, taking into account the particular severity of the illness of the applicant for asylum concerned, the precautions taken are not sufficient to ensure that his transfer does not entail a real risk of a significant and permanent worsening of his state of health, it is for the authorities of the Member State concerned to suspend the enforcement of the transfer of the person concerned for such time as his state renders him unfit for such a transfer. Furthermore, if the Member State notes that the state of health of the applicant for asylum concerned is not going to improve in the short term, or that the protracted suspension of the procedure risks worsening the state of health of the person concerned, it may choose to conduct its own examination of that person's application by making use of the 'discretionary clause'. The Court nonetheless concluded that Article 17(1) of the Dublin III Regulation, read in the light of Article 4 of the Charter, cannot be interpreted, in a situation such as that at issue in the main proceedings, as implying an obligation on that Member State to make use of it in that way. That being the case, if the state of health of the applicant for asylum concerned does not enable the requesting Member State to carry out the transfer before the expiry of the period of six months provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would, in the Court's view, be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State.

In its judgment in *X and X* (C-638/16 PPU, [EU:C:2017:173](#)), delivered on 7 March 2017 under the urgent preliminary ruling procedure, the Grand Chamber of the Court considered *the obligations on a Member State to which a visa application has been made under Article 25(1)(a) of the Visa Code*⁴⁹ *through a diplomatic post located in the territory of a third country, with a view to lodging, immediately upon arrival in that Member State, an application for international protection*. In the instant case, a Syrian couple and their three minor children, living in Syria, had submitted applications for humanitarian visas at the Belgian Embassy in Lebanon, before returning to Syria. The purpose of the applications was to obtain visas with limited territorial validity, in order to enable the family to leave Syria

^{48/} Judgment of the Court of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, [EU:C:2011:865](#)).

^{49/} Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009 L 243, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

and apply for asylum in Belgium at a later stage. The applicants emphasised, among other things, the deteriorating security situation in Syria and the fact that they were at risk of persecution on account of their belonging to the Orthodox Christian community. Their applications were rejected. Proceedings having been brought before it challenging that rejection, the referring court questioned the extent of Member States' discretion in such circumstances, having regard in particular to the obligations flowing from the Charter, especially Articles 4 and 18.

The Court first of all recalled that the Visa Code was intended for the issuing of visas for stays on the territories of Member States not exceeding 90 days in any 180-day period. It is obvious that the purpose of the Syrian family's visa applications differed from that of a short-term visa, since the family intended to apply for asylum in Belgium immediately upon arrival there and obtain a residence permit with a period of validity not limited to 90 days. Consequently, the Court considered that such applications, even if formally submitted on the basis of the Visa Code, fall outside the scope of that code. In addition, since no measure has been adopted, to date, by the EU legislature with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third country nationals on humanitarian grounds, those applications fall solely within the scope of national law. Therefore, since that situation is not governed by EU law, the provisions of the Charter do not apply to it.

The Court added that to conclude otherwise would be tantamount to allowing third country nationals to lodge applications for visas in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by the Dublin III Regulation. To conclude otherwise would also mean that Member States are required, on the basis of the Visa Code, to allow such third country nationals to submit applications for international protection to the diplomatic posts of Member States that are within the territory of a third country. The EU measures governing the procedures for applications for international protection do not impose such an obligation and, on the contrary, exclude from their scope applications made to the representations of Member States.

The judgment in ***Al Chodor and Others*** (C-528/15, [EU:C:2017:213](#)), delivered on 15 March 2017, concerns *the notion of objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond*. That notion is mentioned in Article 2(n) of the Dublin III Regulation, which defines 'risk of absconding'. Under Article 28(2) of that regulation, an applicant for international protection may be detained where there is a significant risk of absconding, but only on the basis of an individual assessment and in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

In this case, two Iraqi nationals had been subject to a police check in the Czech Republic which revealed, after consulting the Eurodac database, that they had submitted an asylum application in Hungary. Pending their transfer to that Member State, the persons concerned were placed in detention on account of the risk that they might abscond. However, their detention was held to be unlawful because Czech legislation did not lay down the objective criteria for assessing the risk of absconding.

The Court recalled that although regulations generally have immediate effect in the national legal systems, some of their provisions may necessitate, for their implementation, the adoption of measures of application by the Member States. That is the case with regard to Article 2(n) of the Dublin III Regulation, which explicitly requires that the objective criteria in issue be 'defined by law'. The Court therefore ruled that the elaboration of those criteria is a matter for national law, that the criteria must be established in a binding provision of general application, and that the absence of such a provision leads to the inapplicability of Article 28(2) of that regulation. The Court pointed out in that regard that the existence of settled case-law confirming a consistent administrative practice cannot suffice.

In reaching that conclusion, the Court made clear, in particular, that the detention of applicants for international protection constitutes a serious interference with their right to liberty, enshrined in Article 6 of the Charter. Accordingly, such detention must be subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness. Only a provision of general application is capable of meeting those requirements. Such a provision sets out the limits of the flexibility of national authorities in the assessment of the circumstances of each specific case in a manner that is binding and known in advance. Furthermore, criteria established by a binding provision are best placed for the external direction of the discretion of those authorities for the purposes of protecting applicants against arbitrary deprivations of liberty.

In its judgments in **Mengesteab** (C-670/16, [EU:C:2017:587](#)) and **Shiri** (C-201/16, [EU:C:2017:805](#)), the Grand Chamber of the Court ruled that the procedures for taking charge of and taking back applicants for international protection must be carried out in compliance with a series of specified time limits, and that those time limits are intended to provide a framework for those procedures and also contribute to determining the Member State responsible for examining their application, so that it must be possible for compliance with them to be subject to judicial review.

Specifically, in the first case, which was decided under the expedited procedure and gave rise to the judgment of 26 July 2017 in **Mengesteab**, the Court provided clarification *on the time limits laid down in Article 21(1) of the Dublin III Regulation, which establish the framework for the making of a take charge request*. That article provides that if such a request is not made within three months from the date on which the application for international protection was lodged or, in the case of a Eurodac hit, within two months of receiving that hit, responsibility for examining the application lies with the Member State in which the application was lodged. In the case in point, an Eritrean national had submitted a request for asylum in September 2015 with the German authorities, which had then issued a certificate of registration to him, bearing in mind that German law distinguishes between submitting a request for asylum, resulting in such a certificate being issued, and lodging a formal application for asylum. In January 2016 at the latest, the competent German authorities received the original of the applicant's certificate, a copy of it or the main information which it contained. In July 2016, the person concerned was finally able to lodge a formal application for asylum. However, as a search in the Eurodac system revealed that his fingerprints had been taken in Italy, the German authorities requested, in August 2016, that the Italian authorities take charge of him. Thus, although the applicant's certificate had reached the competent authority more than three months before the take charge request was made, his formal asylum application was lodged less than three months before that request was made. In November 2016, an order was issued to transfer the applicant to Italy.

First of all, as regards the consequences of failing to comply with the time limits set out in Article 21(1) of the Dublin III Regulation, the Court stated that a decision to transfer a person to a Member State other than the one with which the application for international protection was lodged cannot validly be adopted once those time limits have expired. It also ruled that an applicant for international protection may rely, in the context of an action brought against a decision to transfer him, on the expiry of a time limit laid down in that article, even if the requested Member State is willing to take charge of that applicant. Thus, the court dealing with the action may satisfy itself that the contested transfer decision was adopted following a proper application of the take charge procedure.

Secondly, as regards the relationship between the two time limits laid down in the first and second subparagraphs of Article 21(1) of the Dublin III Regulation, the Court found that a take charge request cannot validly be made more than three months after the application for international protection has been lodged, even if that request is made within two months of receipt of a Eurodac hit. The receipt of that hit does not permit the three-month period to be exceeded in order to make a take charge request after an application for international protection has been lodged.

Thirdly, as regards the point in time when the three-month period begins to run, namely the date on which the application for international protection was lodged for the purpose of Article 20(2) of the Dublin III Regulation, the Court held that such an application is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation and, as the case may be, if only the main information contained in such a document has reached that authority. In order to be able effectively to start the process of determining the responsible Member State, the competent authority needs to be informed, with certainty, of the fact that a third country national has requested international protection, and it is not necessary for the written document prepared for that purpose to have a precisely defined form or for it to include additional information relevant to the application of the criteria laid down by that regulation or, a fortiori, to the examination of the application for international protection. Nor is it necessary, at that stage of the procedure, for a personal interview already to have been organised.

In the second case, which gave rise to the judgment in *Shiri* of 25 October 2017, the Court provided clarification on the time limits laid down in Article 29(1) and (2) of the Dublin III Regulation, which establish the framework for the decision to transfer an applicant for international protection. That article provides, in particular, that if such a transfer does not take place within six months of acceptance of the request to take charge of or take back the person concerned, or of the final decision on an appeal having suspensive effect, responsibility is then transferred to the requesting Member State. In the main proceedings, an Iranian national had challenged the decision to refuse his application for international protection in Austria and to remove him to Bulgaria where he had lodged an earlier application. In March 2015, the Austrian authorities requested that the Bulgarian authorities take charge of him, to which they agreed. In July 2015, an order was issued to transfer the applicant to Bulgaria. However, since the transfer did not take place within the six-month time limit, the person concerned argued that the Republic of Austria had become the responsible Member State.

In reply to the question from the national court as to whether the expiry of the six-month time limit is sufficient in itself to result in such a transfer of responsibility between Member States, the Court, in the first place, stated that if the applicant's transfer is not carried out within that time limit, responsibility for examining the application for international protection is transferred automatically to the requesting Member State, without it being necessary for the Member State responsible to refuse to take charge of or take back the person concerned.

In the second place, the Court considered that an applicant for international protection must have an effective and rapid remedy available to him which enables him to rely on the expiry of that six-month period, irrespective of whether that period expired before or after the transfer decision was adopted. Unlike the time limits providing a framework for the making of a take charge request (at issue in *Mengesteab*), the periods set out in Article 29 of the Dublin III Regulation are intended to provide a framework not only for the adoption but also for the implementation of the transfer decision. They may therefore expire after the adoption of that decision. In this instance, the right provided for in Austrian legislation to plead circumstances subsequent to the adoption of the transfer decision, in an action brought against that decision, meets the obligation to provide for an effective and rapid remedy laid down, in particular, in Article 47 of the Charter.

1.3. International protection in the event of a migration crisis

In the judgments in *Jafari* (C-646/16, [EU:C:2017:586](#)) and *A.S.* (C-490/16, [EU:C:2017:585](#)), delivered on 26 July 2017, the first of which was decided under the expedited procedure and the second of which was accorded priority treatment, the Grand Chamber was required to decide *whether the arrival of an unusually large number of third country nationals seeking international protection affected the rules on the issuing of visas and the determination of the*

Member State responsible for examining applications for international protection. In the disputes in the main proceedings, the members of an Afghan family and a Syrian national had crossed the border between Serbia and Croatia. The Croatian authorities had then organised transport for those persons to the Slovenian border with the aim of assisting them in moving on to other Member States in order to make an application for international protection. The Afghan family submitted such an application in Austria while the Syrian national did so in Slovenia. However, the Slovenian authorities requested that the Croatian authorities take charge of the Syrian national since, under Article 13(1) of the Dublin III Regulation, responsibility lies with the Member State whose external border has been crossed irregularly. The Austrian authorities, for their part, requested that the Croatian authorities take charge of the Afghan family on the basis of Article 21 of that regulation. The Afghan family and the Syrian national challenged the decision to refuse their applications for international protection and to transfer them to Croatia. The national courts concerned referred a question to the Court on the subject of the internal relationship between the relevant provisions of the Dublin III Regulation.

In its judgment in *Jafari*, the Court first of all dealt with the question whether the fact that the Croatian authorities had tolerated the entry into their territory of persons seeking transit through that Member State in order to lodge an application for international protection in another Member State was tantamount to the issuing of a visa within the meaning of Article 12 of the Dublin III Regulation. In that regard, the Court ruled that, by definition, a visa is the 'authorisation or decision of a Member State' which is 'required for transit or entry' into the territory of that Member State or several Member States. Thus, first, the term 'visa' refers to an act formally adopted by a national authority, not to mere tolerance, and, secondly, a visa is not to be confused with admission to the territory of a Member State, since a visa is required precisely for the purposes of enabling such admission. Consequently, admission to the territory of a Member State, which may merely be tolerated by the authorities of that Member State, does not constitute a 'visa'. The Court added that the fact that such admission occurs in a situation characterised by the arrival of an unusually large number of third country nationals seeking international protection does not alter that conclusion.

Next, in the judgment in both *Jafari* and *A.S.*, the Court ruled on the concept of 'irregular crossing' used (but not defined) in Article 13(1) of the Dublin III Regulation. It stated that that provision must be interpreted as meaning that a third country national admitted into the territory of one Member State, without fulfilling the entry conditions generally imposed in that Member State, for the purpose of transit to another Member State in order to lodge an application for international protection there, must be regarded as having 'irregularly crossed' the border of that first Member State. According to the Court, the fact that the crossing was tolerated or authorised in breach of the applicable rules, or was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third country nationals, does not render that crossing regular. A Member State that has decided to authorise, on humanitarian grounds, the entry into its territory of a third country national who does not have a visa and is not entitled to a visa exemption cannot be absolved of its responsibility towards that person without calling into question the overall scheme of the Dublin III Regulation. Furthermore, as indicated previously, the fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third country nationals is irrelevant. On that last point, the Court made clear in particular that the EU legislature has taken account of the risk that such a situation may occur and has therefore provided the Member States with means intended to be capable of responding to that situation appropriately, without, however, providing for the application, in that case, of a specific body of rules for determining the Member State responsible. That is the case, for example, with regard to the Member States' power under Article 17(1) of the Dublin III Regulation to decide to examine applications for international protection even if such examination is not their responsibility under the criteria laid down in that regulation (discretionary clause). As it did in its judgment in *C. K. and Others*

(C-578/16 PPU),⁵⁰ the Court nonetheless recalled that an applicant for international protection must not be transferred if that transfer entails a genuine risk that the person concerned may suffer inhuman or degrading treatment contrary to Article 4 of the Charter. Against that background, the Court acknowledged the possibility that, following the arrival of an unusually large number of third country nationals seeking international protection, such a risk may exist in the Member State responsible, with the result that an applicant cannot be transferred to that Member State.

The Court applied the principles established in *Jafari* in its judgment in *A.S.*. Thus, it ruled that in order to challenge a transfer decision, an applicant for international protection is entitled, in the context of the remedies provided for in Article 27(1) of the Dublin III Regulation, to plead misapplication of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State, laid down in Article 13(1) of that regulation. Relying on its judgment in *Ghezelbash*,⁵¹ in which it held that such an applicant may, in accordance with his right to an effective remedy, plead misapplication of the criterion relating to the grant of a visa, the Court pointed out that the reasons given in that judgment also applied to the criterion set out in Article 13(1) of the Dublin III Regulation.

Lastly, continuing with the judgment in *A.S.*, the Court examined the effects of lodging an appeal against a transfer decision on the running of the time limits laid down in Article 13(1) and Article 29(2) of the Dublin III Regulation. The Court pointed out that both provisions are intended to limit in time the responsibility of a Member State under the Dublin III Regulation. Under Article 13(1), the responsibility of a Member State based on the criterion of irregular crossing of the border is to cease 12 months after the date of that crossing and, under Article 29, the transfer of an applicant for international protection must take place within 6 months of acceptance by the Member State responsible or of the final decision on an appeal or review having suspensive effect in accordance with Article 27(3) of the Dublin III Regulation.

First, the Court held that the lodging of an appeal against a transfer decision has no effect on the running of the time limit laid down in Article 13(1), which constitutes a condition for the application of the criterion laid down in that provision. Secondly, the Court ruled that the time limit laid down in Article 29(1) and (2) does not start to run until the final decision on that appeal, including when the court hearing the appeal has decided to request a preliminary ruling from the Court, as long as that appeal has suspensive effect. That latter time limit relates to the enforcement of the transfer decision and may be applied only once the principle of transfer has been established, that is to say, at the earliest when the requested Member State has accepted the request to take charge or take back.

With further reference to the migration crisis, on 6 September 2017, the Grand Chamber of the Court delivered its judgment in *Slovakia and Hungary v Council* (C-643/15 and C-647/15, [EU:C:2017:631](#)), in which it *dismissed in full the actions seeking annulment of Council Decision 2015/1601 establishing provisional measures for the mandatory relocation of asylum applicants*.⁵² The Council had adopted that decision on the basis of Article 78(3) TFEU in order to help Italy and Greece deal with the massive inflow of migrants in the summer of 2015. It provided for the relocation from those two Member States to other Member States, over a period of two years, of almost 120 000 persons in clear need of international protection. Slovakia and Hungary, which had voted against the adoption of that decision in the Council, asked the Court to annul the decision. In support of their actions, they argued, first, that the adoption of the contested decision was vitiated by errors of a procedural nature or was

^{50/} That judgment is presented in this report under Section VIII.1.2 'Handling of applications for international protection'.

^{51/} Judgment of the Court of 7 June 2016, *Ghezelbash* (C-63/15, [EU:C:2016:409](#)).

^{52/} Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).

founded on an inappropriate legal basis and, secondly, that the decision was neither a suitable response to the migration crisis nor necessary for that purpose.

The Court first of all held that whilst Article 78(3) TFEU provides that the Council is to adopt the provisional measures referred to therein on a proposal from the Commission and after consulting the Parliament, it does not contain any express reference to the legislative procedure. Accordingly, Decision 2015/1601 could be properly adopted in a non-legislative procedure and is consequently a non-legislative act. It follows that, contrary to the submissions of the applicant Member States, the adoption of the contested decision was not subject to the requirements relating to the participation of national Parliaments and to the public nature of the deliberations and vote in the Council, as those requirements apply only to legislative acts. In addition, the Court found that the Council was not required to act unanimously when it adopted the contested decision, even though, for the purpose of adopting some amendments, it had to depart from the Commission's initial proposal. The amended proposal was approved on behalf of the Commission by two of its Members, who were authorised by the College for that purpose, which is consistent with the objective of Article 293(2) TFEU of protecting the Commission's power of initiative.

The Court also ruled that although it is true that the provisional measures adopted on the basis of Article 78(3) TFEU may in principle derogate from provisions of legislative acts, both the material and temporal scope of such derogations must nonetheless be circumscribed, so that the latter are limited to responding swiftly and effectively, by means of a temporary arrangement, to a specific crisis: that precludes such measures from having either the object or effect of replacing legislative acts or amending them permanently and generally, thereby circumventing the ordinary legislative procedure provided for in Article 78(2) TFEU. It nonetheless pointed out that the derogations provided for in the contested decision meet that requirement since, first, they apply for a two-year period only (subject to the possibility of extension) and, secondly, they concern a limited number of applicants for international protection in Greece and Italy who have one of the nationalities referred to in that decision and who have arrived or will arrive in those Member States over a given period.

With regard to observance of the principle of proportionality, the Court recalled that the EU institutions must be allowed broad discretion when they adopt measures in areas which entail choices on their part, including of a political nature, and in which they are called upon to undertake complex assessments. Consequently, the legality of such measures adopted in one of those areas can be affected only if the measure is manifestly inappropriate having regard to the objective which the institutions are seeking to pursue. In the case in point, the Court considered that the relocation mechanism provided for in the contested decision is not a measure that is manifestly inappropriate for working towards its objective, namely to take pressure off the Greek and Italian asylum systems which were severely disrupted by the massive inflows of refugees in 2015. The Council was therefore fully entitled to take the view, in the exercise of the broad discretion which it must be allowed in this regard, that the distribution of the persons to be relocated had to be mandatory, given the particular urgency of the situation in which the contested decision was to be adopted. In any event, the lawfulness of the decision cannot be called in question on the basis of retrospective assessments of its efficacy, such as the small number of relocations carried out pursuant to the decision, since that can be explained by a series of factors that the Council could not foresee at the time when the decision was adopted, including, in particular, the lack of cooperation on the part of certain Member States.

Furthermore, the Court pointed out that the Council, when adopting the contested decision, was required to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented. Therefore, the Council made no manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take — on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU — provisional measures imposing a binding relocation mechanism.

Lastly, the Court made clear that if, in line with the arguments put forward by one of the intervening Member States, relocation in this case were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, consequently, the adoption of a binding relocation mechanism would be impossible. In any case, considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Article 21 of the Charter. The system established by the Dublin III Regulation is based on objective criteria rather than on a preference expressed by the applicant for international protection.

2. IMMIGRATION POLICY

In the judgment in *Fahimian* (C-544/15, [EU:C:2017:255](#)), delivered on 4 April 2017, the Grand Chamber of the Court was called upon to interpret *the concept of 'threat to public security' within the meaning of Article 6(1)(d) of Directive 2004/114 on the conditions of admission of third country nationals for the purposes of studies*⁵³ and to clarify the scope of the discretion accorded to the Member States for that purpose. Under that provision, the Member States are to verify whether there are grounds relating to the existence of a threat to public policy, public security or public health which may justify a refusal to admit a third country national. The applicant in the main proceedings, an Iranian national, held a Master of Science degree in the field of information technology awarded by a university which is the subject of EU restrictive measures because of its support of the Iranian Government, in particular in the military field. The person concerned had secured a grant from a German university in order to pursue doctoral studies there in the field of the security of mobile systems, but she was refused a study visa. She challenged that refusal before the German referring court. The German Government justified the refusal by the fear that the knowledge the person concerned might acquire during her research could subsequently be misused in Iran (for purposes such as the collection of confidential information in western countries, internal repression or, more generally, in connection with human rights violations).

Having been asked about the interpretation of Directive 2004/114, the Court held that the competent national authorities, where a third country national has applied to them for a visa for study purposes, have a wide discretion in ascertaining, in the light of all the relevant elements of the situation of that national, whether he represents a threat, if only potential, to public security. That assessment may thus take into account not only the personal conduct of the applicant but also other elements relating, in particular, to his professional career.

The Court also ruled that Article 6(1)(d) of Directive 2004/114 does not preclude the competent national authorities from refusing to admit to the territory of the Member State concerned a third country national who holds a degree from a university which is the subject of EU restrictive measures because of its large scale involvement with the Iranian Government in military or related fields, and who plans to carry out research in that Member State in a field that is sensitive for public security, if the elements available to those authorities give reason to fear that the knowledge acquired by that person during his research may subsequently be used for purposes contrary to public security. As regards judicial review of the discretion enjoyed by national authorities in that respect, the Court found that although such review is limited, as regards the substance, to the absence of manifest error, it must also relate to compliance with procedural guarantees. Thus, it is for the national court to ascertain whether the decision to refuse admission is based on sufficient grounds and a sufficiently solid factual basis.

^{53/} Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375, p. 12).

IX. JUDICIAL COOPERATION IN CIVIL MATTERS

1. REGULATIONS No 44/2001 AND No 1215/2012 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS.

In its judgment in *Nogueira and Others* (C-168/16 and C-169/16, [EU:C:2017:688](#)), delivered on 14 September 2017, the Court was required to interpret *the concept of 'place in which the employee habitually carries out his work' within the meaning of Article 19(2)(a) of Regulation No 44/2001*,⁵⁴ in order to determine the courts before which airline crew may bring legal action. The six applicants in the main proceedings were members of the cabin crew hired by or placed at the disposal of Ryanair, a company established in Ireland. All the employment contracts were drafted in English, were governed by Irish law and included a jurisdiction clause providing that the Irish courts had jurisdiction. In those contracts, it was stipulated that the work of the employees concerned was regarded as being carried out in Ireland given that their duties were performed on board aircraft registered in that Member State. Those contracts nevertheless designated Charleroi airport (Belgium) as the employees' 'home base'. Those employees started and ended their working day at that airport and were contractually obliged to reside within an hour of their 'home base'. With a view to ascertaining whether it had jurisdiction to hear the cases in the main proceedings, the Belgian court before which the applicants had brought proceedings asked the Court about the interpretation in those circumstances of the concept of 'place in which the employee habitually carries out his work' within the meaning of Regulation No 44/2001. Specifically, it enquired whether that concept could be equated with the concept of 'home base' within the meaning of Regulation No 3922/91⁵⁵ in the field of civil aviation. Regulation No 3922/91 defines that concept as the place from which the air crew systematically starts its working day and ends it by organising its daily work there and close to which employees have, during the period of performance of their contract of employment, established their residence and are at the disposal of the air carrier.

First of all, the Court recalled that, as regards disputes related to employment contracts, the EU rules concerning jurisdiction are aimed at protecting the weaker party to the contract, by allowing an employee to sue his employer before the courts which he regards as closest to his interests. Next, the Court pointed out that where a national court is not able to determine with certainty the 'place where the employee habitually carries out his work', it must, in order to assess whether it has jurisdiction, identify 'the place from which' that employee principally discharges his obligations towards his employer. In order to determine specifically that place, the national court must refer to a set of indicia (circumstantial method), including the place where the aircraft aboard which the work is habitually performed are stationed. Consequently, the concept of 'place where, or from which, the employee habitually performs his work' cannot be equated with any concept referred to in an act of EU law that is not Regulation No 44/2001. In particular, as regards the air crew employed by or assigned to an airline, that concept cannot be equated with the concept of 'home base' within the meaning of Regulation No 3922/91. Indeed,

^{54/} 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).

^{55/} Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ 1991 L 373, p. 4), as amended by Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 377, p. 1).

Regulation No 44/2001 does not refer to Regulation No 3922/91, nor does it have the same objectives; the latter regulation aims to harmonise technical requirements and administrative procedures in the field of civil aviation safety.

That said, the Court made clear that the concept of ‘home base’ constitutes nevertheless a significant indicium for the purposes of determining the ‘place where the employee habitually carries out his work’. According to the Court, it would only be if, taking account of the facts of each individual case, applications were to display closer connections with a place other than the ‘home base’ that the relevance of that base in identifying the ‘place from which employees habitually carry out their work’ would be undermined.

In another case concerning the determination of the court with jurisdiction, the Court, sitting as the Grand Chamber, ruled in the judgment of 17 October 2017 in ***Bolagsupplysningen and Ilsjan*** (C-194/16, [EU:C:2017:766](#)) on the application of Article 7(2) of Regulation No 1215/2012.⁵⁶ That regulation lays down a rule of special jurisdiction in matters relating to tort, delict or quasi-delict, under which a defendant may be sued in the courts of the Member State where the harmful event occurred or may occur. In its judgment, the Court provided clarification on *the identification of the place where the damage occurred in the case of an alleged infringement of the personality rights of a legal person committed on the internet*. In this case, the applicant, a company governed by Estonian law, had brought an action against a company governed by Swedish law before the Estonian courts. That action related to applications for the rectification of allegedly incorrect information published on the website of the latter concerning the applicant, the deletion of associated comments on a discussion forum on that website and compensation for harm allegedly suffered. The question that arose was whether the Estonian courts had jurisdiction on the ground that they were the courts for the place where the alleged damage occurred — Estonia — even though the information and comments at issue had been published in Swedish, without a translation, on a Swedish website.

A request for a preliminary ruling having been submitted to it in that regard, the Court recalled the principle established in ***eDate Advertising and Others***,⁵⁷ concerning a natural person, according to which, in the event of an alleged infringement of personality rights by means of content placed online on a website, the person who considers that his rights have been infringed must have the option of bringing an action for damages, in respect of all the harm caused, before the courts of the Member State in which the centre of his interests is based. In applying that judgment, the Court held that the matter of whether the person is a natural or legal person is not conclusive. As regards a legal person, as in the main proceedings, the centre of interests at issue must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries on the main part of its activities. The Court added that where a legal person carries on the main part of its activities in a different Member State from the one in which its registered office is located, that person may sue the alleged perpetrator of the injury in that other Member State by virtue of it being where the damage occurred.

Lastly, the Court recalled — again with reference to *eDate Advertising and Others* — that a person who considers that his rights have been infringed may also, instead of an action for damages in respect of all the harm caused, bring his action before the courts of each Member State in whose territory content placed online is or has been accessible, which have jurisdiction only in respect of the harm caused in the territory of the Member State of the court seised. However, that principle does not apply in the case of an application for the rectification of information and the removal of content placed online on a website. In the light of the ubiquitous nature of that content and

^{56/} Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

^{57/} Judgment of the Court of 25 October 2011, ***eDate Advertising and Others*** (C-509/09 and C-161/10, [EU:C:2011:685](#)).

information and the fact that the scope of their distribution is, in principle, universal, such an application can only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage.

2. REGULATION No 1259/2010 ON THE LAW APPLICABLE TO DIVORCE

In its judgment in *Sahyouni* (C-372/16, [EU:C:2017:988](#)) of 20 December 2017, the Court ruled on the substantive scope of Regulation No 1259/2010 (Rome III Regulation)⁵⁸ implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. The case in the main proceedings concerned the dissolution, by a religious court in Syria, of a marriage entered into in Syria between two persons each with Syrian and German nationality who currently live in Germany. Recognition of that 'private' divorce, which had been established by means of a unilateral declaration by the husband, was subsequently granted in Germany on the ground that the divorce was governed by Syrian law under the Rome III Regulation. The wife challenged that decision before the national court, which referred a number of questions to the Court for a preliminary ruling on the interpretation of that regulation.

By order of 12 May 2016,⁵⁹ the Court however declared that it manifestly lacked jurisdiction to answer those questions on the ground, in particular, that the Rome III Regulation did not apply to the recognition of a divorce decision delivered in a third country, and that the referring court had not provided any evidence capable of establishing that the provisions of that regulation had been rendered directly and unconditionally applicable by national law to the case in the main proceedings. It was against that background that the national court submitted a second reference for a preliminary ruling to the Court on the interpretation of the Rome III Regulation, pointing out that, under German law, that regulation applies to the recognition in Germany of private divorces pronounced in a third country, such as the divorce at issue in the main proceedings.

In the light of that clarification, the Court first of all found that the second reference for a preliminary ruling was admissible. Secondly, it examined whether a 'private' divorce such as that at issue in the main proceedings falls within the substantive scope of the Rome III Regulation. It considered that although it is true that that regulation does not define the concept of 'divorce' and that private divorces are not explicitly excluded from its scope, the fact remains that there are several factors which show that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority. Thus, in the Court's opinion, it was not the intention of the EU legislature that that regulation should be applicable to other types of divorce, such as that in issue in the main proceedings, which is based on a 'unilateral declaration of intent' pronounced before a religious court. The Court took the view that such an interpretation in addition ensures consistency with the scope of Regulation No 2201/2003,⁶⁰ which was also adopted in the context of the policy of judicial cooperation in civil matters and applies only to divorces pronounced by a court, pursuant to Articles 1(1) and 2(4) thereof. Accordingly, having regard not only to the wording of the Rome III Regulation, but also its context and the objectives it pursues, the Court ruled that a divorce resulting from a unilateral declaration made by one of the spouses before a religious court does not fall within the scope of that regulation.

^{58/} Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10). This regulation repeals Regulation No 44/2001.

^{59/} Order of the Court of 12 May 2016, *Sahyouni* (C-281/15, [EU:C:2016:343](#)).

^{60/} Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

3. REGULATION No 650/2012 ON SUCCESSION

In the judgment in *Kubicka* (C-218/16, [EU:C:2017:755](#)), delivered on 12 October 2017, the Court had the opportunity to rule on *the lawfulness of a refusal to draw up a will in accordance with the law of the testator's nationality — which was also the law chosen by the testator — on account of a legacy appearing therein relating to property located in another Member State which does not recognise that legacy*. Accordingly, the Court was required to interpret, for the first time, Regulation No 650/2012⁶¹ on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession, and provided clarification on its scope. In the main proceedings, a Polish testator residing in Germany, who had chosen, pursuant to Article 22(1) of Regulation No 650/2012, Polish succession law as the law governing her will, wanted to establish in her will a legacy 'by vindication', which produces direct material effects on the date of opening of the succession, in respect of immovable property in Germany, a Member State in which the material effects of that type of legacy are not recognised. Since foreign legacies 'by vindication' are, by means of adaptation, considered to be legacies 'by damnation' in Germany, the officiating notary in Poland had refused to draw up a will contrary to German legislation and case-law relating to rights in rem and land registration, which the notary considered himself bound to take into account under Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012. Since the person concerned wished to rule out recourse to a legacy 'by damnation', which would entail difficulties in relation to the representation of her minor children, she brought an action against the decision refusing to draw up a will containing a legacy 'by vindication'.

The Court first of all recalled that Regulation No 650/2012 applies to succession to the estate of a deceased person, which covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. Next, it pointed out that Article 1(2) of that regulation lists various matters that are excluded from its scope, including, under point (k), 'the nature of rights in rem' and, under point (l), 'any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register'. In the case in point, the Court concluded that direct transfer of a right of ownership by means of a legacy 'by vindication' concerns only the arrangement by which the right of ownership of an asset is transferred at the time of the testator's death, which is precisely what Regulation No 650/2012 seeks to allow. Accordingly, such methods of transfer are not covered by Article 1(2)(k) of Regulation No 650/2012. In the view of the Court, those exclusions do not justify the refusal, by an authority of a Member State, to recognise the material effects of a legacy 'by vindication', provided for by the law governing succession, on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.

Based on the principle that the law governing succession should govern the succession as a whole, the Court considered that since Article 1(2)(l) of Regulation No 650/2012 concerns only the recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register, the conditions under which such rights are acquired do not constitute one of the subjects excluded from the scope of the regulation under this provision. In that connection, it drew attention to the objective pursued by Regulation No 650/2012, which is to eliminate obstacles to the free movement of persons who want to assert their rights arising from a cross-border succession.

^{61/} Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107).

The Court also held that Article 31 of Regulation No 650/2012, which provides for the adaptation of rights in rem, did not apply in the instant case. That provision does not concern the method of the transfer of rights in rem, including, *inter alia*, legacies 'by vindication' or 'by damnation', but only the respect of the content of rights in rem, determined by the law governing the succession, and their reception in the legal order of the Member State in which they are invoked. Therefore, in so far as the right in rem transferred by the legacy 'by vindication' is the right of ownership, which is recognised in German law, there is no need for the adaptation provided for in Article 31 of Regulation No 650/2012.

X. JUDICIAL COOPERATION IN CRIMINAL MATTERS

In the field of judicial cooperation in criminal matters, reference must be made to two judgments interpreting the provisions of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States.⁶²

In its judgment in *Popławski* (C-579/15, [EU:C:2017:503](#)), delivered on 29 June 2017, the Court ruled on the compatibility with Framework Decision 2002/584 of national legislation implementing Article 4(6) of that framework decision, which provides that the residence of the requested person in the executing Member State is an optional ground for non-execution 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 residing in the Netherlands for the purpose of enforcing a custodial sentence in Poland.

The Court ruled that Article 4(6) of Framework Decision 2002/584 precludes national legislation implementing that provision which prescribes that judicial authorities are, in any event, obliged to refuse to execute a European arrest warrant if the requested person resides in that Member State, without those authorities having any margin of discretion and without that Member State actually undertaking to execute the custodial sentence pronounced against the requested person, within the meaning of the framework decision. In the Court's view, such a situation creates a risk of impunity of that person.

The Court first of all recalled that Framework Decision 2002/584 lays down the principle that the Member States must execute any European arrest warrant on the basis of the principle of mutual recognition and that a refusal to execute is intended to be an exception which must be interpreted strictly. Next, it pointed out that it is apparent from Article 4(6) of Framework Decision 2002/584 that any refusal to execute a European arrest warrant presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person, even though the mere fact that that Member State declares itself 'willing' to execute the sentence cannot, in any event, be regarded as justifying such a refusal.

Furthermore, the Court noted that the provisions of Framework Decision 2002/584 do not have direct effect. However, the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law, so far as is possible, in the light of the wording and the purpose of that framework decision. Consequently, in the event of a refusal to execute a European arrest warrant issued with a view to the surrender of a person who has been finally judged in the issuing Member State and given a custodial sentence, the judicial authorities of the executing

^{62/} 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).

Member State are themselves required to ensure that the sentence pronounced against that person is actually executed, and not merely to inform the issuing Member State that they are willing to execute that sentence. Similarly, Article 4(6) of Framework Decision 2002/584 does not permit the authorities of the executing Member State to refuse to surrender a person on the sole ground that that Member State intends to prosecute the person in relation to the same acts.

In the judgment in **Tupikas** (C-270/17 PPU, [EU:C:2017:628](#)), delivered on 10 August 2017 under the urgent preliminary ruling procedure, the Court ruled on *the interpretation of Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299*,⁶³ providing for an optional ground for non-execution of a European arrest warrant where the person concerned did not appear in person at the trial resulting in his conviction. The main proceedings concerned the execution, in the Netherlands, of a European arrest warrant issued by a Lithuanian court against a Lithuanian national for the purpose of enforcing a custodial sentence in Lithuania. Although it was common ground that the party concerned had appeared in person at the trial at first instance, the European arrest warrant did not contain any information concerning his appearance at the appeal. Against that background, the Netherlands court sought to ascertain whether the optional ground for non-execution of a European arrest warrant, relating to the person concerned's non-appearance in person at the trial resulting in the decision, referred to the trial at first instance or the appeal.

The Court first of all noted that the concept of 'trial resulting in the decision' must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union, irrespective of classifications in the Member States. The Court ruled that that concept must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European arrest warrant. If proceedings have taken place at several instances giving rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case. Consequently, an appeal proceeding in principle falls within the scope of that concept. Lastly, the Court confirmed that that interpretation was fully in line with the requirements of respect for the rights of the defence which Article 4a of Framework Decision 2002/584 seeks to uphold.

^{63/} 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).

XI. COMPETITION

1. ARTICLE 101 TFEU

In the area of agreements, decisions and concerted practices concerning the liability of a parent company and a selective distribution system, two judgments deserve mention. Reference should also be made to the judgment in **APVE and Others** (C-671/15) relating to the conditions for the application of the rules on competition in the field of the common agricultural policy.⁶⁴

1.1. Liability of a parent company

On 27 April 2017, in its judgment in **Akzo Nobel and Others v Commission** (C-516/15 P, [EU:C:2017:314](#)), the Court confirmed the judgment under appeal⁶⁵ and found that *the fact that the Commission's power to impose penalties on two subsidiaries is time-barred does not preclude the parent company, in respect of which the limitation period has not expired, from being held liable.*

The Court pointed out, first of all, that the authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law liable to be punished pursuant to Article 101 or 102 TFEU and that, according to the case-law, that concept must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal. The Court also recalled that neither Article 23(2)(a) of Regulation No 1/2003 nor the case-law lays down which legal or natural person the Commission is obliged to hold responsible for the infringement or to punish by the imposition of a fine. Since the unlawful conduct of a subsidiary may, according to a rebuttable presumption, be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, the parent company and its subsidiary form, in those circumstances, a single economic unit and therefore form a single undertaking for the purposes of EU competition law.

The Court also pointed out that the parent company to which the unlawful conduct of its subsidiary is attributed is, in accordance with settled case-law, held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary. For that reason, the joint and several liability as between two companies constituting an economic unit cannot, in the Court's view, be reduced, as regards the payment of the fine, to a type of security provided by the parent company in order to guarantee payment of the fine imposed on the subsidiary. Lastly, since the parent company's liability is wholly derivative, it necessarily depends on the facts constituting the infringement committed by its subsidiary and to which its liability is inextricably linked.

Nonetheless, the Court held that the fact that the Commission's power to impose penalties is time-barred vis-à-vis the subsidiary does not necessarily mean that the limitation period has expired in respect of the parent company, even though the parent company's liability for the time frame at issue may be entirely based on the

^{64/} That judgment is presented in Section VI 'Agriculture'.

^{65/} Judgment of the General Court of 15 July 2015, **Akzo Nobel and Others v Commission** (T-47/10, [EU:T:2015:506](#)).

unlawful conduct of that subsidiary. The Court therefore ruled that the fact that penalties can no longer be imposed on certain subsidiaries because the limitation period has expired, under Article 25(1)(b) of Regulation No 1/2003,⁶⁶ does not preclude the parent company, which is considered personally responsible and jointly and severally liable for the same anticompetitive behaviour subsequent to that time frame, and in respect of which the limitation period has not expired, from having proceedings instituted against it. In this case, since the participation of two subsidiaries of Akzo Nobel in the cartels at issue ended in 1993, whereas Akzo Nobel had been involved in those infringements until 2000, the Court ruled that the General Court had been right to consider that the fact that the power to impose penalties on the two subsidiaries was time-barred did not preclude the parent company from being held liable.

1.2. Vertical agreements

As regards restrictions contained in vertical agreements, the Court, in its judgment in **Coty Germany** (C-230/16, [EU:C:2017:941](#)), delivered on 6 December 2017, provided considerable guidance on *the compatibility of selective distribution systems for luxury goods with Article 101 TFEU*. The dispute concerned a restriction contained in a selective distribution contract concluded between Coty Germany, a supplier of luxury cosmetics, and an authorised distributor of those goods, which prohibited such distributors from using, in a discernible manner, third-party undertakings for internet sales of the goods.

The referring court enquired, first, whether the contested restriction, which was designed primarily to preserve the luxury image of those goods, was compatible with Article 101(1) TFEU.

The Court first of all drew attention to its decision in **Copad**,⁶⁷ according to which, first, luxury goods may require the implementation of a selective distribution system in order to preserve their quality and to ensure that they are used properly, and, secondly, such a system is compatible with Article 101(1) TFEU to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary.

By its second question, the referring court asked whether Article 101(1) TFEU had to be interpreted as precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors from using, in a discernible manner, third-party platforms for the online sale of luxury goods. The Court found that such a contractual clause could be compatible with Article 101(1) TFEU provided that it seeks in particular to preserve the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and, lastly, that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court. Next, the Court held that the contested restriction was appropriate in the light of the objective pursued since it required the goods in issue to be exclusively associated with the authorised distributors, enabling Coty to monitor the sales environment of those goods and thus preserve their luxury image among consumers. In respect of the proportionality of the restriction, the Court made clear that the restriction was not absolute, as in **Pierre Fabre Dermo-Cosmétique**,⁶⁸ in so far as the authorised distributors in the case in point were permitted

^{66/} 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).

^{67/} Judgment of the Court of 23 April 2009, **Copad** (C-59/08, [EU:C:2009:260](#)).

^{68/} Judgment of the Court of 13 October 2011, **Pierre Fabre Dermo-Cosmétique** (C-439/09, [EU:C:2011:649](#)).

to sell the contract goods online both via their own websites and via third-party platforms where the use of such platforms is not discernible to the consumer. Therefore, the Court considered that the restriction appeared to be lawful in the light of Article 101(1) TFEU.

Lastly, in the context of its answers to the national court's third and fourth questions, the Court was called upon to assess whether the aforementioned prohibition amounted to a restriction of customers, within the meaning of Article 4(b) of Regulation No 330/2010,⁶⁹ or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation. The Court found that it did not. In accordance with Article 101(3) TFEU, Regulation No 330/2010 establishes exemptions for certain types of restrictions on competition, provided that the market share held by both supplier and buyer does not exceed 30% of the relevant market. Article 4 of Regulation No 330/2010 also makes provision for hardcore restrictions which do not qualify for those exemptions. In that regard, the Court concluded that since the contested clause did not completely prevent Coty's distributors from using the internet as a means of marketing the goods, just from using a specific kind of internet sale, namely the discernible use of third-party undertakings, the clause could not be classified as a restriction of customers or of passive sales to end users within the meaning of Article 4 of Regulation No 330/2010.

2. ARTICLE 102 TFEU

On 6 September 2017, the judgment delivered in *Intel v Commission* (C-413/14 P, [EU:C:2017:632](#)) afforded the Court the opportunity, sitting as the Grand Chamber, to determine *the Commission's territorial jurisdiction to punish abuse of a dominant position*. The dispute at issue originated in the decision of the Commission to impose a fine of EUR 1.06 billion on Intel, a US manufacturer of central processing units ('CPUs'), for having abused its dominant position on the world market for x86 CPUs, in particular by granting loyalty rebates to original equipment manufacturers in return for being supplied exclusively by Intel.⁷⁰ The Court *set aside the judgment of the General Court dismissing Intel's action for annulment of that decision*.⁷¹ It considered that the General Court had failed, in the judgment under appeal, to examine all of the arguments put forward by Intel as regards whether the rebates at issue, as applied by Intel to some of its customers, were capable of restricting competition.

Concerning, in the first place, the question raised by Intel as to whether the Commission had jurisdiction to find and punish conduct adopted outside the European Union, the Court recalled that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of Article 101 TFEU if that agreement is operative on the territory of the internal market. In this case, the Commission had, in the contested decision, based its jurisdiction to apply Article 102 TFEU to the agreements concluded by Intel with a major original equipment manufacturer ('OEM') in China on the 'qualified effects' of the practices at issue in the European Economic Area. The Court confirmed that that criterion may serve as a basis for the Commission's jurisdiction to apply EU competition law under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the EU market. The Court held that it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied, which was the case here. Despite the fact that the CPUs were intended for delivery in China, the Court

^{69/} Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1).

^{70/} Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 Intel).

^{71/} Judgment of the General Court of 12 June 2014, *Intel v Commission* (T-286/09, [EU:T:2014:547](#)).

found that Intel's conduct formed part of an overall anticompetitive strategy aimed at foreclosing its only competitor's access to the most important sales channels on the market and noted that the sale of computers equipped with those CPUs was in particular planned in the European Economic Area.

As regards, in the second place, the plea alleging a material procedural irregularity affecting Intel's rights of the defence, Intel essentially criticised the General Court's consideration of the plea by which it had complained, at first instance, about the Commission's failure to record an interview with an executive of one of Intel's largest customers during the administrative procedure. The Court found, in that respect, that the General Court had erred in law by drawing a distinction between formal interviews, which fall in particular under Article 19(1) of Regulation No 1/2003, and informal interviews, which do not fall within that provision. The Commission is required to record, in a form of its choosing, any interview which it conducts under that provision for the purpose of collecting information relating to the subject matter of an investigation. However, the Court pointed out that since the Commission had not relied in the contested decision on information collected during the interview at issue, it was for Intel to prove that, if it had been able to rely on a proper recording of that interview, it would have been able to influence the assessments made against it in that decision. The Court ruled that no such proof had been provided in this case.

As regards, in the third and last place, the assessment of abuse, the Court found that Intel's disputed conduct vis-à-vis its trading partners, seeking to exclude its only serious competitor from the market, consisted, first, in the grant of a rebate to four major OEMs on the condition that they would purchase all or almost all of their x86 CPUs from Intel and, secondly, in the making of payments to OEMs so that they would delay, cancel or restrict the marketing of certain products equipped with that competitor's CPUs. In the judgment under appeal, the General Court had considered that the question whether an exclusivity rebate granted by an undertaking in a dominant position could be categorised as 'abusive' did not depend on an analysis of the circumstances of the case aimed at establishing the capability of that rebate to restrict competition, since such rebates are by their very nature capable of restricting competition. The Court however found that the Commission had carried out an in-depth examination in the contested decision of the circumstances of the case and had concluded, on that basis, that an as efficient competitor would have had to offer prices, on account of those rebates, which would not have been viable. Thus, according to the Court, the as efficient competitor test had played an important role in the Commission's assessment of whether the practice at issue was capable of having foreclosure effects on competitors. The Court therefore found that the General Court was required to examine all of Intel's arguments concerning the application of the as efficient competitor test seeking to demonstrate alleged errors by the Commission in the context of that test. It thus set aside the judgment under appeal and referred the case back to the General Court so that it may examine, in the light of the arguments put forward by Intel, whether the rebates at issue are capable of restricting competition.

3. CONCENTRATIONS

In its judgment in **Austria Asphalt** (C-248/16, [EU:C:2017:643](#)), delivered on 7 September 2017, the Court ruled that Article 3 of Regulation No 139/2004⁷² must be interpreted as meaning that *a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity.*

The main proceedings concerned an asphalt plant which was wholly owned by a group of construction undertakings and whose activities were confined to supplying the parent company. As such, it had no significant presence on the market. The proposal at the origin of the dispute provided for the merger of two construction undertakings, one of which was the owner of the asphalt plant. Under the proposal, control of the asphalt plant was to be split between the two undertakings subject to the merger and its production output was primarily intended for those undertakings.

Having been asked about the conditions under which a concentration arises where there is a change in the form of control of an existing undertaking, for the purpose of Article 3(1)(b) and Article 3(4) of Regulation No 139/2004, the Court first of all recalled that the aim of that regulation is to ensure that the process of reorganisation of undertakings does not result in lasting damage to competition. The concept of ‘concentration’ must therefore be defined in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and, thus, in the structure of the market. In particular, Article 3(1)(b) of that regulation takes as the constituent element of the concept of concentration not the creation of an undertaking, but a change in the control of an undertaking. Accordingly, the Court stated that Article 3(4) of the regulation concerns joint ventures only in so far as their creation provokes a lasting effect on the structure of the market, regardless of whether that undertaking, now jointly controlled, existed before the transaction in question.

The Court pointed out that, under Article 21(1) of Regulation No 139/2004, that regulation alone is to apply to concentrations as defined in Article 3 of the regulation, to which Regulation No 1/2003⁷³ is not, in principle, applicable. By contrast, in the Court’s view, Regulation No 1/2003 continues to apply to the actions of undertakings which, without constituting a concentration within the meaning of Regulation No 139/2004, are nevertheless capable of leading to coordination between undertakings in breach of Article 101 TFEU and which, for that reason, are subject to the control of the Commission or of the national competition authorities. The Court ruled that an interpretation of Article 3 of Regulation No 139/2004, according to which a change in the control of an undertaking which, previously exclusive, becomes joint is covered by the concept of concentration even if that joint venture does not perform on a lasting basis all the functions of an autonomous economic entity, is not, therefore, consistent with Article 21(1) thereof.

^{72/} 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).

^{73/} 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).

4. PROCEDURE FOR THE APPLICATION OF THE COMPETITION RULES

On 14 March 2017, in the judgment of the Grand Chamber in *Evonik Degussa v Commission* (C-162/15 P, [EU:C:2017:205](#)), the Court ruled on the extent of the protection to be afforded to information taken from a statement made with a view to obtaining leniency, in the context of the publication of Commission decisions relating to the application of Article 101 TFEU. The dispute concerned a decision of the Commission⁷⁴ by which the hearing officer for competition proceedings had rejected a request for confidential treatment of information that had been provided by the applicant in the course of its cooperation under the 2002 Leniency Notice.⁷⁵ That information was contained in an extended version of the decision finding an infringement of the competition rules which was to be published on the website of the Directorate-General for Competition.⁷⁶ In the contested decision, the hearing officer had in particular concluded that he had no power to adjudicate on the applicant's argument that the publication of such information would constitute an unwarranted difference in treatment by comparison with the other participants in the infringement, thereby contravening the principles of legitimate expectations and equal treatment. The Court set aside the judgment of the General Court, which had previously dismissed the action,⁷⁷ on the ground that the latter had erred in law in finding that the hearing officer had been right to decline competence.

The Court recalled that the aim of Article 8 of Decision 2011/695⁷⁸ is to provide, on a procedural level, for the protection of information required by EU law which has come to the Commission's knowledge in the context of proceedings applying the competition rules. Although it is apparent from Article 8 of Decision 2011/695 that the hearing officer may find that the information may be disclosed when it does not, in fact, constitute a business secret or other confidential information or when there is an overriding interest in its disclosure, the person concerned is not, by contrast, limited in the grounds on which he may rely in order to object to the proposed publication. Thus, the protection provided for in Article 8 must be understood as relating to any ground, arising from rules or principles of EU law, to justify protecting the confidentiality of the contested information. The Court pointed out that the scope of Article 8(2) of Decision 2011/695 would be considerably reduced if that provision had to be interpreted as allowing the hearing officer to take into account only those rules intended to afford specific protection against disclosure of the information to the public, such as the rules in Regulation No 45/2001

^{74/} Commission Decision C(2012) 3534 final of 24 May 2012 rejecting a request for confidential treatment submitted by Evonik Degussa (Case COMP/F/38.620 — Hydrogen peroxide and Perborate) (OJ 2015 C 198, p. 24).

^{75/} Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), in force at the material time.

^{76/} Decision C(2006) 1766 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen Peroxide and Perborate) (OJ 2006 L 353, p. 54).

^{77/} Judgment of the General Court of 28 January 2015, *Evonik Degussa v Commission* (T-341/12, [EU:T:2015:51](#)).

^{78/} Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29).

on the protection of individuals with regard to the processing of personal data by the institutions⁷⁹ or in Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents.⁸⁰

Next, as regards the substance of the case, the Court rejected the arguments submitted in support of the appeal. First of all, it recalled that information which was secret or confidential but which is over five years old must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature. Thus, it made clear that those considerations, which give rise to a rebuttable presumption, are valid both in the context of requests for confidential treatment in respect of parties intervening in actions before the EU Courts and in the context, such as this case, of requests for confidentiality with a view to the publication by the Commission of a decision finding an infringement of competition law.

As regards the question raised by the applicant as to whether, despite the fact that Regulation No 1049/2001 does not apply in the instant case, the case-law formulated on the basis of that regulation, under which the Court acknowledged that there was a general presumption capable of justifying the refusal to disclose the documents in a file relating to a proceeding under Article 101 TFEU, must be transposed to the publication of decisions on infringements of Article 101 TFEU, the Court answered in the negative. In that connection, the Court relied on the significant differences between the system of third-party access to the Commission's file (provided for in Regulation No 1049/2001) and the system relating to the publication, in compliance with the protection of business secrets (provided for in Article 30 of Regulation No 1/2003), of infringement decisions. The publication of a non-confidential version of a decision finding an infringement of Article 101 TFEU must *inter alia* enable victims of infringements to be provided with support in their actions for damages. However, the interests at issue must be weighed against the protection of rights conferred by EU law, in particular, on the undertakings concerned, such as the right to the protection of professional secrecy or business secrets.

The Court also considered that such publication does not undermine the protection which the applicant may claim under the 2002 Leniency Notice, since that protection can relate only to the determination of the fine and the treatment of the documents and statements specifically targeted by that notice. The only protection available to an undertaking which has cooperated with the Commission in the context of a proceeding under Article 101 TFEU is the protection concerning (i) the immunity from or reduction in the fine in return for providing the Commission with evidence of the suspected infringement which represents significant added value with respect to the information already in its possession, and (ii) the non-disclosure by the Commission of the documents and written statements received by it in accordance with its Leniency Notice.

79/ 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).

80/ 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).

5. STATE AID

In the area of State aid, mention should be made of three judgments. The first concerns the review carried out by the Commission in respect of existing State aid which may subsequently be classified as unlawful aid. The second addresses the question whether tax exemptions granted by a Member State to a religious community may be regarded as State aid of the kind prohibited by Article 107(1) TFEU. The last judgment deals with whether State aid granted to an undertaking that has been admitted, at its own request, to a national insolvency procedure may be withdrawn.

In its judgment in **Commission v Italy** (C-467/15 P, [EU:C:2017:799](#)), delivered on 25 October 2017, the Court set aside the judgment of the General Court⁸¹ concerning the possibility, for the Commission, of classifying as new, and, where necessary, unlawful, aid not only the alteration of existing aid, but also all the existing aid to which that alteration relates. This case originated in Council Decision 2003/530⁸² permitting Italy to take the place of milk producers for the purpose of paying a levy owed to the European Union for exceeding the national milk quota in 1995 and 2001 and allowing the producers concerned to repay their debt to that Member State by way of deferred payment without interest. The grant of that aid ('the existing aid') was in particular subject to a temporal limit applying to the system of staggered payments set at 14 years. Italy authorised the deferral of payment of the same aid in 2010 and 2011, after several further alterations, which resulted in the 14-year time limit being exceeded. The Commission subsequently adopted the contested decision, finding that Italy had made successive alterations to the existing aid scheme in breach of one of the conditions to which the approval of that aid had been subject, and classified as new and, thus, unlawful aid (since the measure had not been notified to the Commission) not only the deferral of payment taken in isolation, but also the whole of the pre-existing system of staggered payments.⁸³ It therefore ordered the immediate recovery of the sums granted to producers who had benefited from the deferral of payment, together with interest. Italy challenged that decision before the General Court, which annulled the contested decision in part. The Commission then lodged an appeal challenging the General Court's interpretation of the concept of 'new aid' set out in Article 1(c) of Regulation No 659/1999.⁸⁴

Against that background the Court held that — in contrast to the General Court's assertions — the concept of 'new aid' was capable of covering not only the alteration of existing aid, but also the aid concerned by that alteration. Thus, according to the Court, existing aid which has been altered in breach of the compatibility conditions imposed can no longer be regarded as authorised and, therefore, loses the status of existing aid in its entirety. Consequently, the Commission is not required to establish that the alteration affects the very substance of the pre-existing aid. According to the Court, such an interpretation gives the best assurance of the effectiveness of the system of review of State aid in the European Union by promoting compliance by the Member State concerned with the authorisation conditions for the aid scheme. If a Member State makes an alteration to an existing aid scheme in breach of an authorisation condition for that scheme, that Member State will have no guarantee that

^{81/} Judgment of the General Court of 24 June 2015, **Italy v Commission** (T-527/13, [EU:T:2015:429](#)).

^{82/} Council Decision 2003/530/EC of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers (OJ 2003 L 184, p. 15).

^{83/} Commission Decision 2013/665/EU of 17 July 2013 on State aid SA.33726 (11/C) (ex SA.33726 (11/NN)) — granted by Italy (deferral of payment of the milk levy in Italy) (notified under document C(2013) 4046) (OJ 2013 L 309, p. 40).

^{84/} 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).

the authorised aid scheme will not be affected by that alteration and that the advantages granted on the basis of that scheme will therefore be retained.

The Court therefore found that, in this case, the legislative alteration implementing the deferral of payment did not constitute an alteration of a purely formal or administrative nature, or an increase in the original budget of an aid scheme within the meaning of Article 4(1) of Regulation No 794/2004.⁸⁵

In the case giving rise to the judgment in ***Congregación de Escuelas Pías Provincia Betania*** (C-74/16, [EU:C:2017:496](#)), delivered on 27 June 2017, the Grand Chamber of the Court was called upon to rule on *whether the tax exemptions granted by a Member State to a religious community constitute State aid of the kind prohibited by Article 107(1) TFEU*. That question was submitted in the context of various tax exemptions granted to the Spanish Catholic Church under a 1979 agreement concluded between the Holy See and Spain before Spain's accession to the European Union. In the main proceedings, a religious congregation had relied on that agreement to claim a refund of municipal tax paid on works carried out in a Church school near Madrid. The premises in question are used not only for State-regulated primary and secondary education, which is equivalent to the education provided in State schools and is financed entirely from public funds, but also for other school activities for which fees are charged. The tax authorities had refused the claim for a refund on the ground that the tax exemption provided for in domestic law for works did not apply to an activity which had no religious purpose.

Proceedings having been brought by the religious congregation concerned, the referring court enquired whether such a tax exemption had to be regarded as State aid prohibited by EU law. In its reply, the Court ruled that a measure of that nature may fall under the prohibition in Article 107(1) TFEU if, and to the extent to which, the activities at issue are economic, a matter which it is for the referring court to determine.

The Court first of all considered that the educational activities of the congregation which were not subsidised by the Spanish State appeared to be economic in nature and were therefore capable of falling under Article 107(1) TFEU, since they were financed essentially by private contributions. It also made clear that the exemption at issue seemed to meet two of the four conditions in order to be classified as prohibited State aid, inasmuch as it confers a *selective economic advantage* on the congregation running the school and entails a reduction in the municipal council's revenue and hence the *use of State resources*. So far as the other two conditions are concerned, the Court considered that the exemption at issue might make the religious congregation's educational service provision more attractive by comparison with that of other establishments that are also active on the same market and could therefore risk distorting competition. On the other hand, the Court pointed out that, under Article 2 of Regulation No 1998/2006,⁸⁶ aid not exceeding a ceiling of EUR 200 000 over a period of three years is deemed not to affect trade between Member States and not to distort or threaten to distort competition; such measures are therefore excluded from the concept of 'State aid'. The Court ruled that it is nevertheless for the national court to determine whether that threshold has been reached in this case.

^{85/} Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1).

^{86/} Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles [107 and 108 TFEU] to *de minimis* aid (OJ 2006 L 379, p. 5).

Finally, as regards the agreement between Spain and the Holy See, the Court stated that although that agreement dates from before Spain's accession to the European Union, the tax exemption at issue, which had been introduced into domestic legislation by an order of 2001, should not, as the case may be, be considered to be existing aid, but new aid.

In its judgment in *Nerea* (C-245/16, [EU:C:2017:521](#)), delivered on 6 July 2017, the Court ruled on the scope of the concept of 'collective insolvency proceedings' referred to in Article 1(7)(c) of Regulation No 800/2008 (General block exemption Regulation)⁸⁷ and on whether an undertaking that has been admitted, at its own request, to a national insolvency procedure is barred under the same provision from receiving aid awarded previously. *Nerea*, the applicant in the main proceedings, had been the recipient of State aid granted under a regional operational programme in Marche (Italy). Following *Nerea*'s application for admission to an arrangement with creditors as a going concern, the region of Marche withdrew the disputed aid on the ground that, under Article 1(7)(c) of Regulation No 800/2008, an undertaking subject to such a procedure was an undertaking in difficulty which should not receive aid. An action having been brought before it by *Nerea* challenging that decision, the national court submitted two questions to the Court for a preliminary ruling.

By its first question, the Court was required to rule on the scope of the concept of being 'subject' to 'collective insolvency proceedings'. It held that neither Article 1(7)(c) of Regulation No 800/2008 nor any other provision of that regulation draws any distinction between existing collective insolvency proceedings in the different national legal systems according to whether they are opened by the administrative and judicial authorities of the Member States or whether they are opened at the request of the undertaking concerned, as was the case here. Therefore, according to the Court, that concept does not cover only proceedings opened by administrative or judicial authorities of their own motion, but also those opened at the request of the undertaking concerned.

As regards the second question concerning the conclusions to be drawn from the fact that *Nerea* was subject to collective insolvency proceedings after the disputed aid had been granted, the Court pointed out that aid must be considered to be granted at the moment the right to receive it is conferred on the beneficiary and that that is the time when the company's eligibility to receive aid should be assessed. Furthermore, Article 1(7)(c) of Regulation No 800/2008 does not impose on the competent authorities of the Member States the obligation to carry out an independent examination of the undertaking's actual situation in order to determine whether it is in difficulty. Thus, the fact that an undertaking satisfied the conditions for being subject to collective insolvency proceedings according to national law is sufficient to prevent State aid being granted to it under Regulation No 800/2008 or, if such aid has already been granted to it, to hold that it could not be granted in accordance with that regulation provided that those conditions were satisfied on the date on which that aid was granted. However, aid granted to an undertaking in compliance with Regulation No 800/2008 and, in particular, Article 1(6) thereof, cannot be withdrawn solely on the ground that that undertaking has been subject to collective insolvency proceedings subsequent to the date on which that aid was granted to it.

^{87/} Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 and 108 TFEU] (General block exemption Regulation) (O) 2008 L 214, p. 3).

XII. FISCAL PROVISIONS

In the area of taxation, five judgments are worthy of note. The first concerns the validity of various provisions of Directive 2006/112.⁸⁸ The second addresses the question whether national courts are entitled to review the legality of a request for tax information submitted by another Member State under Directive 2011/16.⁸⁹ The third relates to the chargeability conditions for excise duty within the meaning of Article 9 of Directive 2008/118.⁹⁰ The fourth deals with the scope of the principle of respect for the rights of the defence in the context of national administrative procedures of inspection and establishment of the basis for VAT assessment. The last case is concerned with the principle that abusive practices are prohibited in the tax sphere.

In its judgment in *RPO* (C-390/15, [EU:C:2017:174](#)), mentioned earlier in this report,⁹¹ the Court, sitting as the Grand Chamber, confirmed the validity of the provisions of Directive 2006/112 excluding the supply of digital books electronically from the reduced rate of VAT, while the Member States are able to apply such a rate to the supply of digital books on physical supports. The national court raised, among others, the question whether that exclusion infringed the principle of equal treatment as set out in Article 20 of the Charter.

After confirming that those provisions of Directive 2006/112 establish a difference in treatment between two situations that are, however, comparable in the light of the objective pursued, namely, in the instant case, to promote reading, the Court examined whether that difference in treatment could be justified. Since such justification is possible where the difference in treatment relates to a legally permitted objective and is proportionate to that objective, the Court first of all pointed out that the exclusion of electronic publications from the reduced rate of VAT formed part of a specific VAT regime for e-commerce intended to make electronically supplied services subject to clear, simple and uniform rules with a view to facilitating the administration of that tax by taxable persons and national tax authorities. While noting that the EU legislature enjoys a broad discretion when it adopts tax measures, the Court confirmed that that objective was legally permitted and that the contested measure was appropriate for achieving it. Since the other requirements associated with the proportionality condition were also met, the Court therefore confirmed that the provisions of Directive 2006/112 at issue were consistent with the principle of equal treatment set out in Article 20 of the Charter.

In the judgment in *Berlioz Investment Fund* (C-682/15, [EU:C:2017:373](#)), delivered on 16 May 2017 by the Grand Chamber, the Court examined *whether the courts of one Member State may review the legality of requests for tax information sent by another Member State under Directive 2011/16*. That question was raised in proceedings deriving from the refusal by a Luxembourg company to comply in full with a decision of the Luxembourg authorities ordering it to provide certain items of information requested by the French authorities under that directive. The request for information was specifically concerned with dividends paid by a French subsidiary and sought to clarify whether the conditions laid down in French law for the exemption of those dividends from withholding tax had been met. As a result of the Luxembourg company's refusal to provide some of the information requested,

^{88/} Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ 2009 L 116, p. 18).

^{89/} Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

^{90/} Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

^{91/} That judgment was also presented under Section III 'Institutional provisions'.

on the ground that it was not foreseeably relevant, it received a fine. Proceedings having been brought against that fine, the national court asked the Court in particular whether it could examine the merits of the information order of the Luxembourg authorities and, therefore, of the request for information on which the order was based.

The Court first of all found that since the imposition of the fine on the Luxembourg company falls within the scope of the implementation of Directive 2011/16, the Charter applies in the instant case. In addition, after confirming that the Luxembourg company has the right to an effective remedy, within the meaning of Article 47 of the Charter, against the administrative penalty imposed on it, the Court made clear that, under that provision, the national court before which such an action has been brought against a fine imposed for failure to comply with an order to provide information, in the context of an exchange between national tax administrations pursuant to Directive 2011/16, must be able to review the legality of that order. Since only information that is foreseeably relevant in the light of the tax laws of the requesting Member State may be the subject of a request for information under Directive 2011/16, that requirement of relevance is, according to the Court, a condition of the legality of the order addressed to the relevant person in order to obtain the requested information and of the penalty imposed on that person for failure to comply with the order. However, the Court pointed out that the judicial review of the legality of the order is limited to verifying that that order is based on a sufficiently reasoned request by the requesting authority concerning information that is not — manifestly — devoid of any foreseeable relevance. That review entails that the court must have access to the request for information and, if necessary, to any other information sent by the requesting authority. On the other hand, since the relevant person may be barred from having access to the request for information because it is secret, he has a right of access only to the key information in the request for information in order to be given a fair hearing.

On 29 June 2017, the Court delivered its judgment in *Commission v Portugal* (C-126/15, [EU:C:2017:504](#)), in which it ruled on the chargeability conditions for excise duty, within the meaning of the first paragraph of Article 9 of Directive 2008/118 concerning the general arrangements for excise duty, interpreted in the light of the principle of proportionality. In this case, an action for failure to fulfil obligations had been brought before the Court seeking a declaration that, by subjecting packets of cigarettes to a prohibition on marketing and sale to the public at the end of the third month of the year following that which appears on the marking affixed, the Portuguese Republic had failed to comply with its obligations under that directive and with the principle of proportionality.

After recalling, first, that the prevention of possible tax evasion, tax avoidance and abuse is an objective pursued by Directive 2008/118, the Court pointed out that releases for consumption in excessive quantities of packets of cigarettes at the end of the year, in anticipation of a future increase in the rate of excise duty, constitute a form of abuse that the Member States are entitled to prevent by the appropriate measures. It added that, since the first paragraph of Article 9 of the directive refers to national law in order to determine the conditions of chargeability and the rate of excise duty, such a right recognised to the Member States necessarily implies that they have the possibility to adopt measures such as those at issue in this case.

However, the Court also recalled that, in the exercise of the powers conferred on them by EU law, the Member States must comply with the principle of proportionality. That principle requires Member States to employ means which, while enabling them effectively to attain the objective pursued by their domestic laws, must not go beyond what is necessary and are the least detrimental to the objectives and the principles laid down by the relevant EU legislation. The Court ruled that the prohibition on the marketing and sale of cigarettes at issue was appropriate to achieve the legitimate objectives of combating tax evasion and tax avoidance and protecting public health. Nonetheless, since that prohibition applied in all cases, including where the rate of excise duty decreases or remains unchanged, the Court held that it did not appear necessary to achieve those objectives in so far as they could be achieved in a manner which is less restrictive and just as appropriate if the contested measure applied only in the case of an increase in the rate of excise duty on cigarettes. Therefore, the Court held that, by the

measures at issue, the Portuguese Republic had failed to fulfil its obligations under the first paragraph of Article 9 of Directive 2008/118 and under the principle of proportionality.

In the judgment in *Ispas* (C-298/16, [EU:C:2017:843](#)), delivered on 9 November 2017, the Court provided clarification on the scope of the general principle of EU law of respect for the rights of the defence in the context of national administrative procedures of inspection and establishment of the basis for VAT assessment. In this case, the applicants had been subject to a tax inspection, following which tax assessment notices imposing additional VAT on them had been issued. The applicants had argued before the national court that those tax assessment notices were null and void because their rights of defence had been infringed. They submitted in particular that the tax authorities ought to have given them access of the latter's own motion to all the relevant information on the basis of which the authorities had adopted the tax inspection report and issued the two notices, so that they would subsequently be in a position to challenge them.

The Court first of all recalled in that connection that respect for the rights of the defence is a general principle of EU law according to which the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. National authorities are subject to that obligation when they take decisions which come within the scope of EU law. According to the Court, that is particularly the case where a Member State, in order to comply with the obligation arising from the application of EU law to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing fraud, submits taxpayers to a tax inspection procedure.

The Court thus held that the general principle of EU law of respect for the rights of the defence must be interpreted as a requirement that, in administrative procedures of inspection and establishment of the basis for the assessment of VAT, an individual is to have the opportunity to have communicated to him, at his request and not on the initiative of the authorities, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents. That general principle is not an unfettered prerogative and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure at issue and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. The Court made clear in that respect that, in a procedure of tax inspection and establishment of the basis for VAT assessment, such restrictions may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents.

In its judgment in *Cussens and Others* (C-251/16, [EU:C:2017:881](#)), delivered on 22 November 2017, the Court ruled on the scope of the principle that abusive practices are prohibited in the tax sphere, particularly in the context of VAT. In the main proceedings, the applicants had constructed several holiday homes intended for sale which they had leased out for a term of more than 20 years to a company associated with them. At the same time, they had entered into a contract with that company providing that the homes would be leased back to them for a term of two years. Those two leases were extinguished by mutual surrender one month later and the applicants sold the homes to third parties. Under national legislation, no VAT was payable on those sales, as only the long lease was subject to VAT. However, the tax authorities classified that lease as abusive and sought payment of additional VAT in respect of the sales. Proceedings having been brought before it, the referring court noted that there were no national rules which would require the tax authorities to disregard transactions constituting an abusive practice. Accordingly, it decided to submit a number of questions to the Court for a preliminary ruling in order to determine, in particular, whether the principle that abusive practices are prohibited provided for in EU law, as

recognised in the judgment in *Halifax and Others*,⁹² requires the tax authorities' approach in this case to be taken.

The Court first of all found that the principle that abusive practices are prohibited, as applied in the sphere of VAT by the case-law stemming from the judgment in *Halifax and Others*, is not a rule established by a directive, but is based on the case-law. That principle, which — according to the Court — displays the comprehensive character which is inherent in general principles of EU law, may be relied on against a taxable person to refuse him the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal. Although the transactions at issue were carried out before the judgment in *Halifax and Others* was delivered, the Court confirmed that the principles of legal certainty and of the protection of legitimate expectations do not preclude the application, in the main proceedings, of the principle flowing from that judgment that abusive practices are prohibited. The interpretation which the Court gives to EU law clarifies and defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the date of its entry into force. Finally, the Court held that if the properties at issue had not yet been actually used by their owner or tenant before being sold to third-party purchasers, a matter which it was for the referring court to verify in the instant case, the supply of those properties would be liable to result in the accrual of a tax advantage contrary to the purpose of Directive 77/388,⁹³ thereby falling within the scope of the principle that abusive practices are prohibited.

XIII. APPROXIMATION OF LAWS

1. INTELLECTUAL PROPERTY

In the field of intellectual property, three judgments are worthy of note. The first two concern the concept of 'communication to the public' in the field of copyright while the third addresses the interpretation of the 'repair' clause in the sphere of Community designs.

In the two judgments in *Stichting Brein* (C-527/15, [EU:C:2017:300](#) and C-610/15, [EU:C:2017:456](#)), delivered on 26 April and 14 June 2017 respectively, the Court was required to examine, among other things, *the concept of 'communication to the public' within the meaning of Article 3(1) Directive 2001/29*.⁹⁴

In both cases, proceedings had been brought before the referring courts by a Netherlands foundation for the protection of the interests of copyright holders. The first case concerned a dispute between that foundation and a seller of a multimedia player on which there were pre-installed add-ons, available on the internet, containing hyperlinks to websites — that were freely accessible to the public — on which copyright-protected works had been made publicly available without the consent of the copyright holders. In the second case, the dispute related to requests made by that foundation seeking an order requiring internet access providers to block the domain

^{92/} Judgment of the Court of 21 February 2006, *Halifax and Others* (C-255/02, [EU:C:2006:121](#)).

^{93/} Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

^{94/} 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).

names and IP addresses of the online sharing platform 'The Pirate Bay' which, by means of indexation of metadata referring to protected works and the provision of a search engine, allowed users of that platform to locate those works and to share them in the context of a peer-to-peer network.

In both judgments, the Court first of all recalled its previous case-law,⁹⁵ according to which the principal objective of Directive 2001/29 is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that the concept of 'communication to the public' should be understood in a broad sense and requires an individual assessment. Furthermore, it is clear from Article 3(1) of Directive 2001/29 that the concept of 'communication to the public' includes two cumulative criteria, namely an 'act of communication' of a work and the communication of that work to a 'public'.

Thus, according to the Court, in order to determine whether a user is making a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, it is necessary to take into account several complementary criteria, which are not autonomous and are interdependent. Those criteria include, first, the indispensable role played by the user and the deliberate nature of his intervention. That user makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, and does so in particular where, without that intervention, his customers would not be able to enjoy the broadcast work or would find it difficult to do so. Secondly, the Court specified that the concept of the 'public' refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people. The Court also noted that in order to be categorised as a 'communication to the public', a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public. Finally, the Court underlined that the profit-making nature of a communication, within the meaning of Article 3(1) of Directive 2001/29, is not irrelevant.

Based on the above criteria, the Court considered in these two judgments that the sale of a multimedia player, such as that at issue in the main proceedings, as well as the making available and management, on the internet, of the sharing platform 'The Pirate Bay', constitute, in the circumstances of the instant case, a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29.

On 20 December 2017, in its judgment in *Acacia and D'Amato* (C-397/16 and C-435/16, [EU:C:2017:992](#)), the Court ruled on the interpretation of the 'repair' clause provided for in Article 110(1) of Regulation No 6/2002.⁹⁶ Under that clause, protection as a Community design does not exist for a design which constitutes a component part of a complex product used for the purpose of the repair of that complex product so as to restore its original appearance. This judgment was delivered in the context of infringement proceedings in Italy and Germany between, on the one hand, two car manufacturers, holders of Community designs of alloy car wheel rims, and, on the other, Acacia and its managing director, who manufacture replica wheels rims that are often aesthetically or functionally identical to the original equipment wheel rims.

The Court was first asked whether Article 110(1) of Regulation No 6/2002 makes the exclusion of protection provided for in that article subject to the condition that the protected design of the component part at issue is dependent upon the appearance of the complex product into which it is incorporated. The car manufacturers appearing as parties to the main proceedings essentially argued in that respect that the exclusion was not justified

^{95/} See, in particular, judgments of the Court of 31 May 2016, *Reha Training* (C-117/15, [EU:C:2016:379](#)), and of 8 September 2016, *GS Media* (C-160/15, [EU:C:2016:644](#)).

^{96/} Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

in relation to car wheel rims, the shape of which is not dictated by the appearance of the vehicle fitted with them. The Court drew attention to the objective pursued by Article 110(1) of Regulation No 6/2002, which is to avoid the creation of captive markets in certain spare parts and, in particular, to prevent a consumer who has bought a long-lasting and perhaps expensive product from being indefinitely tied, for the purchase of external parts, to the manufacturer of the complex product. From that point of view, and applying a literal and teleological interpretation, the Court held that the scope of that provision is not limited to component parts of a complex product 'upon whose appearance the protected design is dependent', pointing out that that interpretation contributed to the objective of the 'repair' clause to limit the creation of captive markets in spare parts.

The Court was also asked about the conditions governing the application of the exclusion provided for in the 'repair' clause. The Court first of all pointed out that that exclusion is applicable only to component parts which are protected as a Community design and which, therefore, satisfy the conditions for protection laid down in particular in Article 4(2) of Regulation No 6/2002. Under that provision, a product which constitutes a component part of a complex product is to be protected where, first, the component part, once it has been incorporated into a complex product, remains visible during normal use of that product and, secondly, the visible features of the component part fulfil in themselves the requirements as to novelty and individual character set out in Article 4(1) of that regulation. This applies to the Community designs of car wheel rims of which the manufacturers concerned are the holders. Next, the Court considered those wheel rims to be 'component parts of a complex product' within the meaning of Article 110(1), such a wheel rim being a component of a car, without which that product could not be subject to normal use. As regards the condition that the component part at issue be 'used ... for the purpose of the repair of that complex product', the Court pointed out that the 'repair' clause excludes any use of a component part for reasons of preference or purely of convenience, such as, *inter alia*, the replacement of a part for aesthetic purposes or customisation of the complex product, but rather that it requires that its use be necessary for the repair of a complex product that has become defective. Finally, the Court considered that the repair had to be carried out so as to restore the complex product to its original appearance. In that regard, it drew attention to the need for a component part that is used to repair the appearance of the complex product within the meaning of that provision to be visible. In the light of those considerations, the Court concluded that Article 110(1) of Regulation No 6/2002 applies only to component parts of a complex product that are visually identical to original parts, which is not the case if the replacement part does not correspond, in terms of its colour or its dimensions, to the original part, or if the appearance of a complex product has changed since it was placed on the market.

Finally, the Court was asked whether eligibility for the exclusion provided for in Article 110(1) of Regulation No 6/2002 requires the manufacturer or seller of a component part of a complex product to ensure that the component part can be purchased exclusively for repair purposes, and if so, how. The Court made clear that the manufacturer or seller of a component part of a complex product which seeks to benefit from the derogation provided for in that provision is under a duty of diligence. In that connection, such a manufacturer or seller must, in particular, inform the downstream user, through a clear and visible indication on the product, on its packaging, in the catalogues or in the sales documents, that the component part concerned incorporates a design of which they are not the holder and that the part is intended exclusively to be used for the purpose of the repair of the complex product so as to restore its original appearance. It is also required to ensure, through appropriate means, in particular contractual means, that downstream users do not intend to use the component parts at issue in a way that does not comply with the conditions prescribed by Article 110(1) of Regulation No 6/2002 and, furthermore, to refrain from selling such a component part where they know or ought reasonably to know that the part in question will not be used in accordance with the prescribed conditions.

2. PROTECTION OF PERSONAL DATA

In the field of data protection, three judgments merit special attention: the first required the Court to clarify the information obligations applicable in connection with payment services in the internal market; the second concerned the erasure of personal data from a companies register; and the third resulted in the Court providing clarification as regards the concept of 'personal data' in the context of a professional examination. Reference should also be made to **Opinion 1/15** ([EU:C:2017:592](#)), which concerns the compatibility with the provisions of the Treaties and the Charter of the agreement negotiated between Canada and the European Union on the transfer and processing of Passenger Name Record (PNR) data.⁹⁷

On 25 January 2017, in the judgment in **BAWAG** (C-375/15, [EU:C:2017:38](#)), the Court ruled, first, on the concept of 'durable medium' within the meaning of Directive 2007/64⁹⁸ on payment services in the internal market and, secondly, on the scope of the obligation on payment service providers to supply information to users.

As regards the question whether the website of a bank can be considered to be a durable medium, the Court stated that that website *must enable the payment service user to store information* addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored. Furthermore, any possibility that the payment service provider or another professional to whom the management of that site has been entrusted could change the content unilaterally must be excluded.

So far as concerns the obligation on the payment service provider to supply information to users, the Court held that where such information is transmitted through the electronic mailbox of an online banking internet website, it may not be considered to have been supplied on a durable medium unless these two conditions are met. First, the website must allow the user concerned to store information addressed to him personally in such a way that he may access it and reproduce it unchanged for an adequate period, without any unilateral modification of its content by that service provider or by another professional being possible. Secondly, if the payment service user is obliged to consult the internet website in order to become aware of that information, the transmission of the information must be accompanied by active behaviour on the part of the payment service provider aimed at drawing the user's attention to the existence and availability of that information on the website.

In the event of the payment service user being obliged to consult such a website in order to become aware of the relevant information, that information is merely made available to the user when the transmission of the information is not accompanied by such active behaviour on the part of the payment service provider.

^{97/} That Opinion is presented in Section I 'Fundamental rights'.

^{98/} Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1).

In its judgment in **Manni** (C-398/15, [EU:C:2017:197](#)), delivered on 9 March 2017, the Court ruled on *whether a natural person is able to have personal data relating to him, contained in the companies register in connection with a company that has been wound up, erased*, in the light of Article 6(1)(e), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46,⁹⁹ read in conjunction with Article 3 of First Directive 68/151.¹⁰⁰ The main proceedings involved a dispute between the sole director of a company and a chamber of commerce concerning the latter's refusal to delete from the companies register certain personal data linking that person to the liquidation of another company, which had been struck off the companies register following liquidation proceedings. In support of his action, the sole director had argued in particular that the information at issue was prejudicial to his current economic activity.

As regards the accessibility of personal data held in the companies register to third parties, the Court first of all pointed out that the public nature of such registers is intended to ensure legal certainty in dealings between companies and third parties and to protect, in particular, the interests of third parties in relation to joint stock companies and limited liability companies, since the only safeguards they offer to third parties are their assets. Moreover, questions requiring personal data held in the companies register may arise for many years after a company has ceased to exist. In those circumstances, the Court considered that Member States cannot guarantee that natural persons whose data are included in the companies register in connection with a given company have the right to obtain, after a certain period of time from the dissolution of the company, the erasure of personal data concerning them.

Since that interpretation of the provisions of Directive 95/46 may infringe the right to respect for the private life of the persons concerned and their right to protection of personal data as guaranteed by Articles 7 and 8 of the Charter, the Court also made clear that it does not result in disproportionate interference with those fundamental rights. It pointed out in that respect that only a limited number of personal data items are entered in the companies register and that it is moreover justified that natural persons who choose to participate in trade through a joint stock company or limited liability company, whose only safeguards for third parties are the assets of that company, should be required to disclose data relating to their identity and functions within the company. That said, the Court does not exclude the possibility that, in specific situations, overriding and legitimate reasons relating to the specific case of the person may justify, exceptionally, that access to personal data concerning him should be limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who can demonstrate a specific interest in consulting that data. It is, however, for each Member State to decide whether it would be desirable to have such a limitation of access in its national legal system.

In the judgment in **Nowak** (C-434/16, [EU:C:2017:582](#)), delivered on 20 December 2017, the Court confirmed that the written answers submitted by a candidate at a professional examination and any comments made by an examiner with respect to those answers constitute personal data, within the meaning of Article 2(a) of Directive 95/46. In the main proceedings, the applicant had, after failing an examination set by the Institute of Chartered Accountants of Ireland, submitted a data access request seeking all the personal data relating to him held by that organisation. The Institute of Chartered Accountants of Ireland sent the candidate a number of documents but refused to provide him with his examination script, on the ground that it did not contain personal data relating

^{99/} 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).

^{100/} First Council Directive 68/151/EEC of 9 March 1968 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, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41), as amended by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 (OJ 2003 L 221, p. 13).

to him. Proceedings having been brought before it by the unsuccessful candidate, the national court decided to refer a question to the Court for a preliminary ruling.

After recalling that Article 2(a) of Directive 95/46 defines personal data as ‘any information relating to an identified or identifiable natural person’, the Court first of all noted that a candidate at a professional examination is a natural person who can be identified, either directly, through his name, or indirectly, through an identification number, these being placed either on the examination script itself or on its cover sheet. Referring to the aim of the EU legislature to assign a wide scope to the concept of ‘personal data’ within the meaning of Directive 95/26, the Court went on to observe that that concept is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it ‘relates’ to the data subject. The written answers submitted by a candidate at a professional examination constitute information that is linked to him as a person, particularly since the content of those answers reflects and serves as a basis for evaluating the extent of the candidate’s knowledge and competence in a given field and, in some cases, his thought processes, judgment and capacity for critical thinking. Furthermore, the use of that information, one consequence of that use being the candidate’s success or failure at the examination concerned, is liable to have an effect on his rights and interests, in that it may determine or influence, for example, his chances of entering the profession aspired to or of obtaining the post sought. As regards the comments of the examiner on the candidate’s answers, the Court considered that they also constitute information relating to that candidate.

Finally, the Court made clear that if written answers and comments contained in a written test were not to be classified as ‘personal data’, that would have the effect of entirely excluding that information from the obligation to comply with the principles and safeguards that must be observed in the area of personal data protection. That classification cannot be affected by the fact that the consequence of it is, in principle, that the candidate has rights of access and rectification under Directive 95/46, given that those rights, which do not extend to the examination questions and do not allow candidates to correct answers that are incorrect, serves the purpose of that directive of guaranteeing the protection of candidates’ right to privacy with regard to the processing of data relating to them.

3. TELECOMMUNICATIONS

In its judgment in ***Europa Way and Persidera*** (C-560/15, [EU:C:2017:593](#)), delivered on 26 July 2017, the Court was called upon to examine *whether a Member State is able, in the light of Directives 2002/20,¹⁰¹ 2002/21¹⁰² and 2002/77,¹⁰³ to replace a free-of-charge selection procedure for the allocation of radio frequencies, commenced in order to remedy the unlawful exclusion of certain operators from the market, with a fees-based procedure initiated under an amended Radio Frequency Allocation Plan subsequent to a reduction in the number of those frequencies.*

The Court first of all ruled that Article 3(3a) of Directive 2002/21 must be interpreted as precluding the annulment, by a national legislature, of an ongoing selection procedure for the allocation of radio frequencies conducted by

101/ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ 2002 L 108, p. 21).

102/ 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 (OJ 2002 L 108, p. 33).

103/ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

the competent national regulatory authority, which was suspended by ministerial order, where the national legislature and ministry concerned did not act as appeal bodies within the meaning of Article 4 of that directive. Under Article 3(3a) of Directive 2002/21, those bodies have the exclusive power to suspend or overturn decisions by the national regulatory authorities. Since, in this case, the national legislature and ministry concerned did not act as appeal bodies, the requirements relating to the independence of national regulatory authorities preclude intervention such as that at issue.

Secondly, the Court found that Article 9 of Directive 2002/21, Articles 3, 5 and 7 of Directive 2002/20 and Articles 2 and 4 of Directive 2002/77 must be interpreted as not precluding a free-of-charge selection procedure for the allocation of radio frequencies, which has been commenced in order to remedy the unlawful exclusion of certain operators from the market, from being replaced by a fees-based procedure commenced under an amended Radio Frequency Allocation Plan after a reduction in their number, provided that the new selection procedure is based on objective, transparent, non-discriminatory and proportionate criteria and that it is in line with the objectives laid down in Article 8(2) to (4) of Directive 2002/21. It is for the national court to ascertain, taking into account all the relevant circumstances of the case, whether the conditions set out in the fee-based selection procedure are such as to allow an actual entry of new entrants into the digital television market without unduly favouring analogue or digital incumbents.

Finally, the Court pointed out that principle of legitimate expectations must be interpreted as not precluding the annulment of a selection procedure for the allocation of radio frequencies on the sole ground that operators had been invited to tender and, as the only tenderers, would have been granted rights to use digital terrestrial broadcasting frequencies for radio and television had the procedure not been annulled.

4. ELECTRONIC COMMERCE

In the judgment of 4 May 2017 in **Vanderborght** (C-339/15, [EU:C:2017:335](#)), the Court concluded that *Article 56 TFEU and Directive 2000/31*¹⁰⁴ on certain legal aspects of information society services, in particular electronic commerce, in the internal market preclude national legislation which prohibits any form of electronic commercial communication aimed at promoting oral and dental care, including by means of a website created by a dentist.

The Court took the view that although the content and form of the commercial communications may legitimately be subject to professional rules, such rules cannot include a general and absolute prohibition of any type of online advertising aimed at promoting the activity of a dentist.

It also considered that a prohibition of advertising for a certain activity is liable to restrict the possibility, for the persons carrying on that activity, of making themselves known to their potential clientele and of promoting the services which they offer to their clientele. Consequently, such a restriction constitutes a restriction on the freedom to provide services.

The Court nonetheless accepted that the objectives of the legislation in question, that is to say, the protection and dignity of the profession of dentistry, are overriding reasons in the public interest capable of justifying a restriction on the freedom to provide services. The extensive use of advertising or the selection of aggressive promotional messages, even such as to mislead patients as to the care being offered, by damaging the image of the profession of dentist, by distorting the relationship between dentists and their patients, and by promoting

^{104/} 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 ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

the provision of inappropriate and unnecessary care, may undermine the protection of health and compromise the dignity of the profession of dentist.

That being the case, the Court finds that a general and absolute prohibition of any advertising exceeds what is necessary to attain the objectives pursued. Those objectives could be attained through the use of less restrictive measures supervising, closely if necessary, the form and manner which the communication tools used by dentists may legitimately have.

5. TRANSFER OF UNDERTAKINGS

In its judgment in *Federatie Nederlandse Vakvereniging and Others* (C-126/16, [EU:C:2017:489](#)), delivered on 22 June 2017, the Court was required to rule, for the first time, on the *applicability of the scheme for the protection of employees in the event of a transfer of undertakings, established by Directive 2001/23*,¹⁰⁵ in a 'pre-pack' situation. A 'pre-pack' is a transaction involving assets which is prepared before the declaration of insolvency of a company, with the consent of a prospective insolvency administrator, appointed by a court, and is put into effect by that administrator immediately after the declaration of insolvency. In the case in point, on the date of the declaration of insolvency of a Netherlands company, a pre-pack had been signed by that company's insolvency administrator and the new undertaking, under which the latter agreed to offer employment to almost 2 600 employees of the company. However, over 1 000 employees were ultimately dismissed and were not offered new contracts of employment.

The Court first of all recalled that Article 5(1) of Directive 2001/23 states that the scheme for the protection of employees, referred to in Articles 3 and 4 of the directive, does not apply to transfers of undertakings where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings. A 'pre-pack' procedure, in fact entailing insolvency, may therefore be covered by the concept of 'bankruptcy proceedings or any analogous insolvency proceedings'. Article 5(1) also requires the bankruptcy proceedings or any analogous insolvency proceedings to be instituted with a view to liquidation of the assets of the transferor. The Court pointed out that a procedure aimed at ensuring the continuation of the undertaking in question did not satisfy that requirement. In that respect, it made clear that a procedure is aimed at ensuring the continuation of the undertaking where that procedure is designed to preserve the operational character of the undertaking or of its viable units. A 'pre-pack' procedure is aimed at preparing the transfer of the undertaking down to its very last detail in order to enable a swift relaunch of the undertaking's viable units once the insolvency has been declared and in order to avoid the disruption that would result from an abrupt cessation of the undertaking's activities on the day of the declaration of insolvency, so as to safeguard the value of the undertaking and the employment posts. In those circumstances, since such a procedure is not ultimately aimed at liquidating the undertaking, the economic and social objectives it pursues are no explanation of, or justification for, the employees of the undertaking concerned losing the rights conferred on them by Directive 2001/23 when all or part of that undertaking is transferred. The Court therefore concluded that a 'pre-pack' procedure does not satisfy all the conditions laid down in Article 5(1) of Directive 2001/23 and, accordingly, there can be no derogation, in the context of such a procedure, from the protection scheme laid down in Articles 3 and 4 of that directive.

^{105/} Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

6. FOODSTUFFS

In its judgment in *Fidenato and Others* (C-111/16, [EU:C:2017:676](#)), delivered on 13 September 2017, the Court ruled on *whether Member States are able to adopt emergency measures regarding genetically modified food and feed on the basis of the precautionary principle*. In 1998, the Commission authorised the placing on the market of genetically modified maize MON 810. In doing so, it referred to the opinion of the Scientific Committee which took the view that there was no reason to believe that that product would have any adverse effects on human health or the environment. In 2013, the Italian Government asked the Commission to adopt emergency measures to prohibit the cultivation of maize MON 810 in the light of new scientific studies carried out by two Italian research institutes. On the basis of a scientific opinion issued by the European Food Safety Authority (EFSA), the Commission concluded that there was no new science-based evidence to support the requested emergency measures. Despite this, in 2013 the Italian Government adopted a decree prohibiting the cultivation of MON 810 in Italian territory. The applicants in the main proceedings were subsequently prosecuted for cultivating maize MON 810 in breach of that decree.

The Court held that provisional risk management measures which may be adopted on the basis of the precautionary principle and the emergency measures taken pursuant to Article 34 of Regulation No 1829/2003¹⁰⁶ do not operate according to the same system. It is clear from Article 7 of Regulation No 178/2002¹⁰⁷ that the adoption of those provisional measures is subject to the condition that, following an assessment of available information, the possibility of harmful effects on health is identified but that scientific uncertainty also persists. By contrast, Article 34 of Regulation No 1829/2003 permits the use of emergency measures when it is 'evident' that products authorised by that regulation are likely to constitute a 'serious' risk to human health, animal health or the environment. The Court therefore concluded that Article 34 of Regulation No 1829/2003, read in conjunction with the precautionary principle as set out in Article 7 of Regulation No 178/2002, does not give Member States the option of adopting interim emergency measures solely on the basis of that principle, without the substantive conditions set out in Article 34 of Regulation No 1829/2003 being satisfied.

106/ Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1).

107/ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

XIV. ECONOMIC AND MONETARY POLICY

In the sphere of economic and monetary policy, mention should be made of two judgments. The first is concerned with the Council's decision to impose a fine on a Member State for the manipulation of data in connection with its budget. The second, delivered in *Florescu and Others* (C-258/14), relates to the Memorandum of Understanding with Romania regarding financial assistance granted by the European Union.¹⁰⁸

On 20 December 2017, in its judgment in *Spain v Council* (C-521/15, [EU:C:2017:982](#)), the Grand Chamber of the Court dismissed in its entirety the *action for annulment brought by the Kingdom of Spain against Council Implementing Decision 2015/1289 imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia*.¹⁰⁹

That implementing decision had been adopted on the basis of Article 8(1) of Regulation No 1173/2011,¹¹⁰ under which the Council, acting on a recommendation by the Commission, may decide to impose a fine on a Member State that intentionally or by serious negligence misrepresents deficit and debt data. It therefore falls within the Council's task of economic and budgetary surveillance of the euro area.

The Court was first of all required to adjudicate on whether it had jurisdiction to decide on such an action given that, in accordance with Article 51 of the Statute of the Court of Justice of the European Union, actions for annulment brought by a Member State against implementing decisions of the Council fall within the jurisdiction of the General Court where those decisions have been adopted pursuant to Article 291(2) TFEU. It found that even if the contested decision had to be regarded as an act adopted in the exercise of an implementing power, in so far as it was adopted under the powers conferred on the Council by Regulation No 1173/2011, Article 291(2) TFEU does not, however, constitute the legal basis for the exercise of that power. The Court stated that Article 291(2) TFEU relates solely to legally binding acts of the European Union which lend themselves in principle to implementation by the Member States, which is clearly not the case as regards Regulation No 1173/2011 because that regulation establishes a power consisting in the imposition of a fine on a Member State. It therefore confirmed that it had jurisdiction to hear the action for annulment brought by the Kingdom of Spain against the contested decision.

As regards the observance of the Kingdom of Spain's rights of defence in the procedure leading to the adoption of the contested decision, the Court recalled that Regulation No 1173/2011 empowers the Commission to initiate an investigation when it finds that there are serious indications of the existence of misrepresentation in relation to the deficit or debt of a Member State, while requiring the Commission to respect fully the rights of the defence of the Member State concerned before submitting a proposal to the Council for the imposition of a fine. In that context, the Court made clear that the provisions of Regulation No 1173/2011 do not prevent the information serving as the basis for the Council's decision to impose a fine from being gathered by Eurostat during visits in the Member State concerned prior to the adoption by the Commission of the decision to launch an investigation. Under the powers conferred on it by Regulation No 479/2009,¹¹¹ Eurostat was moreover entitled to organise

^{108/} That judgment is presented in Section I 'Fundamental Rights'.

^{109/} Council Implementing Decision (EU) 2015/1289 of 13 July 2015 imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia (OJ 2015 L 198, p. 19, and corrigendum OJ 2015 L 291, p. 10).

^{110/} Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1).

^{111/} Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (OJ 2009 L 145, p. 1).

such visits in Spain and to gather, in the course of those visits, items of evidence relating to the possible manipulation of economic and budgetary data. Since the circumstances in which that information had been gathered in the instant case were also consistent with the requirements laid down by the EU legislature, and since the exercise of the Kingdom of Spain's rights of defence in the context of the investigation procedure had not been impaired by the various visits by Eurostat, the Court found that the Council had not infringed the Kingdom of Spain's rights of defence in this case.

As the Kingdom of Spain had also pleaded infringement of the right to good administration in the investigation conducted by the Commission after Eurostat's visits, the Court confirmed that that right, set out in Article 41 of the Charter, is a general principle of EU law which may be relied on by the Member States. It is therefore incumbent on the EU institutions to comply with the requirement of impartiality in the context of administrative procedures that are initiated against Member States and are liable to result in decisions adversely affecting them. As regards the doubts raised by the Kingdom of Spain concerning the Commission's objective impartiality during the investigation, the Court held that the fact that the investigation had been entrusted to a team largely composed of staff members who had been involved in Eurostat's earlier visits did not, as such, permit the Court to conclude that the Commission had infringed the requirement of impartiality to which it is subject, particularly because those visits and that investigation procedure fell within separate legal frameworks and had different purposes.

Regarding the substantive requirements that must be met so that the Council can impose a fine on a Member State under the powers conferred on it by Article 8(1) of Regulation No 1173/2011, the Court also confirmed the need for a broad interpretation of the concept of 'misrepresent[ation of] deficit and debt data'. In the light of the objective of deterrence pursued by the EU legislature, that concept therefore covers all misrepresentations by the Member States concerning data that must be reported to Eurostat under Article 3 of Regulation No 479/2009, irrespective of whether, first, the data at issue is provisional or definitive and, secondly, the misrepresentations in that regard have had the effect of jeopardising the economic and budgetary coordination and surveillance carried out by the Council and the Commission. As regards the requirement that the Member State concerned must have acted, at the very least, with serious negligence, the Court moreover found that the assessment as to whether such negligence exists depends on the magnitude of the Member State's breach of the obligation to exercise due care owed by it when drawing up and checking the data to be reported to Eurostat under Article 3 of Regulation No 479/2009.

Finally, while confirming that the principle that penal provisions may not have retroactive effect applies to an administrative penalty such as a fine imposed under Article 8(1) of Regulation No 1173/2011, the Court ruled that there had been no breach of that principle in the present case. Having rejected the Kingdom of Spain's argument that the fine had been miscalculated, the Court dismissed the action for annulment brought by it in its entirety.

XV. SOCIAL POLICY

Mention should be made of one judgment in the area of social policy, concerning the right of employees to paid annual leave. Two other judgments are also worthy of note — **G4S Secure Solutions** (C-157/15) and **Bougnaoui and ADDH** (C-188/15) — relating to the compatibility with Directive 2000/78 of the prohibition by an employer of the visible wearing of religious signs in the workplace.¹¹²

In the judgment in **King** (C-214/16, [EU:C:2017:914](#)), delivered on 29 November 2017, the Court ruled on the right of employees to paid annual leave, guaranteed by Article 7 of Directive 2003/88,¹¹³ specifically the possibility of carrying over and accumulating unexercised rights to paid annual leave. In the instant case, the applicant had worked for a company on the basis of a ‘self-employed commission-only contract’ under which annual leave was unpaid. Upon termination of his employment relationship, he sought to recover payment for his annual leave — taken and not paid as well as not taken — for the entire period of his engagement. Hearing the case on appeal, the national court submitted several questions to the Court for a preliminary ruling concerning, in particular, the compatibility with EU law of national legislation which requires the worker to take leave before being able to establish whether he is entitled to paid annual leave and which excludes the carrying over of annual leave beyond the leave year for which it is granted. In that regard, the Court ruled, in the first place, that Article 7 of Directive 2003/88 and Article 47 of the Charter preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave. A worker faced with circumstances liable to give rise to uncertainty during the annual leave period as to the remuneration owed to him would not be able to fully benefit from that leave as a period of relaxation and leisure, in accordance with the very purpose of the right to paid annual leave. Similarly, such circumstances are liable to dissuade the worker from taking his annual leave. Furthermore, as regards the judicial remedies available to the worker, the Court ruled that the Member States must ensure compliance with the right to an effective remedy, as enshrined in Article 47 of the Charter. In that connection, it found that national legislation which requires a worker to take leave without pay in the first place and then to bring an action to claim payment for it, where the employer is willing to grant only unpaid leave, is incompatible with Article 7 of Directive 2003/88.

In the second place, the Court held that Article 7 of Directive 2003/88 precludes national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave. Indeed, if it were to be accepted, in those circumstances and in the absence of any national provision establishing a limit to the carry-over of leave in accordance with the requirements of EU law, that the worker’s acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of the directive, which is that there should be due regard for workers’ health. Finally, the Court pointed out that, unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unable to take leave due to sickness, an employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences.

^{112/} Those judgments are presented under Section I ‘Fundamental rights’.

^{113/} Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

XVI. CONSUMER PROTECTION

In the field of consumer protection, three judgments merit special attention. The first relates to misleading advertising and comparative advertising, the second concerns the rights of air passengers and the third addresses the issue of liability for defective products.

In its judgment in **Carrefour Hypermarchés** (C-562/15, [EU:C:2017:95](#)), delivered on 8 February 2017, the Court provided clarification *on the conditions regarding the permissibility of comparative advertising, as listed in Article 4(a) and (c) of Directive 2006/114*,¹¹⁴ which require comparative advertising not to be misleading and to compare objectively one or more material, relevant, verifiable and representative features of the goods and services compared. The main proceedings involved a dispute between two retail competitors, namely ITM, which is responsible for the strategy and commercial policy of shops in the Intermarché retail chain, and Carrefour, concerning an advertising campaign launched by Carrefour comparing the prices of leading brand products in shops in the Carrefour retail chain and in competitors' shops, including prices in shops in the Intermarché retail chain.

In the first place, the Court pointed out that, under Directive 2006/114, all comparative advertising must compare prices objectively and must not be misleading. However, where the advertiser and the competitors belong to retail chains which each have a range of shops of different sizes and formats, and where the comparison does not relate to shops of the same size or format, the objectivity of the comparison may be distorted if the advertising does not mention that difference.

In the second place, the Court found that comparative advertising which omits or hides material information which the average consumer requires, according to the context, in order to take an informed transactional decision or which provides that information in an unclear, unintelligible, ambiguous or untimely manner, and which may consequently cause the average consumer to take a transactional decision that he would not otherwise have taken, is misleading. However, according to the Court, advertising such as that at issue in the present case will be misleading only if the consumer is not informed of the fact that the comparison is being made between the prices charged in shops having larger sizes or formats in the retail chain of the advertiser and the prices displayed in shops having smaller sizes or formats belonging to competing retail chains. In that regard, such information not only must be provided clearly, but must also be contained in the advertisement itself.

The judgment in **Pešková and Peška** (C-315/15, [EU:C:2017:342](#)), delivered on 4 May 2017, gave the Court the opportunity to interpret, among other things, *the concepts of 'extraordinary circumstances' and 'reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004*,¹¹⁵ in the context of a dispute concerning the refusal of an air carrier to pay compensation to passengers whose flight had suffered a delay of more than three hours in arrival because of a collision between a bird and their aircraft.

The Court recalled that extraordinary circumstances within the meaning of Regulation No 261/2004 are events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier and are outside that carrier's actual control. Conversely, the premature failure of certain parts of an aircraft does not

^{114/} Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).

^{115/} Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

constitute an extraordinary circumstance, since such a breakdown remains intrinsically linked to the operating system of the aircraft. However, the Court held that a collision between an aircraft and a bird, as well as any damage caused by that collision, are not intrinsically linked to the operating system of the aircraft, with the result that such a collision is not by its nature or origin inherent in the normal exercise of the activity of the air carrier and is outside its actual control. Consequently, the Court considered that a collision between an aircraft and a bird is an extraordinary circumstance within the meaning of Article 5(3) of Regulation No 261/2004.

As to whether the air carrier took all 'reasonable measures' to prevent the collision in question, the Court held that the air carrier cannot be obliged to take measures which would require it to make intolerable sacrifices in the light of the capacities of its undertaking. In addition, although the air carrier may be required to take certain preventative measures in order to reduce or even prevent the risks of any collisions with birds, it is not responsible for the failure of other entities (such as airport managers or the competent air traffic controllers) to fulfil their obligations to take the preventative measures for which they are responsible.

In its judgment in *W and Others* (C-621/15, [EU:C:2017:484](#)), delivered on 21 June 2017, the Court ruled *on the compatibility with Article 4 of Directive 85/374* ¹¹⁶ *of national evidentiary rules allowing a court, before which an action has been brought involving the liability of the producer of a vaccine due to an alleged defect in that vaccine, to conclude, notwithstanding the lack of scientific consensus on the matter, that that defect exists and that there is a causal link between it and the occurrence of a disease on the basis of a body of serious, specific and consistent evidence.*

The Court considered that Article 4 of Directive 85/374 does not preclude such evidentiary rules. Indeed, such evidentiary rules do not bring about a reversal of the burden of proof which, as provided for in that provision, it is for the victim to discharge, since the onus is on the victim to prove the various elements of his case which, taken together, will provide the court hearing the case with a basis for its conclusion as to the existence of a defect in the vaccine at issue and a causal link between that defect and the damage suffered. Moreover, according to the Court, excluding any method of proof other than certain proof based on medical research could make it excessively difficult, or even impossible, where medical research neither confirms nor rules out the existence of a causal link, to establish producer liability, which would undermine the effectiveness of the directive and its objectives.

However, the Court made clear that national courts must ensure that the evidence adduced is sufficiently serious, specific and consistent to support the conclusion that, having regard also to the evidence and arguments put forward by the producer, a defect in the product appears to be the most plausible explanation for the occurrence of the damage. National courts must moreover safeguard their own freedom of assessment in determining whether such proof has been made out to the requisite legal standard, until such time as they consider themselves in a position to reach a definitive conclusion.

According to the Court, the use by the national legislature or, as the case may be, the supreme judicial body, of a method of proof under which the existence of a causal link between the defect attributed to a vaccine and the damage suffered by the victim will always be considered to be established when certain predetermined causation-related factual evidence is presented, would have the consequence of the burden of proof provided for in Article 4 of Directive 85/374 and the effectiveness of the system of liability established by that directive being undermined.

¹¹⁶ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

XVII. ENVIRONMENT

1. ENVIRONMENTAL LIABILITY

In the judgment of 1 June 2017 in **Folk** (C-529/15, [EU:C:2017:419](#)), the Court provided clarification on *the concept of 'environmental damage' within the meaning of Directive 2004/35, ¹¹⁷ as amended by Directive 2009/31. ¹¹⁸ At issue in the main proceedings was an application submitted by the holder of fishing rights for the river Mürz who had complained of significant environmental damage caused by a hydroelectric power station which had disrupted the natural reproduction of fish.*

According to the first instance court, since the operation of the hydroelectric power station had been authorised under national rules, that damage could not be classified as environmental damage within the meaning of Directive 2004/35. The Court first of all ruled that Article 17 of the directive had to be interpreted as applying *ratione temporis* to the environmental damage that occurred after its entry into force, even if such damage was caused by the operation of a facility authorised before that date. Secondly, the Court stated that Directive 2004/35, particularly Article 2(1)(b) thereof, which defines the concept of 'environmental damage', precludes a provision of national law which excludes, generally and automatically, that damage which has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the water in question be categorised as 'environmental damage', due to the mere fact that it results from an activity authorised under national rules and, in consequence, is covered by an authorisation granted under national law.

The Court also made clear that if the competent national authority issued the authorisation without an examination as to whether the conditions laid down in Article 4(7)(a) to (d) of Directive 2000/60 ¹¹⁹ have been complied with, EU law does not oblige the national courts to take the place of the competent authority by themselves examining those conditions.

The full and correct transposition of Articles 12 and 13 of Directive 2004/35 requires that the three categories of persons listed in Article 12(1), particularly those likely to be affected by environmental damage, may submit observations on environmental damage, that they have the option to request that the competent authority take measures under that directive, and, accordingly, that they may initiate a procedure before a court or tribunal or any other competent public body, without the Member States having any discretion in that regard.

117/ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

118/ Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 (OJ 2009 L 140, p. 114).

119/ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

2. EMISSION ALLOWANCE TRADING

In its judgment of 26 July 2017 in **ArcelorMittal Atlantique et Lorraine** (C-80/16, [EU:C:2017:588](#)), the Court ruled on the validity of Decision 2011/278¹²⁰ concerning a scheme for greenhouse gas emission allowance trading within the meaning of Directive 2003/87.¹²¹ On this occasion, the Court established the appropriate method to be employed by the Commission in setting benchmarks for the free allocation of emission allowances in the steel sector for the period 2013 to 2020. The referring court had expressed doubts about the validity of Decision 2011/278 in the light of the question whether the benchmarks referred to had been set in conformity with Directive 2003/87. Accordingly, it had asked the Court to determine *inter alia* whether, in setting those benchmarks, the Commission could decide not to include the totality of emissions related to the use of recycled waste gases in electricity production in the benchmark for hot metal, and to include a factory producing both sintered ore and pellets in the reference installations for determining the benchmark for sintered ore.

The Court answered those questions in the affirmative and therefore concluded that there was nothing that could affect the validity of Decision 2011/278. Specifically as regards the determination of the benchmark for sintered ore, the Court first of all pointed out that the Commission has broad discretion to determine the benchmarks in individual sectors or subsectors under Article 10a(2) of Directive 2003/87. Therefore, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate. The fact that the Commission included in Decision 2011/278 a factory producing both sintered ore and pellets in the reference installations for determining the benchmark for sintered ore did not vitiate that decision with illegality. In the case of an installation including both a production unit for pellets and a production unit for sintered ore, the production of pellets must be considered to be one of the processes directly or indirectly linked to the process units, within the meaning of the definition of sintered ore in Annex I to Decision 2011/278, since these two production units together allow the manufacture of a unique product which is substitutable for sintered ore.

3. PROTECTED SITES

By interim order delivered on 20 November 2017 in **Commission v Poland** (C-441/17 R, [EU:C:2017:877](#)), the Grand Chamber of the Court ordered *the Republic of Poland to cease immediately, except in exceptional cases and where strictly necessary, active forest management operations in Białowieża forest, a site of Community importance and a special protection area for birds*. The application for interim relief had been made in an action for failure to fulfil obligations¹²² brought by the Commission seeking a declaration that the Republic of Poland had, by means of operations including the felling of trees and the removal of dead or dying trees in order to halt the spread of the

^{120/} 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).

^{121/} 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).

^{122/} Case C441/17, **Commission v Poland**, pending as of 31 December 2017.

spruce bark beetle, infringed its obligations under Directive 92/43¹²³ on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147¹²⁴ on the conservation of wild birds.

The Court granted the application for interim relief and found that all of the relevant requirements had been met in this case. In particular, with regard to the requirement relating to urgency, the Court held that the active forest management operations in the forest at issue were likely to cause irreparable and serious damage to the environment. Indeed, once it has occurred, the damage caused by the felling and removal of trees would be impossible to rectify subsequently, should the Commission's allegations concerning Poland's failure to fulfil obligations be established. Furthermore, the Court pointed out that the interests to be weighed up in this case are, on the one hand, the preservation of habitats and species from a potential threat resulting from the active forest management operations and, on the other hand, the interest of preventing damage to the natural habitats of the forest resulting from the presence of the spruce bark beetle. However, in the absence of detailed information on the harm likely to be caused in the short term by the spruce bark beetle, it is, in the Court's view, more urgent to prevent the damage that a continuation of the operations at issue would cause than the occurrence of such harm.

Exceptionally, the Court nevertheless excluded from the interim measures forest management operations that are necessary in order to ensure, directly and immediately, the public safety of persons. Those operations may continue to be undertaken only when they are the sole means of ensuring the public safety of persons in the immediate vicinity of transport routes or other significant infrastructure where it is impossible to ensure such safety by taking other, less radical measures, such as adequate signposting of the danger or a temporary ban on public access to the immediate vicinity.

Finally, the Court ruled that Article 279 TFEU confers power on it to prescribe the imposition of a periodic penalty payment should its order not be respected by the relevant party. On that basis, it ordered Poland to send the Commission details of all measures that it has adopted in order to comply fully with that decision. The Court will decide, where appropriate, by way of a new order, whether its decision has been infringed and, if an infringement is found, it will order Poland to pay the Commission a penalty payment of at least EUR 100 000 per day.

In the judgment in **Vereniging Hoekschewaards Landschap** (C-281/16, [EU:C:2017:774](#)), delivered on 19 October 2017, the Court ruled on the validity of Implementing Decision 2015/72¹²⁵ adopting an eighth update of the list of sites of Community importance for the Atlantic biogeographical region, adopted on the basis of Directive 92/43.¹²⁶ By that decision, the Commission, at the request of the Kingdom of the Netherlands, had reduced the size of the Haringvliet site of Community importance, a special area of conservation in that Member State, by excluding the Leenheerenpolder, on the ground that the initial inclusion of the latter in the site was the result of a scientific error. The Court pointed out that while it is true that Member States have a certain margin of discretion when making their proposals, under Article 4(1) of Directive 92/43, for a list of sites eligible for designation as sites of Community importance, they do not, however, have that same margin of discretion when suggesting to the Commission to reduce the size of such a site.

^{123/} 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 amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

^{124/} Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2009 L 20, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

^{125/} Commission Implementing Decision (EU) 2015/72 of 3 December 2014 adopting an eighth update of the list of sites of Community importance for the Atlantic biogeographical region (OJ 2015 L 18, p. 385).

^{126/} 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 amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368).

As the inclusion of a site in the list gives rise to the presumption that it is relevant in its entirety from the point of view of the objective of Directive 92/43 of conserving natural habitats and wild fauna and flora, a proposal by a Member State to reduce the size of a site placed on that list requires proof that the areas in question do not have a substantial interest in achieving that objective at national level. Therefore, the Commission may accept and implement the proposal only if it concludes that the protection of those areas is also not necessary from the perspective of the entire European Union.

Consequently, since there was no conclusive scientific evidence in this case capable of proving that an error had vitiated the initial proposal to include Leenheerenpolder in the Haringvliet site, the Court ruled that Implementing Decision 2015/72 was invalid.

4. AARHUS CONVENTION

With respect to the Aarhus Convention, two judgments are worthy of note. The first is the judgment in *Saint-Gobain Glass Deutschland* (C-60/15 P) concerning access to environmental information¹²⁷ while the second deals with access to justice as regards the environment.

In its judgment in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, [EU:C:2017:987](#)), delivered on 20 December 2017, the Court ruled on the standing of an environmental organisation in seeking access to justice based on the Aarhus Convention.¹²⁸

In the first place, the Court made clear that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, provides that a duly constituted environmental organisation operating in accordance with the requirements of national law must be able to contest before a court a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60.¹²⁹ According to the Court, although Article 9(3) of the Aarhus Convention implies that contracting States retain discretion as to the implementation of that provision, it cannot allow those States to impose criteria so strict that it would be effectively impossible for environmental organisations to contest the actions or omissions that are the subject of that provision.

In this case, it appears that, under the applicable national procedural law, even if an environmental organisation such as Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation meets the requirements set out in Article 2(5) of the Aarhus Convention and therefore falls within the definition of ‘public concerned’, it cannot, in principle, be granted the status of party to the procedure in the context of an administrative procedure carried out under the legislation governing water-related matters. The combined provisions of Article 9(3) of that convention, Article 47 of the Charter and Article 14(1) of Directive 2000/60 must be interpreted as precluding national procedural rules that deprive environmental organisations of the right to participate, as a party to the procedure, in a permit procedure that is intended to implement Directive 2000/60 and limit the right to bring proceedings contesting decisions resulting from such a procedure solely to persons who do have that status. It

^{127/} That judgment is presented under Section III.3 ‘Access to documents’.

^{128/} 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).

^{129/} Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

is for national courts to interpret national procedural law in a way that is consistent with those provisions so as to enable such participation.

Against that background, subject to verification by the referring court of the relevant matters of fact and national law, the Court also ruled that Article 9(3) and (4) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted as precluding the application to an environmental organisation of a national rule that imposes a time limit pursuant to which a person loses the status of party to the procedure and therefore cannot bring an action against the decision resulting from that procedure if it failed to submit objections in good time following the opening of the administrative procedure and, at the very latest, during the oral phase of that procedure.

XVIII. COMMON COMMERCIAL POLICY

In *Opinion 2/15* (EU:C:2017:376), delivered by the full Court on 16 May 2017, the Court was called upon to rule, under Article 218(11) TFEU, on the competence of the European Union to conclude alone the Free Trade Agreement it had negotiated with the Republic of Singapore. The agreement is a 'new generation' bilateral free trade agreement which contains, in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers in the field of trade in goods and services, provisions on a number of other matters related to trade. Thus, the commitments contained in the envisaged agreement relate to market access, investment protection, intellectual property protection, competition and sustainable development. The agreement also establishes dispute settlement mechanisms and a specific institutional framework intended to implement, in particular, the different obligations and procedures concerning the exchange of information, cooperation and mediation which it provides for.

In the light of the subject matter and objectives of the draft free trade agreement, the Court first examined to what extent the agreement's provisions fall within the exclusive competence of the European Union in the area of the common commercial policy, as laid down in Article 3(1)(e) TFEU. Since, under Article 207(1) TFEU, the common commercial policy belongs within the context of the EU's external action, the Court pointed out that only the components of the agreement that specifically relate to trade with one or more non-member countries, in that they are essentially intended to promote, facilitate or govern such trade and have direct and immediate effects on it, fall within the field of the common commercial policy. In so far as that was the case for commitments relating to trade in goods provided for in Chapters 2 to 6, to non-tariff barriers to trade and investment in the field of renewable energy generation provided for in Chapter 7, to intellectual property protection provided for in Chapter 11, to competition provided for in Chapter 12 and to sustainable development provided for in Chapter 13, the Court confirmed that those components of the envisaged free trade agreement fall within the exclusive competence of the European Union under Article 3(1)(e) TFEU.

As to the commitments concerning the reduction of barriers to the cross-border supply of services, to establishment and to the temporary presence of natural persons, as provided for in Chapter 8 of the agreement, the Court found that that chapter falls within the common commercial policy and, in consequence, the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU, with the exception of the commitments provided for in the agreement concerning the supply of services in the field of transport. Since those commitments are excluded from the common commercial policy by Article 207(5) TFEU, the Court examined the competence of the European Union to approve them in the light of Article 3(2) TFEU, which provides that the EU has exclusive competence for the conclusion of an international agreement where its conclusion may affect common rules or alter their scope. That risk exists, according to the Court, where the commitments provided for in an agreement fall within the scope of common rules, without it being necessary for the area covered by the international commitments and

that covered by the EU rules to coincide fully. Inasmuch as the supply of the different transport services referred to in Chapter 8 of the agreement was capable of affecting or altering common EU rules in the field of maritime, rail and road transport, the Court concluded that the European Union had exclusive competence to approve those commitments under Article 3(2) TFEU. As regards the provisions of the draft agreement concerning transport by internal waterway, the Court observed that those provisions contained commitments of extremely limited scope which could not, therefore, have an effect on the nature of the European Union's competence as regards the commitments set out in Chapter 8. In the light of these different considerations, the Court concluded that the European Union had exclusive competence in relation to all of those commitments. With reference to Article 3(1)(e) TFEU and, as regards the commitments concerning services in the field of transport, Article 3(2) TFEU, the Court also confirmed that the European Union had exclusive competence in relation to the provisions of Chapter 10 of the agreement, containing commitments concerning public procurement.

So far as concerns investment protection, provided for in Chapter 9, Section A, of the agreement, the Court distinguished between direct investments and other investments. As regards the first type of investment, it recalled that EU acts concerning direct foreign investment fall within the common commercial policy, under Article 207(1) TFEU, without drawing a distinction according to whether the acts concern the admission or the protection of such investments. Since the envisaged commitments relating to direct investments are moreover intended to promote, facilitate and govern trade and are such as to have direct and immediate effects on that trade, the Court confirmed that the European Union has exclusive competence, under Article 3(1)(e) TFEU, to approve them. So far as concerns the commitments relating to non-direct foreign investments, such as 'portfolio' investments made without any intention to influence the management and control of an undertaking, which constitute movements of capital within the meaning of Article 63 TFEU, the Court found, by contrast, that they do not fall within the exclusive competence of the European Union under Article 3(1)(e) TFEU or within one of the situations of exclusive competence referred to in Article 3(2) TFEU. As regards that latter aspect, the Court rejected the Commission's argument that Section A of Chapter 9 was capable of affecting Article 63 TFEU. According to the Court, the 'common rules' referred to in Article 3(2) TFEU cannot include a provision of the TFEU, in particular because the provisions of an international agreement of the European Union are not capable of affecting the rules of EU primary law or of altering their scope. The Court took the view that the approval of commitments which contribute to the establishment of the free movement of capital and payments on a reciprocal basis may, on the other hand, be classified as necessary in order to achieve fully such free movement, which is one of the objectives referred to in the Treaties within the meaning of Article 216(1) TFEU. In that context, approval falls within the competence relating to the internal market that is shared between the European Union and the Member States pursuant to Article 4(2)(a) TFEU.

In respect of the provisions of the envisaged agreement containing various obligations and procedures concerning exchange of information, notification, verification, cooperation and mediation and creating, for that purpose, a specific institutional framework, the Court observed that those commitments are intended to ensure the effectiveness of the substantive provisions of the agreement by establishing, essentially, an organisational structure and certain decision-making powers. Since those provisions are of an ancillary nature, they fall within the same competence as the substantive provisions which they accompany. That approach was also taken in relation to the commitments contained in Chapter 14, entitled 'Transparency', which are also of an ancillary nature in relation to the substantive provisions which they accompany.

Finally, as regards the provisions of the envisaged agreement relating to dispute settlement, the Court drew a distinction between the regime applicable to disputes between investors and States and that applicable to disputes between the EU and Singapore. The Court found that the first regime was not purely ancillary in nature in relation to the substantive rules, since it is liable to remove disputes from the jurisdiction of the courts of the Member States. Consequently, the approval of such a regime necessarily falls within a competence shared between the European Union and the Member States. Concerning the regime for the settlement of disputes between the

European Union and Singapore, the Court recalled, on the other hand, that the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit such agreements, as regards the interpretation and application of their provisions, to the decisions of a court which is created or designated by such agreement or a body which, whilst not formally a court, essentially performs judicial functions, such as the Dispute Settlement Body created within the framework of the WTO Agreement. Since the regime for the settlement of disputes between the European Union and Singapore moreover forms part of the institutional framework for the substantive provisions of the envisaged agreement and is not liable to remove disputes from the jurisdiction of the courts of the Member States or of the European Union, the Court found that the regime falls within the same competence as the substantive provisions which it accompanies.

In the light of all of the foregoing, the Court concluded that the draft free trade agreement with Singapore fell, in part, within the exclusive competence of the European Union and, in part, within a competence that is shared between the European Union and the Member States.

On 25 October 2017, in the judgment in **Commission v Council** (C-389/15, [EU:C:2017:798](#)), the Court, sitting as the Grand Chamber, upheld the action for annulment brought by the Commission against *Council Decision 8512/15 of 7 May 2015 authorising the opening of negotiations on a revised Lisbon Agreement*¹³⁰ on appellations of origin and geographical indications. The Court found that the negotiations on the draft revised agreement fall within the exclusive competence that Article 3(1) TFEU confers on the European Union in the field of the common commercial policy referred to in Article 207(1) TFEU.

The Court first recalled its settled case-law that international commitments concerning intellectual property entered into by the European Union fall within the common commercial policy if they display a specific link with international trade in that they are essentially intended to promote, facilitate or govern such trade and have direct and immediate effects on it. It considered that international agreements which are concerned with safeguarding and organising the protection of intellectual property rights on the territory of the parties are among those that may fall within that policy, provided that they satisfy the above two conditions.

As regards the objective of the draft revised agreement, the Court made clear that since its main objective is to strengthen the system established by the Lisbon Agreement and, within the Special Union created by that agreement, to extend the protection introduced by the latter to geographical indications, supplementing the protection which the Paris Convention¹³¹ affords to the various forms of industrial property, the draft revised agreement must be regarded as falling within the framework of the aim that is pursued by the body of international agreements of which it forms part and, in particular, from the point of view of the European Union, as being intended to facilitate and govern trade between the European Union and the third States party to the Lisbon Agreement.

Concerning the effects of the draft revised agreement, the Court considered that the provisions it contains will have immediate effects on trade between the European Union and the third States concerned, by giving all the manufacturers involved in such trade, and any other interested natural or legal person, the necessary tools to secure, under homogeneous substantive and procedural conditions, definitive observance of the protection

130/ The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, signed on 31 October 1958, revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (United Nations Treaty Series, Vol. 828, No 13172, p. 205).

131/ The Convention for the Protection of Industrial Property, signed in Paris on 20 March 1883, last revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (United Nations Treaties Series, Vol. 828, No 11851, p. 305).

which the draft revised agreement affords to their industrial property rights if appellations of origin or geographical indications are used abroad in a harmful or unfair manner.

The Court therefore concluded that the Council had been wrong to take the view that the contested decision fell within the approximation of laws in the field of the internal market (Article 114 TFEU) and, accordingly, within a competence shared between the European Union and its Member States, with the result that it annulled that decision.

XIX. INTERNATIONAL AGREEMENTS

Two opinions and one judgment should be mentioned in relation to international agreements. The two opinions concern, respectively, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled and the agreement negotiated between Canada and the European Union on the transfer and processing of Passenger Name Record data.¹³² The judgment concerns the interpretation of a provision contained in a decision of the EEC-Turkey Association Council. Reference should also be made to the judgment in Case C-687/15, *Commission v Council* (C-MR-15), which relates to the legal form of acts provided for in Article 218(9) TFEU.¹³³

On 14 February 2017, the Court, sitting as the Grand Chamber, delivered **Opinion 3/15** ([EU:C:2017:114](#)) on the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled,¹³⁴ which was adopted in 2013 following negotiations conducted within the framework of the World Intellectual Property Organisation. The treaty requires the contracting States inter alia to provide in their national law that certain entities (that is, government institutions and non-profit organisations which provide services relating to education, instructional training, adaptive reading or information access) may, without the authorisation of the copyright holder, reproduce or distribute copies of published works in a format which gives access to the works for persons who are blind, visually impaired or otherwise print disabled. The Court was called upon to decide whether the European Union had competence to conclude such an agreement.

In the first place, the Court considered that the conclusion of the Marrakesh Treaty does not fall within the common commercial policy defined in Article 207 TFEU. The treaty is not intended to promote, facilitate or govern international trade in accessible format copies; its aim is rather to improve the position of beneficiary persons by facilitating, through various means, their access to published works. Furthermore, the cross-border exchange of accessible format copies envisaged by the Marrakesh Treaty cannot be equated with international trade engaged in by ordinary operators for commercial purposes, since the exchange in question takes place between only government institutions or non-profit organisations in accordance with the conditions specified in the treaty and the copies imported and exported are intended for beneficiary persons alone.

^{132/} That judgment is presented in Section I 'Fundamental Rights'.

^{133/} That judgment is presented in Section III.2 'Legal acts of the European Union'.

^{134/} The Council authorised the signing of that treaty, on behalf of the European Union, by Council Decision 2014/221/EU of 14 April 2014 (OJ 2014 L 115, p. 1).

In the second place, the Court held that the body of obligations laid down by the Marrakesh Treaty falls within an area that is already covered to a large extent by common EU rules and the conclusion of that treaty may thus affect those rules or alter their scope, within the meaning of Article 3(2) TFEU. Therefore, the conclusion of the Marrakesh Treaty falls within the exclusive competence of the European Union. The Court found that Directive 2001/29¹³⁵ permits Member States which wish to do so to introduce — for the benefit of persons with a disability — an exception or limitation to the rights of reproduction and communication to the public. It follows that the exception or limitation on those rights provided for by the Marrakesh Treaty will have to be implemented within the area harmonised by that directive. The same is true of the import and export arrangements prescribed by the treaty, inasmuch as they are intended to permit the communication to the public or the distribution, in the territory of a contracting State, of accessible format copies published in another contracting State, without the consent of the copyright holders being obtained. The Court pointed out in that regard that, while the Member States have the option under Directive 2001/29 of introducing such an exception or limitation, that option is granted by the EU legislature and is highly circumscribed by various requirements of EU law.

In *Opinion 1/15* (EU:C:2017:592)¹³⁶ of 26 July 2017, the Grand Chamber of the Court ruled among other things on the appropriate legal basis for the adoption of the Council's decision on the conclusion of the agreement negotiated between Canada and the European Union on the transfer and processing of Passenger Name Record data. Given that the choice of substantive legal basis for an EU act, including one adopted in order to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and the content of that measure, the Court first of all found that the envisaged agreement has two components, one concerning the necessity of ensuring public security and the other concerning the protection of Passenger Name Record data. Since both components are fundamental in nature, the Court held that the measures envisaged for the protection of the personal data of passengers relate to the legal basis provided for in Article 16(2) TFEU, while the measures concerning the transfer of that data to the competent criminal authorities and their processing by those authorities relates to the legal basis provided for in Article 87(2)(a) TFEU. In addition, after determining that the use of both of those legal bases does not entail different adoption procedures, the Court lastly confirmed that the Council's decision on the conclusion of the envisaged agreement had to be based jointly on Article 16(2) and Article 87(2)(a) TFEU.

On 5 December 2017, in its judgment in *Germany v Council* (C-600/14, EU:C:2017:935), the Court, sitting as the Grand Chamber, dismissed the action for annulment in part of Council Decision 2014/699,¹³⁷ the aim of which was to establish the position to be adopted on behalf of the European Union with respect to a number of amendments to the Convention concerning International Carriage by Rail (COTIF). In support of its action, the Federal Republic of Germany argued in particular that some of the points on which the contested decision established the positions to be adopted on behalf of the European Union do not fall within the scope of the EU's external competence, unless it has, first, adopted common rules that are liable to be affected by those amendments.

In its judgment, the Court held first of all that the competence of the European Union to conclude international agreements may arise not only from an express grant by the Treaties, but may also flow by implication from other provisions of the Treaties and from measures adopted by the EU institutions under those provisions. In particular,

^{135/} 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).

^{136/} That Opinion was also presented under Section I 'Fundamental rights'.

^{137/} Council Decision 2014/699/EU of 24 June 2014 establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to the Appendices thereto (OJ 2014 L 293, p. 26).

whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the European Union has the competence to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect. Thus, the European Union may have an external competence that falls outside the situations in which it has an exclusive competence under Article 3(2) TFEU. The Court pointed out that the provisions of the COTIF to which the amendments at issue relate are designed to establish common rules at international level, including with respect to international transport to or from the territory of a Member State, or passing across the territory of one or more Member States, as regards parts of the journey that take place outside EU territory and, as a general rule, also as regards parts of the journey that take place on EU territory. Therefore, the fact that the European Union adopts a position on those amendments must be considered to contribute to the achievement of the objectives of the common transport policy, within the framework of the competence conferred on the EU by Article 91(1) TFEU, which also encompasses an external aspect.

The Court also stated that the external EU competence that falls within the scope of the second situation laid down in Article 216(1) TFEU, corresponding to the scenario in which the conclusion of an agreement is ‘necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties’, is not subject to any condition relating to the prior adoption of EU rules that are likely to be affected by the amendments at issue. Furthermore, it cannot be argued that, in the area of transport, which falls within the scope of the shared competence of the European Union and its Member States, the EU cannot take external action unless it has first taken internal action by means of adopting common rules, in areas in which international agreements have been concluded.

In the judgment in *Tekdemir* (C-652/15, [EU:C:2017:239](#)) of 29 March 2017, 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 Council¹³⁸ preventing the Member States and the Republic of 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 present case, a Turkish national born in Germany in June 2014, legally represented by his parents, had applied, in July 2014, for a residence permit to be issued under German law. The child’s mother, also a Turkish national, had entered Germany in 2013 under the cover of a Schengen visa for tourists and had later applied for asylum there. When the child was born, she had authorisation to stay as an asylum applicant. The child’s father, also a Turkish national, held a residence permit valid until October 2016.

On the basis of a national provision introduced after the entry into force of Decision No 1/80 in the Federal Republic of Germany, the competent German authority had rejected the application for a residence permit to be issued to the child, taking the view, first, that it was not intolerable to require him to pursue the procedure for a visa *ex post facto*, even if that would inevitably mean that he and his mother would, at least temporarily, be separated from their father and husband, respectively, and, secondly, that it was also not unreasonable to expect the child’s father to continue his family community and matrimonial life with his son and wife in Turkey.

With reference to the interpretation applied in the judgment in *Demir*,¹³⁹ the Court held that the objective of efficient management of migration flows may constitute an overriding reason in the public interest capable of justifying a national measure, introduced after the entry into force of Decision No 1/80 in the Member State in

^{138/} 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).

^{139/} Judgment of the Court of 7 November 2013, *Demir* (C-225/12, [EU:C:2013:725](#)).

question, requiring nationals of third countries under the age of 16 to hold a residence permit in order to enter and reside in that Member State. Such a measure is not, however, proportionate to the objective pursued where the procedure for its implementation, as regards child nationals of third countries born in the Member State in question and one of whose parents is a Turkish worker lawfully residing in that Member State, goes beyond what is necessary for attaining that objective, particularly in so far as the application of such a measure has the effect of requiring that worker to choose between pursuing paid employment in the Member State in question and having his family life profoundly disrupted or giving up that employment with no guarantee of finding new employment upon a return from Turkey.

XX. COMMON FOREIGN AND SECURITY POLICY

As regards restrictive measures in the field of the common foreign and security policy (CFSP), five judgments merit special attention. Three concern the freezing of funds of groups or individuals considered to have ties to terrorist acts. The fourth judgment concerns the Court's jurisdiction to rule on the legality of decisions of the Council applying restrictive measures to a number of Russian undertakings on account of the Russian Federation's actions in Ukraine. Lastly, reference should be made to the judgment in *Safa Nicu Sepahan v Council* (C-45/15 P) which concerns compensation in respect of damage caused by a decision to freeze funds.¹⁴⁰

In its judgment in *A and Others* (C-158/14, [EU:C:2017:202](#)), delivered on 14 March 2017, the Court, sitting as the Grand Chamber, was required to rule on *the validity of Council Implementing Regulation (EU) No 610/2010*¹⁴¹ *maintaining the Liberation Tigers of Tamil Eelam (LTTE) on a list of groups involved in terrorist acts subject to restrictive measures*. The dispute in the main proceedings concerned national measures freezing the financial resources of various persons involved in raising funds for the LTTE. Since those national decisions took account of Implementing Regulation No 610/2010, the applicants in the main proceedings had challenged the validity of the implementing regulation on the ground that the activities of the LTTE were not terrorist acts but rather actions by armed forces under international humanitarian law because they fell within the context of armed conflict. Accordingly, the national court enquired in particular whether, in connection with the examination of the validity of Implementing Regulation No 610/2010, actions by armed forces during periods of armed conflict, within the meaning of international humanitarian law, may constitute 'terrorist acts' for the purposes of EU law to combat terrorism.

In the first place, the Court confirmed that even though the applicants in the main proceedings had not challenged Implementing Regulation No 610/2010 and the acts preceding it in the context of an action for annulment, they would in any event have been entitled to challenge the validity of those acts before the referring court. The Court recalled that a request for a preliminary ruling concerning the validity of an act of the European Union may indeed be dismissed in the event that, although the action for annulment of that act would unquestionably have been admissible, the natural or legal person capable of bringing such an action abstained from doing so within the prescribed period and is pleading the unlawfulness of that act in national proceedings in order to encourage the national court to submit a request for a preliminary ruling to the Court concerning the validity of the act, thereby circumventing the fact that that act is final as against him once the time limit for his bringing an action has expired.

^{140/} That judgment is presented under Section III.4 'Non-contractual liability of the European Union'.

^{141/} Council Implementing Regulation (EU) No 610/2010 of 12 July 2010 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 1285/2009 (OJ 2010 L 178, p. 1).

However, in this instance, an action for annulment brought by the applicants in the main proceedings would not unquestionably have been admissible. First of all, the Court pointed out that those applicants were not themselves included on the list of those whose funds were to be frozen. The inclusion of the LTTE on the list of those whose funds were to be frozen is of general application with regard to persons other than that entity, in that it serves to impose on an indeterminate number of persons an obligation to comply with specific restrictive measures against that entity. Therefore, it was not obvious that the applicants were ‘individually’ concerned by the acts at issue. Moreover, their situation had been directly affected, not by the acts of the European Union relating to that inclusion, but by the imposition of sanctions based solely on Netherlands law, which took into account, among other factors, that inclusion. Consequently, it was not established, in the Court’s view, that actions for annulment brought by the applicants against the acts of the European Union including and maintaining the LTTE on the list of those whose funds were to be frozen would unquestionably have been admissible.

In the second place, after recalling that a regulation providing for restrictive measures must be interpreted in the light not only of the decision referred to in Article 215(2) TFEU, but also of the historical context of which the regulation forms part, the Court made clear that Regulation No 2580/2001¹⁴² and Common Position 2001/931,¹⁴³ which essentially fall under the common foreign and security policy and intend to implement United Nations Security Council Resolution 1373 (2001), are relevant for the purpose of examining the validity of Implementing Regulation No 610/2010.

Noting that international humanitarian law prohibits terrorist acts, the Court considered that that law pursues different aims from Common Position 2001/931 and Regulation No 2580/2001 but does not prevent the adoption of restrictive measures such as those at issue. Accordingly, the application of those acts of the European Union is not dependent on classifications deriving from humanitarian law and actions by armed forces during periods of armed conflict may constitute ‘terrorist acts’ for the purposes of those acts. The Court therefore concluded that Implementing Regulation No 610/2010 and the acts preceding it relating to the inclusion of the LTTE on the list of those whose funds were to be frozen were valid.

In two judgments delivered on 26 July 2017, **Council v LTTE** (C-599/14 P, [EU:C:2017:583](#)) and **Council v Hamas** (C-79/15 P, [EU:C:2017:584](#)), the Court, sitting as the Grand Chamber, was required to rule on two judgments of the General Court¹⁴⁴ which had annulled the acts of the Council renewing, between 2010 and 2014, measures for the freezing of funds adopted by that institution against Hamas and the Liberation Tigers of Tamil Eelam (LTTE) on the basis of Common Position 2001/931¹⁴⁵ and Regulation No 2580/2001.¹⁴⁶ In those judgments, the Court confirmed that *the Council may maintain an entity on the list of entities suspected of having ties to terrorist acts if it concludes that there is an ongoing risk of that entity being involved in the terrorist activities which justified its initial*

^{142/} Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

^{143/} Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

^{144/} Judgments of 16 October 2014, **LTTE v Council** (T-208/11 and T-508/11, [EU:T:2014:885](#)), and of 17 December 2014, **Hamas v Council** (T-400/10, [EU:T:2014:1095](#)).

^{145/} Cited above, see footnote 142.

^{146/} Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

listing. It stated in that regard that although the initial entry on that list must be based on national decisions adopted by competent authorities, that requirement does not apply to the subsequent retention of that listing.

In the instant case, on 27 December 2001¹⁴⁷ and 29 May 2006¹⁴⁸ respectively, the Council entered Hamas and the LTTE on the list provided for in Article 2(3) of Regulation No 2580/2001. Those listings, which are periodically renewed by the Council, were based on a number of decisions of the United Kingdom authorities and one decision of the Indian authorities in the case of the LTTE and on two decisions of the United States authorities and one decision of the United Kingdom authorities in the case of Hamas. Whilst Hamas and the LTTE did not challenge the Council measures by which they were initially listed, they did contest their subsequent retention on the list. The General Court had annulled those measures on the ground that, inter alia, they were based not on facts examined and accepted in decisions adopted by the competent authorities (as required, according to the General Court, by Common Position 931/2001), but on information which the Council had obtained from the press and the internet.

Called upon to rule on the requirements with which the Council must comply when conducting its periodic review of the restrictive measures in force, the Court reaffirmed its decision in *Al-Aqsa*,¹⁴⁹ according to which the Council may maintain a person or an entity on the list if it concludes that there is an ongoing risk of that person or entity being involved in terrorist activities. The Court stated that, in this case, in order to demonstrate that such a risk still existed in the case of the LTTE and Hamas, the Council was obliged to rely on more recent material than the national decisions which justified their initial listing. According to the Court, under Article 1(4) of Common Position 2001/931, only the initial entry on the list must be based on a national decision by a competent authority. Article 1(6) of the common position lays down no such condition for the subsequent retention of an entity on the list, which may be based on other sources. The Court recalled in that regard that the entities concerned were, in any event, protected by the possibility of disputing all the material relied on by the Council in the context of its periodic review before the EU Courts.

Although, in consequence, the Court set aside the judgment of the General Court as regards Hamas and referred the case back to it, by contrast, it upheld the judgment of the General Court annulling the measures for the freezing of funds directed at the LTTE which were adopted by the Council, despite the error of law committed in that judgment. In view of the LTTE's military defeat in Sri Lanka in 2009 and the fact that that defeat represented a significant change in circumstances capable of calling in question the ongoing nature of the risk of its involvement in terrorist activities, the Court considered that the Council should have referred to the evidence supporting that assessment in the statements of reasons relating to the contested measures, which it did not do. The Court also ruled that the Council may not base the initial entry of a person or entity on the list on a decision adopted by a competent authority of a third State unless it has verified carefully that the legislation of that third State ensures observance of the rights of the defence and the right to effective judicial protection equivalent to that guaranteed under EU law. Furthermore, the grounds for that assessment must be given in the statement of reasons.

^{147/} Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 83).

^{148/} Council Decision 2006/379/EC of 29 May 2006 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/930/EC (OJ 2006 L 144, p. 21).

^{149/} Judgment of the Court of 15 November 2012, *Al-Aqsa v Council* and *Netherlands v Al-Aqsa* (C-539/10 P and C-550/10 P, [EU:C:2012:711](#)).

Lastly, in the judgment in *Rosneft* (C-72/15, [EU:C:2017:236](#)), delivered on 28 March 2017 by the Grand Chamber, the Court confirmed the *validity of Decision 2014/512*¹⁵⁰ and of *Council Regulation No 833/2014*¹⁵¹ concerning restrictive measures imposed on certain Russian undertakings with ties to the Russian State in view of the Russian Federation's actions in Ukraine. One of the undertakings concerned had brought proceedings before the referring court challenging the validity of the restrictive measures adopted by the Council against it as well as national implementing measures.

In the first place, the Court confirmed that it had jurisdiction to give a preliminary ruling on the validity of an act adopted on the basis of provisions relating to the CFSP, provided that the reference for a preliminary ruling relates either to the monitoring of compliance with the procedures and powers of the institutions laid down by the Treaties for the exercise of EU competences, or to reviewing the legality of restrictive measures against the natural or legal persons concerned. As regards the exclusion of the Court's jurisdiction in the field of the CFSP, provided for in the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, and the exception to that rule set out in the same provision of the TEU and the second paragraph of Article 275 TFEU, the Court pointed out, in particular, that while it is true that Article 47 of the Charter cannot confer jurisdiction on the Court, where the Treaties exclude it, the principle of effective judicial protection nonetheless implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly. Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made in Article 24(1) TEU.

In those circumstances, provided that the Court has, under Article 24(1) TEU and the second paragraph of Article 275 TFEU, jurisdiction *ex ratione materiae* to rule on the validity of European Union acts, that is, in particular, where such acts relate to restrictive measures against natural or legal persons, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.

In the second place, as regards the validity of the contested acts, the Court found in particular that, having regard to the different functions of the acts adopted by the Council under Article 29 TEU and those adopted under Article 215 TFEU, the fact that Decision 2014/512, adopted by the Council on the basis of Article 29 TEU, describes in detail the persons and entities that are to be subject to the restrictive measures cannot, as a general rule, be regarded as encroaching on the procedure, laid down in Article 215 TFEU, for the implementation of that decision. Therefore that fact did not, in the context of the adoption of Regulation No 833/2014 intended to implement that decision, undermine the exercise of the powers that Article 215 TFEU confers on the High Representative of the Union for Foreign Affairs and Security Policy and on the Commission. Finally, the Court held that the importance of the objectives pursued by the contested acts was such as to justify certain operators being adversely affected and that, in this case, the interference resulting from those acts with the freedom to conduct a business and the right to property of the operators concerned was not disproportionate. Moreover, the principles of legal certainty and *nulla poena sine lege certa* do not, in the Court's view, preclude a Member State from imposing criminal penalties that are to be applied in the event of an infringement of the provisions of that regulation, even though those provisions may be subject to clarification, gradually and subsequently, by the Court.

^{150/} Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13), as amended by Council Decision 2014/872/CFSP of 4 December 2014 (OJ 2014 L 349, p. 58).

^{151/} Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1), as amended by Council Regulation (EU) No 1290/2014 of 4 December 2014 (OJ 2014 L 349, p. 20).

C/ACTIVITY OF THE REGISTRY OF THE COURT OF JUSTICE IN 2017

By Mr Marc-André GAUDISSERT, Deputy Registrar

As is apparent from the main texts which govern its organisation and functioning, three fundamental tasks are entrusted to the Registry of the Court of Justice.

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 or a request for a preliminary ruling is entered in the register until the decision closing the proceedings before the Court is served on the parties concerned and the case file is archived.

In the course of carrying out this first task, and as an extension of it, the Registry also maintains the necessary contact, in all the official languages of the European Union, with the representatives of the parties, with other persons and the courts of the Member States which make requests for a preliminary ruling concerning the interpretation to be given to, or the validity of, EU law.

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, *inter alia*, 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 latter committee had its work cut out over the past year. It was required not only to draft the report which was sent to the European Parliament, the Council and the Commission on 14 December 2017, concerning the possibility of a partial transfer of some requests for a preliminary ruling to the General Court,¹ but also to engage in deep reflection on the consequences of the reform of the judicial structure of the European Union for the reassignment of jurisdiction between the Court of Justice and the General Court in relation to direct actions and on the impact that the development of the European and national rules and practices on data protection could have on the publication of case-law. The reflection process was, however, still ongoing at the time of writing.

The following paragraphs will thus focus on the actual judicial activity and on the main tendencies resulting from the statistical tables which show that 2017 was a year of unflagging activity, both in terms of the number of cases brought and the number closed.

New cases

In 2017, 739 new cases were brought before the Court of Justice. Leaving aside 1979 — which was an exceptional year in that 1 324 new cases were brought, of which a thousand were connected actions in staff cases — 2017 saw the highest number of cases brought before the Court since its creation, the previous record having been set in 2015 with 713 new cases. That increase is essentially the result of the rise in the number of requests for a

^{1/} The text of that report is available, in all the official languages of the European Union, on the Court's website (<https://curia.europa.eu>, under Court of Justice — Procedure).

preliminary ruling made to the Court, which totalled 533 in 2017 and represented an increase of 13% on the previous year, during which the Court received 470 requests for a preliminary ruling.

Although it is true that that new record can be explained in part by the introduction of 40 similar cases originating in Germany, concerning the interpretation of Regulation (EC) No 261/2004 on compensation to air passengers in the event of denied boarding and of cancellation or long delay of a flight,² it does, however, also testify to the confidence which the courts of the Member States place in the Court of Justice. The requests for a preliminary ruling lodged in 2017 came from practically all of the Member States and national courts — including constitutional courts — within them, and concerned areas of EU law as varied as transport, tax, consumer protection, social policy and the environment, not forgetting, of course, the questions falling under Title V of the Treaty on the Functioning of the European Union related to the migrant crisis and the measures adopted in that respect by the national authorities.

It is in those areas, in particular, that the Court has seen an increase in the number of requests for a preliminary ruling from Germany, Austria and the Netherlands, but also in the number received from countries which joined the Union more recently, such as Hungary, Lithuania and Estonia (with, respectively, 22, 10 and 7 requests for a preliminary ruling lodged in 2017).

Since the Court adjudicated in 2015 and 2016 on numerous important questions related to the sensitive area of mortgages, the number of requests for a preliminary ruling made by the Spanish courts, confronted directly with this problem, fell by half in 2017. The same finding can be made as regards requests received from the United Kingdom (which dropped from 23 requests in 2016 to 11 requests in 2017), whereas the Court has witnessed the reverse trend in respect of the number of requests made by Irish courts, which doubled from 6 in 2016 to 12 in 2017, and from Finland, from which the number of requests received increased from 7 to 13 over the same period.

The reader will find, in the tables set out below, a detailed overview of the requests for a preliminary ruling made over the past year, broken down by Member State and by court.

In addition to the overwhelming proportion of cases concerning requests for a preliminary ruling, which accounted for almost three quarters of the new cases brought in 2017, there was also an increase in the number of actions for failure to act (up from 31 in 2016 to 41 in 2017) and a decrease in the number of appeals, since the number of appeals, all types of appeal combined, fell from 175 cases to 147 cases over the same period. It would, however, be premature to draw, at this stage, any definite conclusions as regards those developments in so far as the number of actions for failure to act was at an all-time low in 2016, whereas the number of appeals brought before the Court depends on various parameters related, *inter alia*, to the number of judgments delivered by the General Court and on the parties' assessment of the likelihood of success of an appeal. The decrease in the number of appeals observed in 2016 and 2017 may be an indication of the beneficial effects of the reform of the judicial structure referred to above, combined with the impact of the measures adopted by the Court quickly to dismiss manifestly inadmissible appeals or those which are wholly unfounded; clearly it will be necessary to wait a few more years to see if those trends continue.

Finally, it is worth noting that the Court received a request for an Opinion, in 2017, made by the Kingdom of Belgium pursuant to Article 218(11) of the Treaty on the Functioning of the European Union, concerning the compatibility with the Treaties of the Comprehensive Economic and Trade Agreement ('CETA') between Canada

^{2/} Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46 of 17 February 2004, p. 1).

and the European Union and its Member States, signed at Brussels on 30 October 2016. The Court was called on to adjudicate, in particular, on the compatibility of the dispute settlement mechanism provided for in that agreement in the area of investments.

Completed cases

Although the number of new cases in 2017 was on the rise, the number of cases closed remained at roughly the same level as in 2016. Over the past year, the Court closed 699 cases compared with 704 in 2016. Leaving aside the 40 or so German cases referred to above — which concerned the same subject and constituted, in reality, one and the same case, which led to their joining — those figures thus show that the number of cases brought and the number of cases closed in 2017 were in balance.

As in 2016, the lion's share of the cases closed by the Court consisted of requests for a preliminary ruling and appeals, which together accounted for over 90% of the cases completed in 2017. That proportion can be explained, rather logically, by the similar percentage of cases which those two types of action accounted for in the cases brought before the Court.

What will be more striking for the reader, however, is the greater number of cases decided by judgment. While the Court delivered 412 judgments in 2016, it delivered 466 in 2017, namely 13% more. That increase can be explained, in part, by factors of a temporary nature, in that the Court was required to rule on a number of questions of principle over the course of 2017 (see, in that regard, the developments in the case-law set out in the second part of this report), but also by the increased complexity and technical nature of the cases brought before the Court justifying an in-depth assessment of questions referred to the Court and, on a regular basis, recourse to an Advocate General's Opinion, including in certain cases which were referred to a chamber comprising three judges. In 2017, over 67% of the total number of judgments delivered were preceded by an Opinion.

The logical consequence of the increase in the number of cases decided by judgment is the decrease in the number of cases decided by order and the correlating increase in the average duration of proceedings. However, that increase remains minimal in respect of cases concerning requests for a preliminary ruling, which account for the lion's share of the Court's workload. While in 2016 the average duration of such proceedings was at a historic low of 15 months, the duration of such proceedings in 2017 averaged 15.7 months. In so far as concerns appeals, the increase was more apparent since the average duration of proceedings was 17.1 months in 2017, compared with 12.9 months in 2016, but that development can be explained largely by the closure of a series of complex cases in the area of competition and State aid, including a very large cartel case on the Belgian, German, French, Italian, Netherlands and Austrian markets for bathroom fittings and fixtures.

Another notable characteristic of 2017 was the relatively high number of requests for application of the accelerated procedure or the urgency procedure in the areas of freedom, security and justice. While there were 21 and 12 such applications, respectively, in 2016, those numbers increased to 31 and 15 in 2017, which reflects the importance which the parties or the national courts place in the swift resolution of their disputes. The reasons given by those courts or the circumstances on which they relied in support of such requests appear, however, to have been less persuasive than in 2016, since only two cases were dealt with by the Court under the accelerated procedure in 2017 and only four under the urgency procedure (compared with three and eight, respectively, in 2016). Nevertheless, the rejection of applications for application of the accelerated or urgency procedures was compensated for by a quicker processing of a number of them, which were dealt with as a priority.

Finally, a special mention must be made of three Opinions delivered by the Court in 2017 pursuant to Article 218(11) of the Treaty on the Functioning of the European Union. Those Opinions provided the Court with the opportunity further to clarify the scope of the EU's powers in the area of external relations, and the scope of

several important agreements for the Union, in particular *Opinion 2/15*, concerning the Free Trade Agreement between the European Union and the Republic of Singapore, delivered by the Full Court on 16 May 2017.

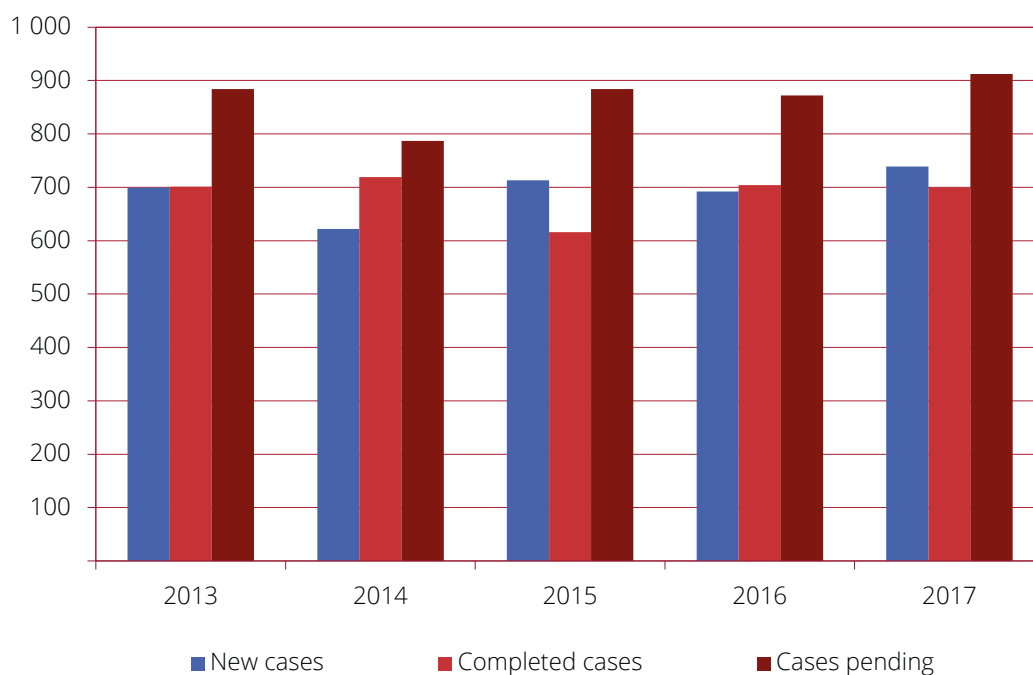
Cases pending

On 31 December 2017, 912 cases (825 after joining) were pending before the Court, which was slightly higher than the number of cases pending at the end of 2016 (872 cases).

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

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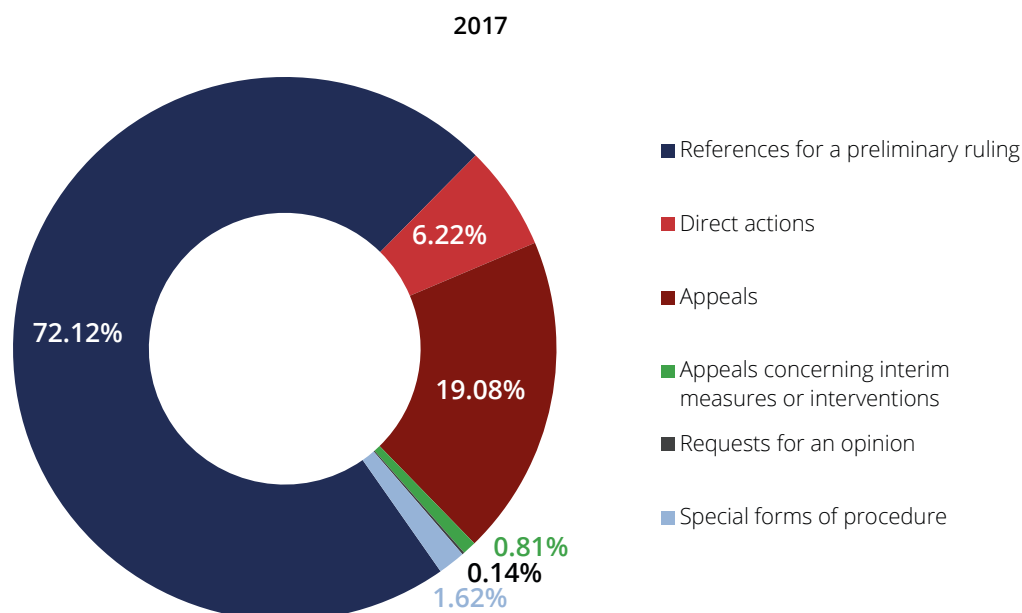
I. GENERAL ACTIVITY OF THE COURT OF JUSTICE — NEW CASES, COMPLETED CASES, CASES PENDING (2013–17) ¹



	2013	2014	2015	2016	2017
New cases	699	622	713	692	739
Completed cases	701	719	616	704	699
Cases pending	884	787	884	872	912

^{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 — NATURE OF PROCEEDINGS (2013–17) ¹



	2013	2014	2015	2016	2017
References for a preliminary ruling	450	428	436	470	533
Direct actions	72	74	48	35	46
Appeals	161	111	206	168	141
Appeals concerning interim measures or interventions	5		9	7	6
Requests for an opinion	2	1	3		1
Special forms of procedure ²	9	8	11	12	12
Total	699	622	713	692	739
Applications for interim measures	1	3	2	3	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).

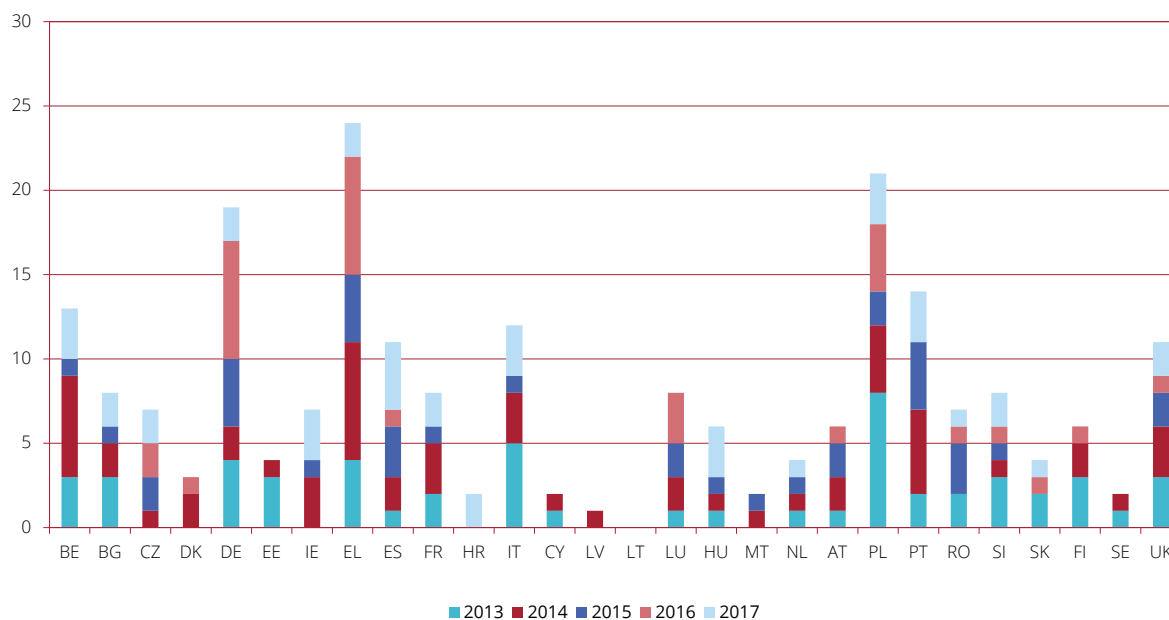
2/ The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of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

III. NEW CASES — SUBJECT MATTER OF THE ACTION (2017) ¹

	Direct actions	References for a preliminary ruling	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Special forms of procedure
Access to documents			1			1	
Accession of new States		1				1	
Agriculture		8	6			14	
Approximation of laws	2	39	1			42	
Arbitration clause			5			5	
Area of freedom, security and justice	5	90	3			98	
Citizenship of the Union	1	7				8	
Commercial policy		2	6			8	
Common fisheries policy	1					1	
Common foreign and security policy		1	5			6	
Company law		1				1	
Competition		2	5			7	
Consumer protection	1	34				35	
Customs union and Common Customs Tariff		12	2			14	
Economic and monetary policy		2	5			7	
Economic, social and territorial cohesion		1	1			2	
Education, vocational training, youth and sport							2
Energy		2				2	
Environment	11	28	1			40	
External action by the European Union		2	1			3	
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	3	2	1			6	
Free movement of capital	2	10				12	
Free movement of goods		6				6	
Freedom of establishment	1	7				8	
Freedom of movement for persons	3	13				16	
Freedom to provide services	2	16				18	
Industrial policy	2	5				7	
Intellectual and industrial property		19	54			73	
Law governing the institutions	2		20	2	1	25	1
Principles of EU law		10	2			12	
Public health		1				1	
Public procurement	1	21		1		23	
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)			1	1		2	
Research and technological development and space			3			3	
Social policy		43				43	
Social security for migrant workers		7				7	
State aid	2	10	8	1		21	
Taxation	2	53				55	
Transport	5	78				83	
EC Treaty/TFEU	46	533	131	5	1	716	3
Procedure			3			3	9
Staff Regulations			7	1		8	
Others			10	1		11	9
OVERALL TOTAL	46	533	141	6	1	727	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).

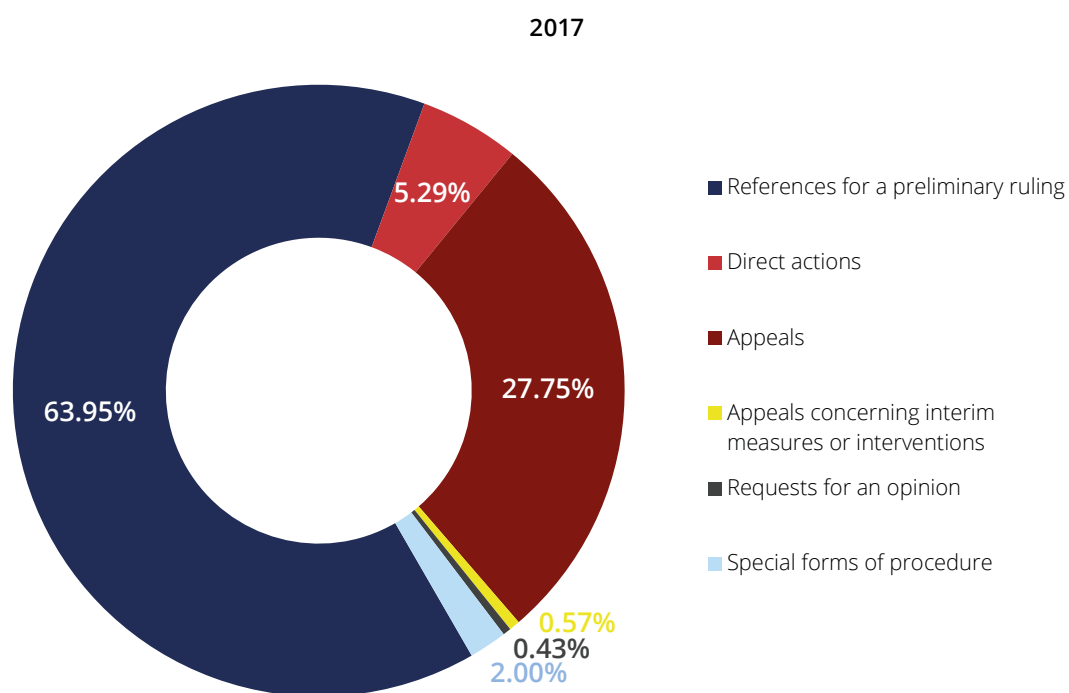
IV. NEW CASES — ACTIONS FOR FAILURE OF A MEMBER STATE TO FULFIL ITS OBLIGATIONS (2013–17)¹



	2013	2014	2015	2016	2017
Belgium	3	6	1		3
Bulgaria	3	2	1		2
Czech Republic		1	2	2	2
Denmark		2		1	
Germany	4	2	4	7	2
Estonia	3	1			
Ireland		3	1		3
Greece	4	7	4	7	2
Spain	1	2	3	1	4
France	2	3	1		2
Croatia					2
Italy	5	3	1		3
Cyprus	1	1			
Latvia		1			
Lithuania					
Luxembourg	1	2	2	3	
Hungary	1	1	1		3
Malta		1	1		
Netherlands	1	1	1		1
Austria	1	2	2	1	
Poland	8	4	2	4	3
Portugal		5	4		3
Romania	2		3	1	1
Slovenia	3	1	1	1	2
Slovakia	2			1	1
Finland	3	2		1	
Sweden	1	1			
United Kingdom	3	3	2	1	2
Total	54	57	37	31	41

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).

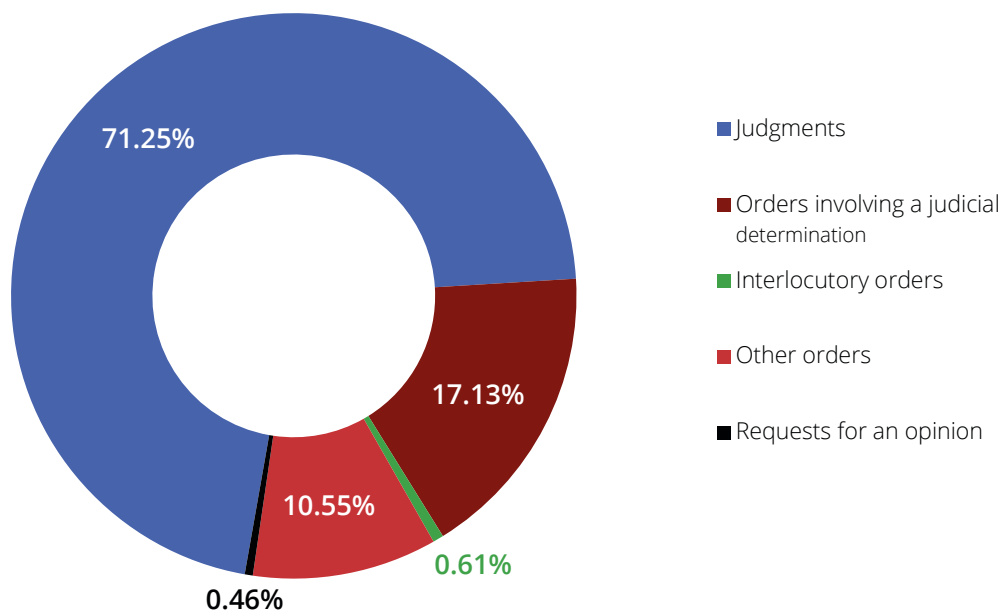
V. COMPLETED CASES — NATURE OF PROCEEDINGS (2013–17) ¹



	2013	2014	2015	2016	2017
References for a preliminary ruling	413	476	404	453	447
Direct actions	110	76	70	49	37
Appeals	155	157	127	182	194
Appeals concerning interim measures or interventions	5	1	7	7	4
Requests for an opinion	1	2	1		3
Special forms of procedure	17	7	7	13	14
Total	701	719	616	704	699

^{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).

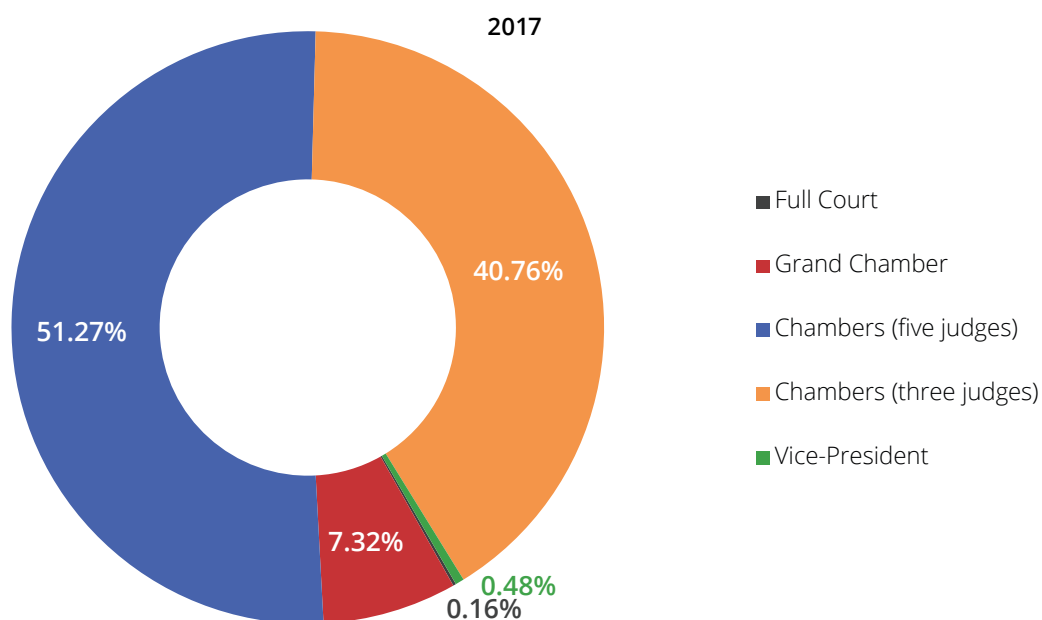
VI. COMPLETED CASES — JUDGMENTS, ORDERS, OPINIONS (2017) ¹



	Judgments	Orders involving a judicial determination ²	Interlocutory orders ³	Other orders ⁴	Requests for an opinion	Total
References for a preliminary ruling	325	42		58		425
Direct actions	27		1	9		37
Appeals	114	57				171
Appeals concerning interim measures or interventions			3	1		4
Requests for an opinion					3	3
Special forms of procedure		13		1		14
Total	466	112	4	69	3	654

- 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.

VII. COMPLETED CASES — BENCH HEARING ACTION (2013–17) ¹



	2013			2014			2015			2016			2017		
	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	52		52	51	3	54	47		47	54		54	46		46
Chambers (five judges)	348	18	366	320	20	340	298	20	318	280	20	300	312	10	322
Chambers (three judges)	91	106	197	110	118	228	93	89	182	120	162	282	151	105	256
Vice-President		5	5		1	1		7	7		5	5		3	3
Total	491	129	620	482	142	624	438	116	554	454	187	641	510	118	628

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.

VIII. CASES COMPLETED BY JUDGMENTS, BY OPINIONS OR BY ORDERS INVOLVING A JUDICIAL DETERMINATION (2013–17) ^{1 2}



	2013	2014	2015	2016	2017
Judgments/opinions	491	482	438	454	510
Orders	129	142	116	187	118
Total	620	624	554	641	628

- 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.

IX. CASES COMPLETED BY JUDGMENTS, BY OPINIONS OR BY ORDERS INVOLVING A JUDICIAL DETERMINATION — SUBJECT MATTER OF THE ACTION (2013–17) ¹

	2013	2014	2015	2016	2017
Access to documents	6	4	3	4	9
Accession of new States				1	
Agriculture	33	29	20	13	22
Approximation of laws	24	25	24	16	29
Area of freedom, security and justice	46	51	49	51	61
Citizenship of the Union	12	9	4	8	5
Commercial policy	6	7	4	14	14
Common fisheries policy		5	3	1	2
Common foreign and security policy	12	3	6	11	10
Company law	4	3	1	1	4
Competition	42	28	23	30	53
Consumer protection	19	20	29	33	20
Customs union and Common Customs Tariff	11	21	20	27	19
Economic and monetary policy		1	3	10	2
Economic, social and territorial cohesion	6	8	4	2	
Education, vocational training, youth and sport		1	1		2
Employment			1		
Energy	1	3	2		2
Environment	35	30	27	53	27
External action by the European Union	4	6	1	5	1
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	2	5	1	2	7
Free movement of capital	8	6	8	7	1
Free movement of goods	1	10	9	5	2
Freedom of establishment	13	9	17	27	10
Freedom of movement for persons	15	20	13	12	17
Freedom to provide services	16	11	17	14	13

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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).

Industrial policy	15	3	9	10	8
Intellectual and industrial property	43	69	51	80	60
Judicial cooperation in civil matters				1	
Law governing the institutions	31	18	27	20	27
Principles of EU law	17	23	12	13	14
Public health	2	3	5	4	5
Public procurement	12	13	14	31	15
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)		5	1	1	7
Research and technological development and space	1		1	3	2
Social policy	27	51	30	23	26
Social security for migrant workers	12	6	14	5	6
State aid	34	41	26	26	33
Taxation	74	52	55	41	62
Trans-European networks				1	
Transport	17	18	9	20	17
EC Treaty/TFEU	601	617	544	626	614
Euratom Treaty			1		
Privileges and immunities			2	1	
Procedure	14	6	4	14	13
Staff Regulations	5	1	3		1
Others	19	7	9	15	14
OVERALL TOTAL	620	624	554	641	628

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).

X. CASES COMPLETED BY JUDGMENTS, BY OPINIONS OR BY ORDERS INVOLVING A JUDICIAL DETERMINATION — SUBJECT MATTER OF THE ACTION (2017) ¹

	Judgments/ opinions	Orders ²	Total
Access to documents	5	4	9
Agriculture	20	2	22
Approximation of laws	23	6	29
Area of freedom, security and justice	59	2	61
Citizenship of the Union	4	1	5
Commercial policy	14		14
Common fisheries policy	2		2
Common foreign and security policy	8	2	10
Company law	4		4
Competition	52	1	53
Consumer protection	16	4	20
Customs union and Common Customs Tariff	18	1	19
Economic and monetary policy	1	1	2
Education, vocational training, youth and sport		2	2
Energy	2		2
Environment	26	1	27
External action by the European Union	1		1
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	5	2	7
Free movement of capital	1		1
Free movement of goods	2		2
Freedom of establishment	7	3	10
Freedom of movement for persons	14	3	17
Freedom to provide services	12	1	13
Industrial policy	8		8
Intellectual and industrial property	38	22	60
Law governing the institutions	12	15	27
Principles of EU law	9	5	14
Public health	5		5
Public procurement	12	3	15

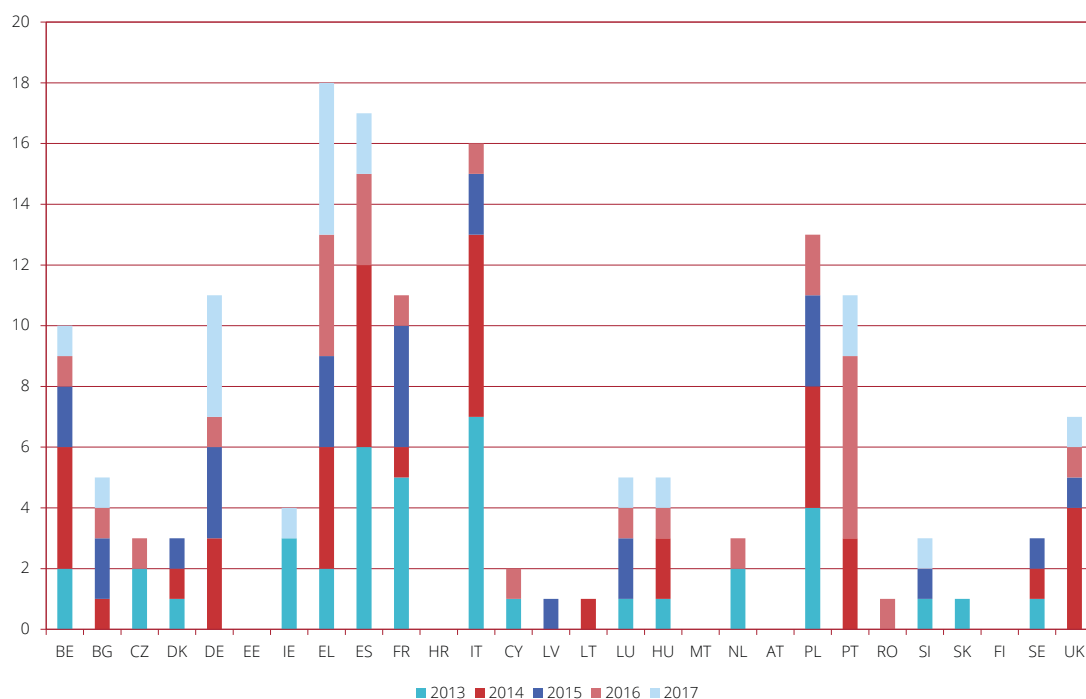
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- 1/ The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).
- 2/ Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	5	2	7
Research and technological development and space		2	2
Social policy	23	3	26
Social security for migrant workers	5	1	6
State aid	24	9	33
Taxation	57	5	62
Transport	16	1	17
EC Treaty/TFEU	510	104	614
Procedure		13	13
Staff Regulations		1	1
Others		14	14
OVERALL TOTAL	510	118	628

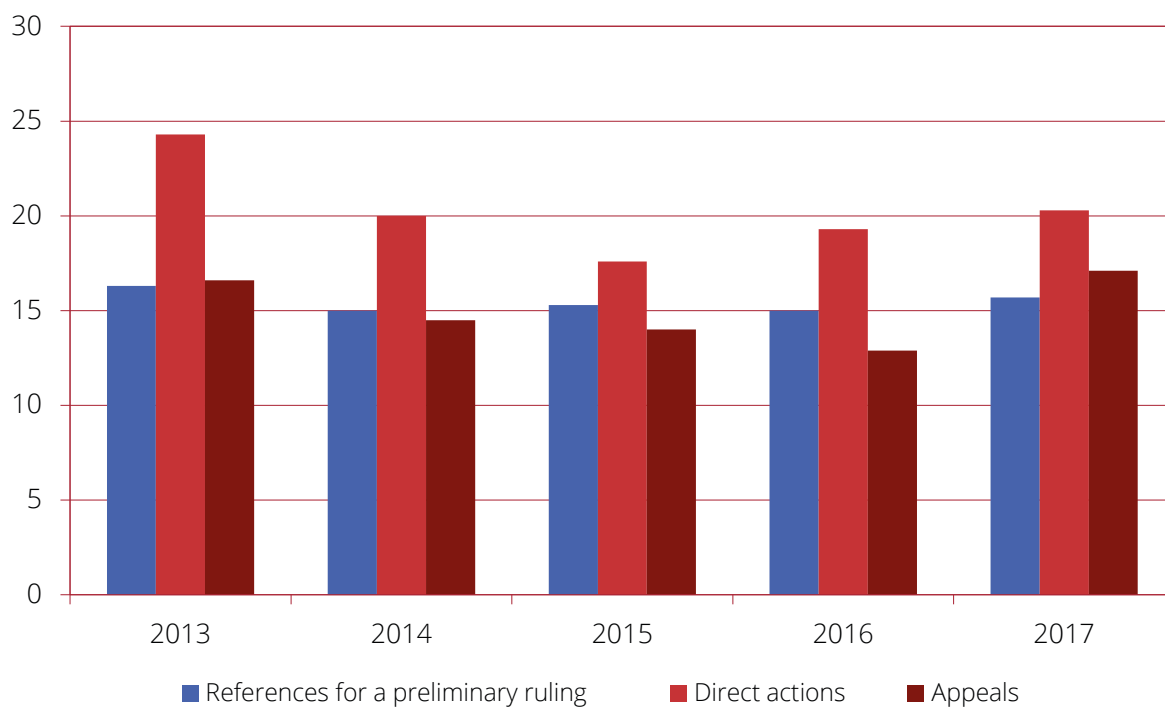
- 1/ The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).
- 2/ Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

XI. COMPLETED CASES — JUDGMENTS CONCERNING FAILURE OF A MEMBER STATE TO FULFIL ITS OBLIGATIONS: OUTCOME (2013–17) ¹



	2013		2014		2015		2016		2017	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	2	1	4		2		1		1	
Bulgaria			1	1	2		1		1	
Czech Republic	2	2					1			
Denmark	1	1	1		1					
Germany		2	3	1	3		1		4	
Estonia										
Ireland	3	1				1			1	
Greece	2	1	4		3		4		5	
Spain	6		6				3		2	
France	5	3	1		4		1			
Croatia										
Italy	7	1	6		2		1			
Cyprus	1						1			
Latvia					1					
Lithuania			1							
Luxembourg	1	1			2		1		1	
Hungary	1		2				1		1	
Malta								1		
Netherlands	2	2		1			1	1		
Austria		1						1		
Poland	4	2	4		3	1	2			
Portugal		1	3				6		2	
Romania							1			
Slovenia	1				1				1	
Slovakia	1					2				
Finland		2								
Sweden	1	1	1		1					
United Kingdom		1	4		1	1	1	1	1	
Total	40	23	41	3	26	5	27	4	20	

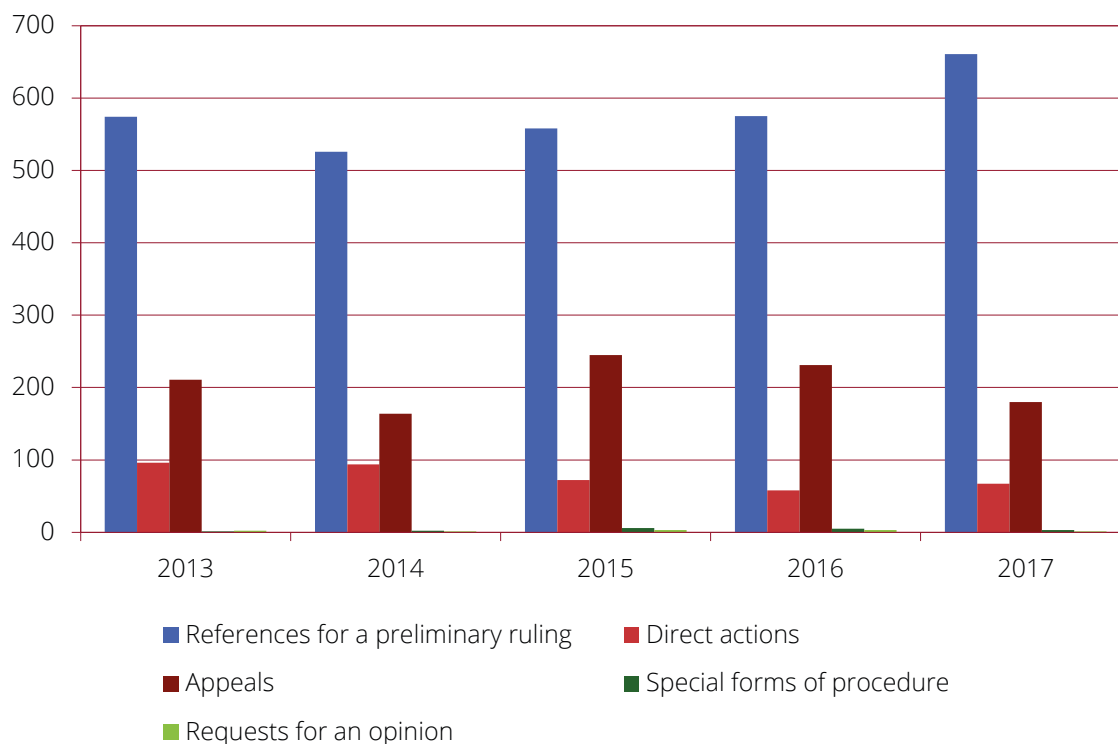
1/ The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

XII. COMPLETED CASES —**DURATION OF PROCEEDINGS IN MONTHS (2013–17) ¹****(JUDGMENTS AND ORDERS INVOLVING A JUDICIAL DETERMINATION)**

	2013	2014	2015	2016	2017
References for a preliminary ruling	16.3	15	15.3	15	15.7
Urgent preliminary ruling procedure	2.2	2.2	1.9	2.7	2.9
Direct actions	24.3	20	17.6	19.3	20.3
Appeals	16.6	14.5	14	12.9	17.1

^{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.

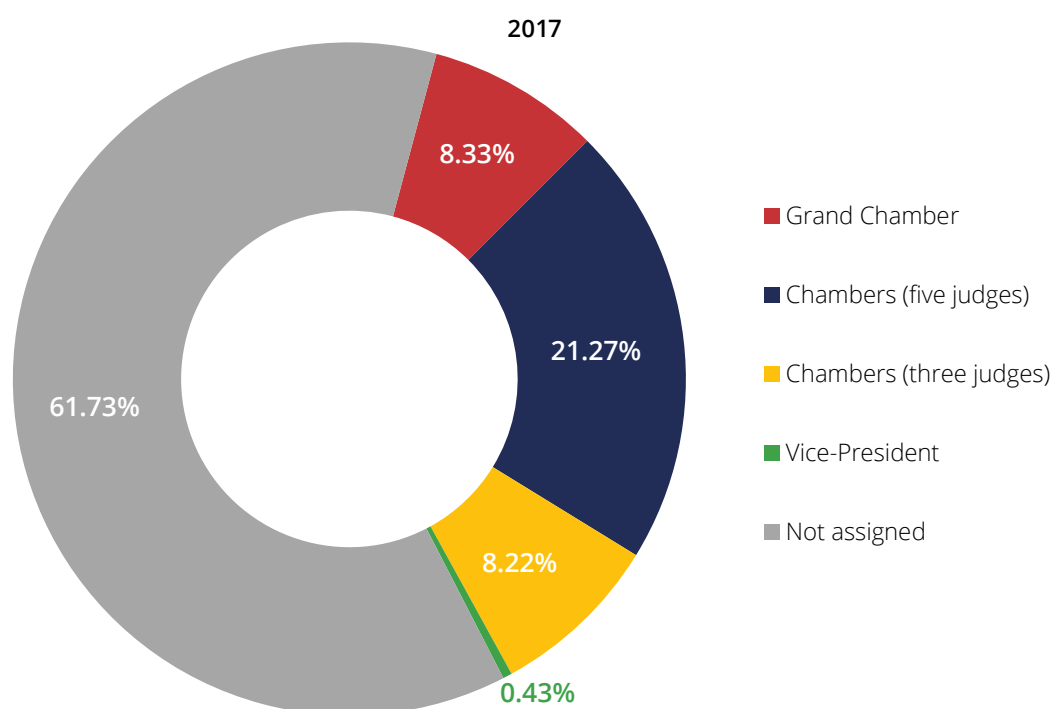
XIII. CASES PENDING AS AT 31 DECEMBER — NATURE OF PROCEEDINGS (2013–17) ¹



	2013	2014	2015	2016	2017
References for a preliminary ruling	574	526	558	575	661
Direct actions	96	94	72	58	67
Appeals	211	164	245	231	180
Special forms of procedure	1	2	6	5	3
Requests for an opinion	2	1	3	3	1
Total	884	787	884	872	912

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).

XIV. CASES PENDING AS AT 31 DECEMBER — BENCH HEARING ACTION (2013–17) ¹



	2013	2014	2015	2016	2017
Full Court				1	
Grand Chamber	37	33	38	40	76
Chambers (five judges)	190	176	203	215	194
Chambers (three judges)	51	44	54	75	75
Vice-President	1		2	2	4
Not assigned	605	534	587	539	563
Total	884	787	884	872	912

^{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).

XV. MISCELLANEOUS — EXPEDITED PROCEDURES (2013–17) ¹

	2013		2014		2015		2016		2017	
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted
Direct actions				1					1	
References for a preliminary ruling		13	2	13	1	20	3	16	3	30
Appeals						3	1			
Total		13	2	14	1	23	4	16	4	30

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.

XVI. MISCELLANEOUS — URGENT PRELIMINARY RULING PROCEDURE (2013–17) ¹

	2013		2014		2015		2016		2017	
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted
Area of freedom, security and justice	2	3	4	1	5	5	9	4	4	11
Approximation of laws				1						
Total	2	3	4	2	5	5	9	4	4	11

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.

XVII. MISCELLANEOUS — PROCEEDINGS FOR INTERIM MEASURES (2017) 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			2		
Environment	1			1	
Industrial policy	1				
Law governing the institutions		2	1		
Public procurement	1	1			
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)		1			
Staff Regulations		1			
State aid		1			1
OVERALL TOTAL	3	6	3	1	1

^{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).

XVIII. GENERAL TREND IN THE WORK OF THE COURT (1952–2017) — NEW CASES AND JUDGMENTS

Year	New cases ¹						Applications for interim measures	Judgments/ opinions ²
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total		
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.

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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
2017	533	46	141	6	1	727	3	466
Total	10 149	9 030	2 204	128	27	21 538	367	11 490

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

2/ Net figures.

XIX. GENERAL TREND IN THE WORK OF THE COURT (1952-2017) — 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												39
1975	7			1	26					15		14				1		4									1			69
1976	11				28					8		12						14								1				75
1977	16			1	30					14		7						9								5				84
1978	7			3	46					12		11						38								5				123
1979	13			1	33					18		19				1		11								8				106
1980	14			2	24					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					15		7						19								6				98
1984	13			2	38					34		10						22								9				129
1985	13				40					45		11				6		14								8				139
1986	13			4	18			2	1	19		5				1		16								8				91

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

	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	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	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	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	62		9	8	1	15	1	26	20	19	21	14	3	6	7	5	23		470
2017	21	16	4	8	149		7	12	4	23	25	57		5	10	1	22		38	31	19	21	16	3	6	13	8	11		533
Total	841	117	57	192	2 449	25	103	182	460	979	11	1 445	7	60	55	92	158	3	1 013	521	127	174	139	20	44	115	134	623	3	10 149

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

**XX. GENERAL TREND IN THE WORK OF THE COURT (1952–2017) —
NEW REFERENCES FOR A PRELIMINARY RULING BY MEMBER STATE
AND BY COURT OR TRIBUNAL**

			Total
Belgium	Cour constitutionnelle	34	
	Cour de cassation	94	
	Conseil d'État	82	
	Other courts or tribunals	631	841
Bulgaria	Върховен касационен съд	5	
	Върховен административен съд	19	
	Other courts or tribunals	93	117
Czech Republic	Ústavní soud		
	Nejvyšší soud	9	
	Nejvyšší správní soud	28	
	Other courts or tribunals	20	57
Denmark	Højesteret	36	
	Other courts or tribunals	156	192
Germany	Bundesverfassungsgericht	2	
	Bundesgerichtshof	229	
	Bundesverwaltungsgericht	131	
	Bundesfinanzhof	319	
	Bundesarbeitsgericht	38	
	Bundessozialgericht	76	
	Other courts or tribunals	1 654	2 449
Estonia	Riigikohus	10	
	Other courts or tribunals	15	25
Ireland	Supreme Court	35	
	High Court	33	
	Other courts or tribunals	35	103
Greece	Άρειος Πάγος	12	
	Συμβούλιο της Επικρατείας	59	
	Other courts or tribunals	111	182
Spain	Tribunal Constitucional	1	
	Tribunal Supremo	78	
	Other courts or tribunals	381	460
France	Conseil constitutionnel	1	
	Cour de cassation	127	
	Conseil d'État	125	
	Other courts or tribunals	726	979

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Croatia	Ustavni sud		
	Vrhovni sud		
	Visoki upravni sud		
	Visoki prekršajni sud		
	Other courts or tribunals	11	11
Italy	Corte Costituzionale	3	
	Corte suprema di Cassazione	150	
	Consiglio di Stato	151	
	Other courts or tribunals	1 141	1 445
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	3	7
Latvia	Augstākā tiesa	21	
	Satversmes tiesa	1	
	Other courts or tribunals	38	60
Lithuania	Konstitucinis Teismas	1	
	Aukščiausiasis Teismas	18	
	Vyriausiasis administracinis teismas	21	
	Other courts or tribunals	15	55
Luxembourg	Cour constitutionnelle	1	
	Cour de cassation	28	
	Cour administrative	28	
	Other courts or tribunals	35	92
Hungary	Kúria	27	
	Fővárosi Ítéletábla	7	
	Szegedi Ítéletábla	2	
	Other courts or tribunals	122	158
Malta	Qorti Kostituzzjonali		
	Qorti tal-Appell		
	Other courts or tribunals	3	3
Netherlands	Hoge Raad	285	
	Raad van State	122	
	Centrale Raad van Beroep	65	
	College van Beroep voor het Bedrijfsleven	156	
	Tariefcommissie	35	
	Other courts or tribunals	350	1 013
Austria	Verfassungsgerichtshof	5	
	Oberster Gerichtshof	124	
	Verwaltungsgerichtshof	107	
	Other courts or tribunals	285	521
Poland	Trybunał Konstytucyjny	1	
	Sąd Najwyższy	18	
	Naczelny Sąd Administracyjny	44	
	Other courts or tribunals	64	127

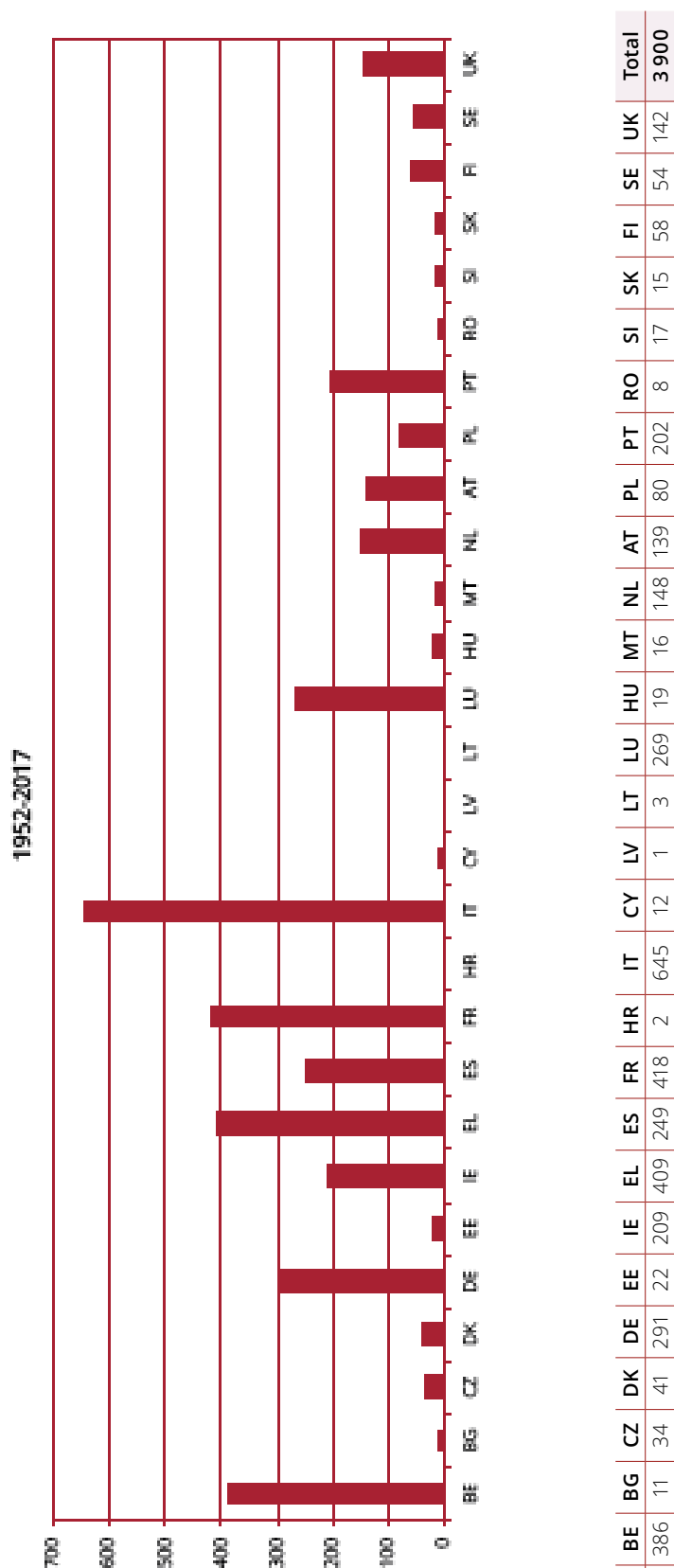
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Portugal	Supremo Tribunal de Justiça	15	
	Supremo Tribunal Administrativo	63	
	Other courts or tribunals	96	174
Romania	Înalta Curte de Casație și Justiție	12	
	Curtea de Apel	75	
	Other courts or tribunals	52	139
Slovenia	Ustavno sodišče	1	
	Vrhovno sodišče	14	
	Other courts or tribunals	5	20
Slovakia	Ústavný Súd		
	Najvyšší súd	16	
	Other courts or tribunals	28	44
Finland	Korkein oikeus	23	
	Korkein hallinto-oikeus	56	
	Työtuomioistuim	5	
	Other courts or tribunals	31	115
Sweden	Högsta Domstolen	22	
	Högsta förvaltningsdomstolen	12	
	Marknadsdomstolen	5	
	Arbetsdomstolen	4	
	Other courts or tribunals	91	134
United Kingdom	House of Lords	40	
	Supreme Court	14	
	Court of Appeal	84	
	Other courts or tribunals	485	623
Others	Cour de justice Benelux/Benelux Gerechtshof ¹	2	
	Complaints Board of the European Schools ²	1	3
Total			10 149

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

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

XXI. GENERAL TREND IN THE WORK OF THE COURT (1952-2017) — 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
386	11	34	41	291	22	209	409	249	418	2	645	12	1	3	269	19	16	148	139	80	202	8	17	15	58	54	142	3 900

XXII. ACTIVITY OF THE REGISTRY OF THE COURT OF JUSTICE (2015–17)

Type of intervention	2015	2016	2017
Number of documents entered in the register of the Registry	89 328	93 215	99 266
Percentage of procedural documents lodged by e-Curia	69%	75%	73%
Number of hearings convened and organised	256	270	263
Number of sittings for the delivery of Opinions convened and organised	239	319	301
Number of judgments, opinions and orders terminating the proceedings served on the parties	570	645	654
Number of minutes of hearings drawn up (oral submissions, Opinions and judgments)	894	1 001	1 033
Number of notices in the OJ concerning new cases	639	660	679
Number of notices in the OJ concerning completed cases	546	522	637

E/COMPOSITION OF THE COURT OF JUSTICE



(Order of precedence as at 31 December 2017)

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; A. Rosas, President of Chamber

Second row, from left to right:

E. Sharpston, Advocate General; E. Juhász, Judge; C. Vajda, President of Chamber; E. Levits, President of Chamber; J. Malenovský, President of Chamber; C.G. Fernlund, President of Chamber; J. Kokott, Advocate General; A. Borg Barthet, Judge

Third row, from left to right:

M. Berger, Judge; M. Safjan, Judge; A. Arabadjiev, Judge; Y. Bot, Advocate General; P. Mengozzi, Advocate General; J.-C. Bonichot, Judge; C. Toader, Judge; D. Šváby, Judge

Fourth row, from left to right:

C. Lycourgos, Judge; K. Jürimäe, Judge; S. Rodin, Judge; E. Jarašiūnas, Judge; A. Prechal, Judge; N. Wahl, Advocate General; F. Biltgen, Judge; M. Szpunar, Advocate General

Fifth row, from left to right:

E. Tanchev, Advocate General; H. Saugmandsgaard Øe, Advocate General; M. Vilaras, Judge; M. Campos Sánchez-Bordona, Advocate General; E. Regan, Judge; M. Bobek, Advocate General; A. Calot Escobar, Registrar

1. CHANGE IN THE COMPOSITION OF THE COURT OF JUSTICE IN 2017

There were no changes in the composition of the Court of Justice in 2017.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2017 TO 6 OCTOBER 2017

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

FROM 7 OCTOBER 2017 TO 31 DECEMBER 2017

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. ROSAS, President of the Seventh Chamber
J. MALENOVSKÝ, President of the Eighth Chamber
E. LEVITS, President of the Tenth Chamber
C.G. FERNLUND, President of the Sixth Chamber
C. VAJDA, President of the Ninth Chamber
J. KOKOTT, Advocate General
E. JUHÁSZ, Judge
A. BORG BARTHET, 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
M. BERGER, Judge
A. PRECHAL, Judge
E. JARAŠIŪNAS, 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
M. VILARAS, Judge
E. REGAN, Judge
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)

JUDGES

Massimo PILOTTI, Judge (1952–1958), President from 1952 to 1958 (†)
 Petrus SERRARENS, Judge (1952–1958) (†)
 Otto RIESE, Judge (1952–1963) (†)
 Louis DELVAUX, Judge (1952–1967) (†)
 Jacques RUEFF, Judge (1952–1959 and 1960–1962) (†)
 Charles Léon HAMMES, Judge (1952–1967), President from 1964 to 1967 (†)
 Adrianus VAN KLEFFENS, Judge (1952–1958) (†)
 Maurice LAGRANGE, Advocate General (1952–1964) (†)
 Karl ROEMER, Advocate General (1953–1973) (†)
 Rino ROSSI, Judge (1958–1964) (†)
 Nicola CATALANO, Judge (1958–1962) (†)
 Andreas Matthias DONNER, Judge (1958–1979), President from 1958 to 1964 (†)
 Alberto TRABUCCHI, Judge (1962–1972), then Advocate General (1973–1976) (†)
 Robert LECOURT, Judge (1962–1976), President from 1967 to 1976 (†)
 Walter STRAUSS, Judge (1963–1970) (†)
 Riccardo MONACO, Judge (1964–1976) (†)
 Joseph GAND, Advocate General (1964–1970) (†)
 Josse J. MERTENS de WILMARS, Judge (1967–1984), President from 1980 to 1984 (†)
 Pierre PESCATORE, Judge (1967–1985) (†)
 Hans KUTSCHER, Judge (1970–1980), President from 1976 to 1980 (†)
 Alain Louis DUTHEILLET DE LAMOTHE, Advocate General (1970–1972) (†)
 Henri MAYRAS, Advocate General (1972–1981) (†)
 Cearbhall O'DALAIGH, Judge (1973–1974) (†)
 Max SØRENSEN, Judge (1973–1979) (†)
 Jean-Pierre WARNER, Advocate General (1973–1981) (†)
 Alexander J. MACKENZIE STUART, Judge (1973–1988), President from 1984 to 1988 (†)
 Gerhard REISCHL, Advocate General (1973–1981) (†)
 Aindrias O'KEEFFE, Judge (1974–1985) (†)
 Francesco CAPOTORTI, Judge (1976), then Advocate General (1976–1982) (†)
 Giacinto BOSCO, Judge (1976–1988) (†)
 Adolphe TOUFFAIT, Judge (1976–1982) (†)
 Thijmen KOOPMANS, Judge (1979–1990) (†)
 Ole DUE, Judge (1979–1994), President from 1988 to 1994 (†)
 Ulrich EVERLING, Judge (1980–1988)
 Alexandros CHLOROS, Judge (1981–1982) (†)
 Sir Gordon SLYNN, Advocate General (1981–1988), then Judge (1988–1992) (†)
 Pieter VERLOREN van THEMAAT, Advocate General (1981–1986) (†)
 Simone ROZÈS, Advocate General (1981–1984)
 Fernand GRÉVISSE, Judge (1981–1982 and 1988–1994) (†)
 Kai BAHLMANN, Judge (1982–1988) (†)
 G. Federico MANCINI, Advocate General (1982–1988), then Judge (1988–1999) (†)

Yves GALMOT, Judge (1982–1988) (†)
 Constantinos KAKOURIS, Judge (1983–1997) (†)
 Carl Otto LENZ, Advocate General (1984–1997)
 Marco DARMON, Advocate General (1984–1994) (†)
 René JOLIET, Judge (1984–1995) (†)
 Thomas Francis O'HIGGINS, Judge (1985–1991) (†)
 Fernand SCHOCKWEILER, Judge (1985–1996) (†)
 Jean MISCHO, Advocate General (1986–1991 and 1997–2003) (†)
 José Carlos de CARVALHO MOITINHO de ALMEIDA, Judge (1986–2000)
 José Luís da CRUZ VILAÇA, Advocate General (1986–1988)
 Gil Carlos RODRÍGUEZ IGLÉSIAS, Judge (1986–2003), President from 1994 to 2003
 Manuel DIEZ de VELASCO, Judge (1988–1994) (†)
 Manfred ZULEEG, Judge (1988–1994) (†)
 Walter VAN GERVEN, Advocate General (1988–1994) (†)
 Francis Geoffrey JACOBS, Advocate General (1988–2006)
 Giuseppe TESAURO, Advocate General (1988–1998)
 Paul Joan George KAPTEYN, Judge (1990–2000)
 Claus Christian GULMANN, Advocate General (1991–1994), then Judge (1994–2006)
 John L. MURRAY, Judge (1991–1999)
 David Alexander Ogilvy EDWARD, Judge (1992–2004)
 Antonio Mario LA PERGOLA, Judge (1994 and 1999–2006), Advocate General (1995–1999) (†)
 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 (1994–1997)
 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 (1997–1999) (†)
 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 (2000–2006)
 Stig von BAHR, Judge (2000–2006)
 José Narciso da CUNHA RODRIGUES, Judge (2000–2012)
 Christiaan Willem Anton TIMMERMANS, Judge (2000–2010)
 Leendert A. GEELHOED, Advocate General (2000–2006) (†)
 Christine STIX-HACKL, Advocate General (2000–2006)
 Luís Miguel POIARES PESSOA MADURO, Advocate General (2003–2009)
 Konrad Hermann Theodor SCHIEMANN, Judge (2004–2012)
 Jerzy MAKARCZYK, Judge (2004–2009)
 Pranas KÜRIS, Judge (2004–2010)

Georges ARESTIS, Judge (2004–2014)
Ján KLUČKA, Judge (2004–2009)
Uno LÖHMUS, Judge (2004–2013)
Aindrias Ó CAOIMH, Judge (2004–2015)
Pernilla LINDH, Judge (2006–2011)
Ján MAZÁK, Advocate General (2006–2012)
Verica TRSTENJAK, Advocate General (2006–2012)
Jean-Jacques KASEL, Judge (2008–2013)
Niilo JÄÄSKINEN, Advocate General (2009–2015)
Pedro CRUZ VILLALÓN, Advocate General (2009–2015)

PRESIDENTS

Massimo PILOTTI (1952–1958) (†)
Andreas Matthias DONNER (1958–1964) (†)
Charles Léon HAMMES (1964–1967) (†)
Robert LECOURT (1967–1976) (†)
Hans KUTSCHER (1976–1980) (†)
Josse J. MERTENS de WILMARS (1980–1984) (†)
Alexander John MACKENZIE STUART (1984–1988) (†)
Ole DUE (1988–1994) (†)
Gil Carlos RODRÍGUEZ IGLÉSÍAS (1994–2003)
Vassilios SKOURIS (2003–2015)

REGISTRARS

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





CHAPTER II

GENERAL COURT



A/ACTIVITY OF THE GENERAL COURT IN 2017

By Mr Marc JAEGGER, President of the General Court

After the numerous and profound changes of 2016 brought about by the two first phases of the implementation of the reform of the judicial structure of the European Union, 2017 proved to be a relatively stable year.

There were, nonetheless, two developments in the composition of the General Court resulting from the entry into office of Mr C. Mac Eochaidh on 8 June 2017 and Mr G. De Baere on 4 October 2017, respectively the sixth and seventh judges appointed in the context of the second phase of the reform (which provided that, in addition to the dissolution of the Civil Service Tribunal and the transfer to the General Court of jurisdiction to rule at first instance in disputes between the European Union and its servants, seven new judges would be appointed at the General Court^{1/}). Paradoxically, the second phase of the reform was thus completed before the first phase (in which 12 new judges were to be appointed from 25 December 2015 onwards), in the context of which a 12th judge still needs to be appointed.

As at 31 December 2017, the General Court was thus composed of the President, Vice-President and 44 other judges, assigned either to one of the eight chambers comprising five judges or to the sole chamber comprising four judges (all of those chambers ordinarily sit in formations of three judges), awaiting the appointment and assignment to a chamber of the final judge due under the first phase of the reform. Alongside those nine chambers, the Appeal Chamber, which has jurisdiction to rule on appeals brought against decisions adopted by the Civil Service Tribunal before it was dissolved on 31 August 2016, continued to exercise its functions. In all likelihood, that chamber will cease to exist at some point in 2018 once it has adjudicated on the final appeal cases still pending.

Moreover, 2017 may be regarded as the first full year which put the new organisation of the General Court to the test. Its new organisation was designed to enable it better to deliver its mandate by simultaneously pursuing a number of ambitious objectives: speed, quality, coherence and, in short, authority of its case-law.

Given the challenge posed by the integration of a considerable number of new judges, this first year of actual implementation of the reform can be deemed to have been highly satisfactory.

In spite of the lodging of an exceptionally large group of related cases in the field of banking and finance (in the region of 100 cases), the point of equilibrium between the number of cases lodged and the number of cases closed was almost reached (917 cases lodged, 895 cases closed^{2/}). In particular, the General Court's productivity increased considerably (140 more cases closed than in 2016, that is an increase of 18.5%) following the inevitable dip experienced by the General Court in the context of its triennial renewal and its internal reorganisation resulting from the reform. That productivity is set to grow further over the coming year, during which time the General Court should be reaching its new cruising speed.

Most importantly, the duration of proceedings — which is a key indicator of performance — was once again reduced quite considerably, with an average of 16.3 months in respect of cases decided by

^{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), and 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/} These totals do not take account of the 47 cases lodged and the 53 cases closed before a judge hearing an application for interim measures.

judgment or order (namely 13% shorter than in 2016). The tendency witnessed for the past five years (a 40% decrease since 2013) thus became noticeably more pronounced and did so in respect of all contentious matters.

Finally, it is worth underlining that the number of cases referred to an extended Chamber sitting with five judges increased very significantly (84 cases referred, 29 in 2016), which is illustrative of one of the methods of organisation and operation chosen by the General Court to pursue its objective — which it set itself in the context of the implementation of the reform — of maintaining its quality standards. Accordingly, in respect of the number of cases lodged, the proportion of cases referred to an extended Chamber bordered on 10% in 2017, which may be contrasted with the average number of such references made during the period preceding the reform of the judicial structure of the European Union (from 2010 to 2015), which was in the region of 1%.

It is too soon to draw from this sample of statistics any definitive conclusions regarding the effects which will be felt once the reform is complete, the final phase of which will begin on 1 September 2019. These statistics are, however, indicative of the General Court's desire swiftly to bear the fruits of the reform by enabling individuals to use it to its full potential, with a view to providing an efficient, diligent and quality justice system at the European Union level.

B/CASE-LAW OF THE GENERAL COURT IN 2017

TRENDS IN THE CASE-LAW OF THE GENERAL COURT IN 2017

By Vice-President Marc van DER WOUDE

One of the significant events that marked the development of the case-law of the General Court in 2017 is the reincorporation of litigation involving the European civil service at first instance within the General Court. This regained jurisdiction led the Court to deliver more decisions relating to natural persons, namely those employed by the institutions of the European Union, in particular as regards observance of methods of calculating remuneration by which the administration has agreed to be bound (judgment of 14 September 2017, **Bodson and Others v EIB**, T-504/16 and T-505/16, [EU:T:2017:603](#)) or, again, the obligations borne by the administration when it receives a request for assistance in relation to psychological harassment (judgment of 24 April 2017, **HF v Parliament**, T-584/16, [EU:T:2017:282](#)).

However, the civil service is not the only type of litigation in which the General Court is called upon to guarantee judicial protection of the interests of natural persons. That protection must also be provided in other spheres, such as that of restrictive measures adopted by the European Union. The General Court has thus continued to review the measures imposed by the European Union, in particular those adopted on the basis of criminal proceedings initiated in third States, such as Tunisia or Ukraine, against natural persons accused of embezzling public funds (judgment of 7 July 2017, **Azarov v Council**, T-215/15, under appeal, ¹ [EU:T:2017:479](#)). Questions relating to the judicial protection of natural persons also arise in cases of potential interest to any citizen of the Union, such as those relating to the right of access to documents based on Regulation No 1049/2001 ² or those concerning European citizens' initiatives. As regards the latter initiatives, the General Court has made clear that they may extend to acts linked with the negotiation of international agreements (judgment of 10 May 2017, **Efler and Others v Commission**, T-754/14, [EU:T:2017:323](#)), and has emphasised the need for the Commission to properly state the reasons for its decisions refusing to register such initiatives (judgment of 3 February 2017, **Minority SafePack — one million signatures for diversity in Europe v Commission**, T-646/13, [EU:T:2017:59](#)).

It may be noted, next, that litigation before the General Court continues to diversify in matters of economic law. Far from being limited solely to competition law, it is changing, in particular, in line with the powers granted to the various institutions and agencies of the European Union responsible for the further development of the internal market and monetary policy. In that context, the Court has thus been able, for example, to continue to develop its case-law relating to the banking sector by defining the outlines of the prudential supervision carried out by the European Central Bank (ECB), in the light of the objectives of the legislation in question, which is designed in particular to provide the ECB with an overall view of the risks liable to affect a credit institution and also to avoid the fragmentation of prudential supervision between the ECB and the national authorities (judgments of 16 May 2017, **Landeskreditbank Baden-Württemberg v ECB**, T-122/15, under appeal, ³ [EU:T:2017:337](#), and of

^{1/} Case C-530/17 P, **Azarov v Council**.

^{2/} 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).

^{3/} Case C-450/17 P, **Landeskreditbank Baden-Württemberg**.

13 December 2017, *Crédit mutuel Arkéa v ECB*, T-52/16, [EU:T:2017:902](#)). There has also been a sharp increase in litigation in relation to merger control, a number of decisions having been delivered concerning this type of transaction, which tend to follow economic cycles (judgments of 7 March 2017, *United Parcel Service v Commission*, T-194/13, under appeal, ⁴ [EU:T:2017:144](#); of 26 October 2017, *Marine Harvest v Commission*, T-704/14, under appeal, ⁵ [EU:T:2017:753](#); and of 26 October 2017, *KPN v Commission*, T-394/15, not published, [EU:T:2017:756](#)). Furthermore, the increasingly complex nature of cases involving assessments of an economic nature seems to lead towards the strengthening of review of respect for the rights of the defence. It has been held, in particular, that respect for the rights of the defence requires that the parties involved in a merger have been able to express their views on the econometric model which the Commission used for the purposes of its decision (judgment of 7 March 2017, *United Parcel Service v Commission*, T-194/13, under appeal, ⁶ [EU:T:2017:144](#)).

Last, an important question of a transversal nature, which has particularly marked several categories of litigation before the General Court in 2017, is the question of the need for action within a reasonable period in administrative and judicial proceedings.

As regards respect for that period as a principle of sound administration, the Court referred to the case-law according to which a request for assistance in the event of psychological harassment must be dealt with expeditiously (judgment of 24 April 2017, *HF v Parliament*, T-584/16, [EU:T:2017:282](#)). It also made clear that the statement of reasons for a decision not to promote an official must be provided no later than the time of the rejection of his complaint and that failure to comply with that obligation to state reasons may give rise to a state of uncertainty and frustration that justify the award of compensation (judgment of 26 October 2017, *Paraskevaidis v Cedefop*, T-601/16, [EU:T:2017:757](#)). Furthermore, the Court has considered that the Commission had not complied with the ‘reasonable period’ principle by taking more than nine months — the period prescribed in the legislation previously applicable — to re-examine a request for remission of import duties, after the Court had annulled an earlier decision rejecting that request (judgment of 11 December 2017, *Léon Van Parys v Commission*, T-125/16, [EU:T:2017:884](#)). Last, the Court considered that a breach of the ‘reasonable period’ principle by the Tunisian authorities, in the context of the judicial proceedings on which the Council’s decision to maintain the applicant’s name on the list of persons covered was based, did not necessarily affect the legality of that decision, but pointed out, however, that such a breach may require the Court to carry out the necessary verifications (judgment of 5 October 2017, *Mabrouk v Council*, T-175/15, [EU:T:2017:694](#)).

As regards compliance with the ‘reasonable period’ principle by the Courts of the European Union, the Court, in a series of five judgments (judgments of 10 January 2017, *Gascogne Sack Deutschland and Gascogne v European Union*, T-577/14, under appeal, ⁷ [EU:T:2017:1](#); of 1 February 2017, *Aalberts Industries v European Union*, T-725/14, [EU:T:2017:47](#); of 1 February 2017, *Kendrion v European Union*, T-479/14, under appeal, ⁸ [EU:T:2017:48](#); of 17 February 2017, *ASPLA and Armando Álvarez v European Union*, T-40/15, under appeal, ⁹ [EU:T:2017:105](#); and of 7 June 2017, *Guardian Europe v European Union*, T-673/15, under appeal, ¹⁰ [EU:T:2017:377](#)), clarified the concept

4/ Case C-265/17 P, *Commission v United Parcel Service*.

5/ Case C-10/18 P, *Marine Harvest v Commission*.

6/ Case C-265/17 P, *Commission v United Parcel Service*.

7/ Case C-138/17 P, *European Union v Gascogne Sack Deutschland and Gascogne* and Case C-146/17 P, *Gascogne Sack Deutschland and Gascogne v European Union*.

8/ Case C-150/17 P, *European Union v Kendrion*.

9/ Case C-174/17 P, *European Union v ASPLA and Armando Álvarez* and Case C-222/17 P, *ASPLA and Armando Álvarez v European Union*.

10/ Case C-447/17 P, *European Union v Guardian Europe* and Case C-479/17 P, *Guardian Europe v European Union*.

of excessive length of judicial proceedings in the field of antitrust law and defined the circumstances in which breach of that principle may cause the European Union to incur financial liability. The Court considered, in particular, that such a breach may give rise to material injury corresponding to the cost of providing a bank guarantee for the period in excess of what may be considered reasonable and also to non-material injury resulting from an unusually long situation of uncertainty.

I. JUDICIAL PROCEEDINGS

In 2017, the Court had the opportunity to rule, in particular, on the extent of the jurisdiction of the EU judicature and on the concept of an actionable measure. It also clarified the conditions relating to representation of a party by a lawyer.

1. JURISDICTION OF THE EUROPEAN UNION JUDICATURE

In the cases that gave rise to the orders of 28 February 2017, *NF v European Council* (T-192/16, under appeal, ¹¹ [EU:T:2017:128](#)); of 28 February 2017, *NG v European Council* (T-193/16, under appeal, ¹² [EU:T:2017:129](#)); and of 28 February 2017, *NM v European Council* (T-257/16, under appeal, ¹³ [EU:T:2017:130](#)), the Court was required to rule on the actions brought by three asylum seekers against the agreement allegedly concluded between the European Council and the Republic of Turkey on 18 March 2016 in response to the migration crisis resulting from the situation in Syria. According to the applicants, that agreement, set out in an ‘EU-Turkey statement’ ¹⁴ which had been adopted on the same date and formed the subject matter of a European Council press release, had been concluded in breach of the rules of the TEU Treaty on the conclusion of international agreements by the European Union.

Adjudicating on the plea of lack of jurisdiction raised by the European Council by way of principal plea on the basis of Article 130 of its Rules of Procedure, and observing that that plea of lack of jurisdiction must be examined before the plea of inadmissibility raised by the defendant in the alternative, the Court noted that, formally, the applicants are requesting annulment of an international agreement. However, the Court stated that review of legality by the EU judicature of measures relating to international treaty law could concern only the measure by which an institution had sought to conclude the international agreement at issue and not the international agreement as such. Consequently, the Court interpreted the form of order sought by the applicants as seeking, in essence, the annulment of a measure by which the European Council had sought to conclude, on behalf of the European Union, an agreement with the Republic of Turkey on 18 March 2016.

After examining the content of the ‘EU-Turkey statement’ and all the circumstances in which that statement had been issued, the Court considered that it did not constitute an act of the European Council — or an act of another institution of the European Union — whereby the European Council had sought to conclude an agreement with the Republic of Turkey. In that regard, the Court emphasised that, notwithstanding the regrettably ambiguous

^{11/} Case C-208/17 P, *NF v European Council*.

^{12/} Case C-209/17 P, *NG v European Council*.

^{13/} Case C-210/17 P, *NM v European Council*.

^{14/} Statement reporting the results of ‘the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis’ between ‘the Members of the European Council’ and ‘their Turkish counterpart’.

terms of the EU-Turkey statement, as published by means of the press release at issue, it had been in their capacity as Heads of State and Government that the representatives of the Member States had met the Turkish Prime Minister on 18 March 2016 in the premises shared by the European Council and the Council of the European Union, a meeting that had led to the adoption of the 'EU-Turkey statement'. Accordingly, the Court considered that the plea of lack of jurisdiction raised by the European Council must be upheld.

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

In the case that gave rise to the order of 11 October 2017, *Guardian Glass España, Central Vidriera v Commission* (T-170/16, [EU:T:2017:722](#)), the Court was required to adjudicate on an application for annulment of the decision contained in a document addressed to the Spanish authorities by the European Commission. The document in question concerned the Commission's assessment of the claims which the applicant had submitted to those authorities concerning the compatibility with the internal market of the State aid which it had received in the form of tax credits. The case comes within the context of the recovery by the Spanish authorities of State aid paid in the form of tax credits, under an aid scheme which the Commission had declared to be unlawful. In the decision finding that the aid was unlawful, the Commission had stated that its assessment related to the aid scheme and was 'without prejudice to whether individual aid [might] be regarded, in full or in part, as compatible with the [internal] market on its own merits, either in a subsequent Commission decision or under exempting regulations'. A recovery order had been served on the applicant by the Spanish authorities following the Commission's decision.

The Court held that the contested measure did not produce binding legal effects of such a nature as to affect the applicant's interests by bringing about a distinct change in its legal position and, consequently, could not form the subject matter of an action for annulment.

In arriving at that conclusion, the Court observed, first of all, that when the Commission is faced with an aid scheme it may, as it did in this case, rule on the general characteristics of the aid scheme in question without examining each particular case in which it applies. It is for the Member State concerned to verify the individual situation of each undertaking concerned by the recovery operation when it implements the Commission's decision. If it encounters unforeseen or unforeseeable difficulties when doing so, the Member State must notify the Commission in accordance with its duty of sincere cooperation. As regards the Commission's letters to the national authorities in the context of such exchanges, they are not binding, as they merely express the Commission's opinion as to whether the implementing measures proposed by the Member State concerned, in the light of the difficulties which it has encountered, are acceptable under EU law.

The Court noted, next, that the purpose of the exchanges between the Spanish authorities and the Commission, as apparent from the contested measure, is part of the implementation of the decision declaring the aid unlawful. In fact, at the stage of recovery of the aid, the Spanish authorities had examined whether the condition related to the incentive effect of that aid had been satisfied in the case of the aid paid to the applicant and, in that context, had asked the Commission about the manner in which that condition set out in that decision was to be interpreted. It was in order to answer that question, by providing them with information about the interpretation to be given to the incentive effect, that the author of the contested measure had drafted that measure and sent it to the Spanish authorities.

The Court also rejected the applicant's argument that as the Kingdom of Spain had notified the aid, the Commission was required to take a view on the compatibility of that aid by adopting a decision. In that regard, the Court held that the content of the exchanges between the Spanish authorities and the Commission showed that those authorities wished to obtain information from the Commission in order to answer, in the submissions which they

were required to lodge before the Spanish courts, the questions arising for certain recipients who had challenged the recovery orders, but the steps taken in that regard by those authorities could not be analysed as a notification of aid paid to the applicant that would have required the Commission to adopt a decision under Regulation (EC) No 659/1999.¹⁵ Last, according to the Court, the Spanish authorities' perception of the legal effects produced by the contested measure, even on the assumption that that perception were established, could not serve to determine the admissibility of the action against that measure.

3. REPRESENTATION BY A LAWYER WHO IS NOT A THIRD PARTY

In the case that gave rise to the order of 20 November 2017, *BikeWorld v Commission* (T-702/15, [EU:T:2017:834](#)), the Court was required to adjudicate an action for annulment in part of the Commission decision establishing the existence of unlawful aid incompatible with the internal market implemented by the Federal German Republic in favour of the Nürburgring racing circuit. While not formally raising an objection of inadmissibility, the Commission claimed that there was an absolute bar to proceedings on the ground that the action did not satisfy the requirements laid down in Articles 19 and 21 of the Statute of the Court of Justice of the European Union, in so far as the lawyer representing the applicant was one of its two associates and therefore not independent of the applicant. On that point, the applicant claimed that at the time when the application was lodged its representative was involved with the applicant only to the extent that he held 10% of its shares, but that he did not hold any role in its administrative and financial management and that he was representing the applicant only in his capacity as a lawyer and not as an associate.

In that regard, the Court recalled that, in order to bring an action before it, parties other than the Member States, institutions of the European Union, States Parties to the European Economic Area (EEA)¹⁶ other than the Member States and the European Free Trade Association (EFTA) Surveillance Authority referred to in that agreement may not act themselves, but must use the services of a third party who must be authorised to practise before a court of a Member State or of a State Party to the EEA Agreement. The Court recalled that, according to the case-law of the Court of Justice, the essence of that requirement of representation by a third party is, first, to prevent private parties from acting on their own behalf before the Courts without using an intermediary and, second, to ensure that legal persons are defended by a representative who is sufficiently distant from the legal person which he represents.

In the light of those criteria, the Court held that the personal connection which the applicant's lawyer had with the applicant and with the case at the time when proceedings were brought, in particular the fact that he had acquired 10% of the applicant's capital and had since then been one of the applicant's only two associates, were of such a nature that they placed him at risk of not being able to fulfil his vital role of assisting in the administration of justice in the most appropriate manner. According to the Court, the applicant and its lawyer had provided no material, notably in response to the Commission's plea alleging an absolute bar to proceedings, which allowed the existence of such a risk to be discounted in the circumstances of the case.

^{15/} 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).

^{16/} Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

The Court noted that the applicant's lawyer had personal connections to the applicant and to the case at the time when the action was brought, which implied that he was not sufficiently distant from the applicant to be able to represent it in full independence, within the meaning of the case-law of the Court of Justice, and it dismissed the action as inadmissible.

II. INSTITUTIONAL LAW

In the case that gave rise to the judgment of 3 February 2017, *Minority SafePack — one million signatures for diversity in Europe v Commission* (T-646/13, [EU:T:2017:59](#)), an application had been made to the Court for annulment of the Commission decision refusing to register a proposed European citizens' initiative (ECI) the purpose of which was to call on the European Union to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity in the Union. In the annex thereto, the proposal mentioned 11 specific areas in which proposed acts should be developed by the EU institutions and, to that end, gave precise suggestions as to the types of act that should be adopted, the content of those acts and the corresponding legal bases in the FEU Treaty. In its decision, the Commission considered that some of the acts requested could, taken individually, fall within the framework of the powers under which it could submit a proposal for a legal act of the European Union, but then concluded that registration of the proposal in its entirety must be refused on the ground that Regulation (EU) No 211/2011¹⁷ did not make provision for the partial registration of a proposed ECI.

In that regard, the Court recalled that a citizen who has submitted a proposed ECI must be placed in a position to be able to understand the reasons why it was not registered by the Commission. It is therefore incumbent on the Commission, when it receives such a proposal, to appraise it and also to specify the various reasons for the refusal to register it, given the effect of such a refusal on the effective exercise of citizens' right to submit a proposed ECI. In the contested decision, the Commission had failed to identify in any way which of the 11 proposals for legal acts referred to in the annex to the proposed ECI manifestly did not, in its view, fall within the framework of the powers under which it is entitled to submit a proposal for a legal act of the European Union and had also failed to provide any reasons in support of that assessment, notwithstanding the precise suggestions provided by the organisers as to the type of act proposed and also the respective legal bases and the content of those acts. In those circumstances, the Commission had in any event not placed the organisers in a position to be able to identify those of the proposals set out in the annex to the proposed ECI that, according to the Commission, fell outside the framework of its powers, or to know the reasons that had led to that assessment. The organisers had therefore been prevented from challenging the merits of the Commission's assessment, just as the Court was prevented from exercising its review of the legality of that assessment.

The Court concluded that the contested decision was vitiated by an insufficient statement of reasons and must therefore be annulled and that it was not necessary to determine whether the Commission ought, in addition, to have stated the grounds on which it had based its interpretation that a proposed ECI cannot be registered if a part of the proposed measures do not fall within the framework of its powers.

In the case that gave rise to the judgment of 10 May 2017, *Efler and Others v Commission* (T-754/14, [EU:T:2017:323](#)), the Court was required to examine the lawfulness of the Commission decision refusing to register a proposed ECI entitled 'Stop TTIP', the purpose of which was to request the Commission to recommend that the Council cancel the mandate which it had granted to the Commission to negotiate the 'Transatlantic Trade and Investment

¹⁷ Regulation (EU) No 211/2011 of the of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, p. 1).

Partnership'¹⁸ and, ultimately, to refrain from concluding the 'Comprehensive Economic and Trade Agreement'.¹⁹ Thus, the case raised the novel question whether a proposed ECI may relate to an act whereby the Council decides to withdraw from the Commission the mandate to negotiate the conclusion of an international agreement with a third country and an act whereby the Council decides not to authorise the signing of such an agreement or not to conclude it. In its decision, the Commission claimed that a proposed ECI could not relate to such acts. It argued, first, that an act for the opening of negotiations with a view to concluding an international agreement is preparatory and has no legal effects outside the institutions and, second, that the legal acts whose adoption was proposed were not necessary 'for the purpose of implementing the Treaties'.

The Court rejected the Commission's argument: in the first place, it considered that the concept of a legal act, for the purposes of Article 11(4) TEU, Article 2(1) and Article 4(2)(b) of Regulation No 211/2011, cannot, in the absence of any indication to the contrary, be understood as being limited only to definitive European Union legal acts which produce legal effects vis-à-vis third parties. In fact, according to the Court, neither the wording of the provisions in question nor the objectives pursued by them justify in particular that a decision authorising the opening of negotiations with a view to concluding an international agreement, taken under Article 207(3) and (4) TFEU and Article 218 TFEU and which clearly constitutes a decision for the purposes of the fourth paragraph of Article 288 TFEU, be excluded from the concept of a legal act for the purposes of an ECI. On the contrary, the Court observed that the principle of democracy, and also the objective specifically pursued by the ECI mechanism, which consists in improving the democratic functioning of the European Union, require an interpretation of the concept of legal act that covers legal acts such as a decision to open negotiations with a view to concluding an international agreement which manifestly seeks to modify the legal order of the European Union. According to the Court, the argument that the Council and the Commission have sufficient indirect democratic legitimacy to adopt legal acts which do not produce legal effects vis-à-vis third parties would have the consequence of limiting considerably recourse to the ECI mechanism as an instrument of European Union citizen participation in the European Union's normative activity as carried out through the conclusion of international agreements. Furthermore, according to the Court, a decision to withdraw authorisation to open negotiations with a view to concluding an international agreement, in so far as it brings those negotiations to a close, cannot be classified as a preparatory act but is, instead, definitive.

In the second place, the Court considered that there is nothing in the provisions on the ECI to indicate that citizen participation could not be proposed in order to prevent the adoption of a legal act. Indeed, although, according to Article 11(4) TEU and Article 2(1) of Regulation No 211/2011, the proposed legal act must contribute to the implementation of the Treaties, that is the case for acts whose object is to prevent the conclusion of the TTIP and the CETA, which seek to modify the legal order of the European Union.

In that regard, the Court observed that the objective of participation in the democratic life of the European Union pursued by the ECI mechanism manifestly includes the power to request an amendment of legal acts in force or their annulment, in whole or in part. Accordingly, there is no justification for excluding from democratic debate legal acts seeking the withdrawal of a decision authorising the opening of negotiations with a view to concluding an international agreement and acts whose object is to prevent the signing and conclusion of such an agreement. Contrary to the Commission's contention, those acts clearly produce independent legal effects by preventing, where relevant, an announced modification of European Union law. There is nothing to justify the authors of an ECI proposal being required to await the conclusion of an agreement and then being able to contest only the appropriateness of that agreement.

18/ By decision of 14 June 2013, the Council authorised the Commission to open negotiations with the United States of America with a view to concluding a free-trade agreement, called the 'Transatlantic Trade and Investment Partnership (TTIP)'.

19/ By decision of 27 April 2009, the Council authorised the Commission to open negotiations with Canada with a view to concluding a free-trade agreement, called the 'Comprehensive Economic and Trade Agreement (CETA)'.

Furthermore, according to the Court, far from amounting to an interference in an ongoing legislative procedure, such a proposed ECI constitutes an expression of the effective participation of citizens of the European Union in the democratic life of the European Union, without undermining the institutional balance intended by the Treaties.

In the case that gave rise to the judgment of 20 November 2017, *Voigt v Parliament* (T-618/15, [EU:T:2017:821](#)), an action had been brought before the Court against two decisions whereby the European Parliament had refused to make a room available to the applicant for the purpose of holding a press conference and also to give Russian nationals access to its premises. The applicant, who had been elected to the Parliament on the list of a German party, had participated in a political forum in Saint Petersburg (Russia). As a further part of that forum, the applicant had wished to organise a press conference and a working meeting in the Parliament's premises, in the presence, in particular, in the case of the working meeting, of members and a sympathiser of the Russian party Rodina. In the meantime, the Parliament had adopted Resolution 2015/2001(INI).²⁰

Examining, first of all, the admissibility of the plea alleging infringement of Article 21 of the Charter of Fundamental Rights of the European Union, in that the refusal to allow the Russian guests access to the Parliament was vitiated by discrimination on grounds of their ethnic origin or nationality, the Court observed that an applicant is not entitled to act in the interests of the law or of the institutions and may put forward, in support of an action for annulment, only such claims as relate to him personally. However, that requirement cannot be understood as meaning that an action will be admissible before the EU judicature only if it is linked to the personal situation of the applicant alone. An applicant's claims are admissible only if they are capable of justifying an annulment which would be of advantage to the applicant. In the present case, according to the Court, the alleged discrimination against the Russian guests on grounds of their nationality or ethnic origin might have also, hypothetically, adversely affected the applicant inasmuch as he had been the instigator of their invitation and was prevented from holding with them at the Parliament the working meeting he had organised.

Examining, next, the merits of that plea, the Court stated that, although nationality is a legal and political link between an individual and a sovereign State, the concept of ethnicity has its origin in the idea that societal groups share the sense of belonging to the same nation or sharing a common religious faith, language, cultural and traditional origin and background. As regards the prohibition on discrimination on the ground of ethnic origin, the applicant merely highlighted the Russian nationality of his guests and did not establish that the decision to refuse his Russian guests access to the Parliament had been adopted on the ground of any specific ethnic affiliation. As regards the prohibition on discrimination on the ground of nationality, the Court recalled that, under the third paragraph of Article 6(1) TEU and Article 52(7) of the Charter of Fundamental Rights, the explanations relating to the Charter²¹ are to be given due regard in its interpretation. According to those explanations, Article 21(2) of the Charter of Fundamental Rights 'corresponds to the first paragraph of Article 18 [TFEU] and must be applied in compliance with that article'.

Consequently, the Court considered, in the light of the first paragraph of Article 18 TFEU and the related case-law, that Article 21(2) of the Charter of Fundamental Rights concerns only situations that come within the scope of EU law in which a national of one Member State is treated in a discriminatory manner by comparison with nationals of another Member State solely on the basis of his nationality, and that article is therefore not applicable in the case of a difference in treatment between nationals of the Member States and nationals of non-member countries. Accordingly, the applicant was not entitled to claim that there had been an infringement of Article 21(2) of the Charter of Fundamental Rights in respect of his Russian guests.

^{20/} European Parliament resolution of 10 June 2015 on the state of EU-Russia relations (2015/2001(INI)) (OJ 2016 C 407, p. 35).

^{21/} Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

Examining, last, a plea alleging misuse of powers, the Court held that the Parliament is not required to privilege, in its infrastructures, the political activities of a party from a non-member country and that, accordingly, it is not obliged to receive members or sympathisers of such a party in order to allow them to express their views in its premises. The overall scheme of the Treaties and the implementing texts, and also the need to safeguard the unfettered exercise of the powers conferred on the Parliament, entail that the Parliament is not the place where any and all members of the public may express themselves entirely as they wish.

III. COMPETITION RULES APPLICABLE TO UNDERTAKINGS

1. DEVELOPMENTS IN THE AREA OF ARTICLES 101 AND 102 TFEU

In the case that gave rise to the judgment of 10 November 2017, *Icap and Others v Commission* (T-180/15, [EU:T:2017:795](#)), an action had been brought before the Court for annulment of the decision whereby the Commission had considered that the applicants had participated in six infringements of Article 101 TFEU concerning the manipulation of the London Interbank Offered Rate (LIBOR, the interbank rate applied in London) and the Tokyo Interbank Offered Rate (TIBOR, the interbank rate applied in Tokyo) interbank reference rates on the yen interest rate derivatives market, which had already been found by a decision in 2013.²² The conduct of which the applicants were accused consisted in the ‘facilitation’ of six infringements, namely the ‘UBS/RBS 2007 infringement’, the ‘UBS/RBS 2008 infringement’, the ‘UBS/DB infringement’, the ‘Citi/RBS infringement’, the ‘Citi/DB infringement’ and the ‘Citi/UBS infringement’. In the 2013 decision, adopted pursuant to the settlement procedure provided for in Article 10a of Regulation (EC) No 773/2004,²³ as amended by Regulation (EC) No 622/2008,²⁴ Citigroup Inc., Citigroup Global Markets Japan Inc., Deutsche Bank Aktiengesellschaft, UBS AG, UBS Securities Japan and The Royal Bank of Scotland (RBS) had acknowledged their participation in the infringements at issue. The applicants had chosen not to participate in the settlement procedure. Consequently, the normal procedure had been applied to them and a fine of EUR 14 960 000 had been imposed on them.

Observing that the applicants’ liability had been established on the basis of their participation in the anticompetitive conduct found by the Commission, which it had classified as ‘facilitation’, the Court examined first of all whether the applicants had intended to contribute by their own conduct to the common objectives pursued by all the participants and whether they were aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives, or might reasonably have foreseen it, and whether they were prepared to accept the risk. In that regard, the applicants maintained that the Commission had not proved to the requisite legal standard that they were aware of collusion between the banks concerned in connection with the ‘UBS/RBS 2007 infringement’, the ‘UBS/RBS 2008 infringement’, the ‘Citi/DB infringement’ and the ‘Citi/UBS infringement’. The Court upheld that argument, but only in respect of one of the infringements at issue (namely the ‘UBS/RBS 2008

^{22/} Commission Decision C(2013) 8602 final of 4 December 2013 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39861 — Yen Interest Rate Derivatives).

^{23/} 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).

^{24/} Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ 2008 L 171, p. 3).

infringement'). Finding that the Commission had not adduced evidence capable of showing that the applicants had been aware of or might reasonably have foreseen the role of RBS in the infringement, the Court annulled the contested decision in so far as the applicants' participation in that infringement was concerned.

As regards the proof of the infringements and their duration, the burden of which was borne by the Commission, the Court observed that, in circumstances where the pursuit of an infringement or concerted practices required special positive measures, the Commission could not assume that the cartel had been pursued in the absence of evidence that those measures had been adopted. It followed that proof of the applicants' participation in single and continuous infringements and, accordingly, their being held liable for the whole of the infringement periods required the Commission to produce evidence of positive measures adopted by the applicants, if not on a daily basis, at least on a basis that was sufficiently limited in time. Otherwise, the Commission had to find the existence of single and repeated infringements and not to include in the infringement periods found against the applicants the intervals in respect of which it did not possess evidence of their participation. In that regard, the Court considered that the evidence put forward by the Commission did not justify the whole infringement period found in respect of the 'UBS/RBS 2007 infringement', the 'Citi/RBS infringement' and the 'Citi/DB and Citi/UBS' infringement'.

In addition, the Court was required to adjudicate on the applicants' complaint that the contested decision, adopted in 2015, should be annulled for breach of the principle of the presumption of innocence, owing to the references to their conduct in the 2013 decision. On that point, the Court emphasised that, although that principle is enshrined in Article 48 of the Charter of Fundamental Rights, which pursuant to Article 6 TEU is to have the same legal value as the Treaties, the origin of the settlement procedure is to be found in a regulation adopted by the Commission alone, on the basis of Article 33 of Regulation (EC) No 1/2003,²⁵ namely Regulation No 622/2008, and that the procedure is optional for both the Commission and the undertakings concerned. Accordingly, the requirements relating to compliance with the principle of presumption of innocence cannot be altered by considerations linked to the safeguarding of the objectives of rapidity and efficiency of the settlement procedure, however laudable those objectives may be. On the contrary, the Commission must apply its settlement procedure in a manner that is compatible with the requirements of Article 48 of the Charter of Fundamental Rights. Thus, the implementation of such a 'hybrid' settlement procedure must be carried out in compliance with the presumption of innocence of the undertaking which has decided not to enter into a settlement. Accordingly, in circumstances where the Commission considers that it is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement, it is for the Commission to take the necessary measures — which may include adopting on the same date the decisions relating to all the undertakings involved in the cartel — that will enable that presumption of innocence to be safeguarded. The Court concluded that the Commission had infringed the applicants' presumption of innocence when adopting the 2013 decision. However, it made clear that this infringement could not have a direct impact on the legality of the contested decision, in view of the separate and independent nature of the proceedings that had given rise to those two decisions.

Last, the Court observed that the Commission had not explained in the contested decision the methodology which it had applied in order to determine the amounts of the fines imposed. The Court therefore annulled the part of the contested decision setting the fines, on the ground of insufficient reasoning.

In the case that gave rise to the judgment of 16 May 2017, *Agria Polska and Others v Commission* (T-480/15, under appeal,²⁶ [EU:T:2017:339](#)), an action had been brought before the Court for annulment of the Commission decision rejecting the complaint lodged by the applicants, companies active in the plant protection products

^{25/} 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).

^{26/} Case C-373/17 P, *Agria Polska and Others v Commission*.

parallel trade sector, concerning infringements of Article 101 TFEU and/or Article 102 TFEU alleged to have been committed by 13 undertakings producing and distributing such products, with the assistance of or through the intermediary of four professional organisations and a law firm. Before the Commission, the applicants had claimed that the entities referred to in the complaint had engaged vis-à-vis the applicants in practices that infringed EU competition law. Such practices had essentially taken the form of an agreement and/or concerted practices between those entities and had consisted of abusive complaints brought in a coordinated manner before the Austrian and Polish administrative and criminal authorities.

In that regard, the Court observed that Article 101 TFEU does strictly preclude any direct or indirect contact between economic operators the object or effect of which is either to influence the conduct on the market or an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. However, economic operators retain the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors. Thus, undertakings may, in particular, act in the defence of their legitimate interests in the event of infringement by their competitors of the applicable provisions, such as, in the present case, the regulations relating to trade in plant protection products. Therefore, the Commission had not made a manifest error of assessment in considering, in the contested decision, that the entities referred to in the complaint had been entitled to inform the national authorities of alleged infringements by the applicants of the applicable rules and, where appropriate, to cooperate with those authorities in the context of the inspections which they carried out.

In that context, the Court found that the decisions to conduct off-site and on-site inspections and to institute administrative and criminal proceedings against the applicants were attributable to the national authorities, which act in the public interest and whose decisions fall, as such, within their discretion. The Court considered that the conduct and decisions of the authorities of the Member States, in particular their consultations with a view to fulfilling their duties of monitoring compliance, fell outside the scope of Articles 101 and 102 TFEU, since those articles are intended to govern the conduct of undertakings only. The Court also ruled out the possibility that the lodging of complaints by the applicants' competitors might fall within the concept of 'abuse of regulatory procedures' or of 'vexatious action' within the meaning of the judgments in *ITT Promedia v Commission*²⁷ and *AstraZeneca v Commission*,²⁸ in particular because of the discretion of the national authorities in their decisions to carry out inspections and/or impose penalties following those complaints.

Last, the Court stated that to accept the applicants' view that the Commission should systematically open an investigation where a complaint, similar to that lodged before it, has already been rejected, possibly erroneously, by a national competition authority on a ground connected with the limitation period, would not be compatible with the objective of Article 13(2) of Regulation No 1/2003, which was to establish, with a view to ensuring effectiveness, an optimal allocation of resources within the European competition network. In addition, the Court recalled that the procedure provided for in Article 7 of Regulation No 1/2003 does not extend to the making of findings of possible breaches by the authorities, including the judicial authorities, of the Member States, since that falls under the procedure for failing to fulfil obligations provided for in Article 258 TFEU.

^{27/} Judgment of 17 July 1998, T-111/96, [EU:T:1998:183](#).

^{28/} Judgment of 1 July 2010, T-321/05, [EU:T:2010:266](#).

2. DEVELOPMENTS IN THE AREA OF MERGERS

In the case that gave rise to the judgment of 7 March 2017, *United Parcel Service v Commission* (T-194/13, under appeal, ²⁹ [EU:T:2017:144](#)), an action had been brought before the Court against the decision whereby the Commission had declared incompatible with the internal market and the EEA Agreement, pursuant to Article 8(3) of Regulation No 139/2004, ³⁰ the merger between United Parcel Service, Inc. (UPS) and TNT Express NV (TNT), two companies present on the international express small package delivery markets. That decision was based on the finding that the purchase of TNT by UPS would have resulted in a restriction of competition in 15 Member States of the EEA for the express distribution of small packages to other European countries. In those States, the acquisition would have reduced to three, or even only two, the number of significant players on that market, sometimes leaving DHL as the only alternative solution to UPS. According to the Commission, the merger would have therefore been harmful to customers owing to the likely increases in prices that it would have entailed.

In response to the plea put forward by the applicant, UPS, alleging infringement of its rights of defence, the Court observed that observance of those rights and, more particularly, the right to a fair hearing require that the undertaking 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 assertions. In that regard, the Court observed that the econometric analysis used by the Commission in its decision had been based on a different model from the analysis that had been the subject of an exchange of views and arguments during the administrative procedure. In fact, the Commission had made appreciable changes to the analyses previously discussed with the applicant. In the light of those changes, the Court considered that the Commission had been required to communicate the final econometric analysis model to the applicant before adopting the contested decision. In failing to do so, the Commission had infringed the applicant's rights of defence. Taking the view that, in the absence of that procedural irregularity, the applicant might have had even a slight chance of being in a better position to defend itself if it had had available, before the adoption of the contested decision, the final version of the econometric analysis chosen by the Commission, the Court annulled the contested decision in its entirety without examining the other pleas put forward by the applicant.

In the case that gave rise to the judgment of 26 October 2017, *KPN v Commission* (T-394/15, not published, [EU:T:2017:756](#)), the Court was required to adjudicate on an application for annulment of the Commission decision declaring compatible with the internal market the concentration involving the acquisition by the international cable operator Liberty Global plc of sole control over the undertaking Ziggo NV. In support of its action, the applicant relied, in particular, on a breach of the duty to state reasons in that the Commission had failed to give its reasons for not analysing the possible vertical anticompetitive effects of the concentration on the market for premium pay TV sports channels.

On that point, the Court observed that, in the contested decision, the Commission had not analysed the effects of the transaction on the possible market for the wholesale supply and acquisition of premium pay TV sports channels, in which the only two channels present would be Sport1, which was owned by Liberty Global, and Fox Sports, which was owned by a third party. Although the contested decision did refer to Sport1 and Fox Sports on a number of occasions, it did not contain any analysis regarding the vertical effects that would result from the proposed concentration if the relevant product market were defined as the market for the wholesale supply and acquisition of premium pay TV sports channels. In that regard, the Court observed that the Commission had

^{29/} Case C-265/17 P, *Commission v United Parcel Service*.

^{30/} 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), as implemented by Regulation (EC) No 802/2004 of 7 April 2004 (OJ 2004 L 133, p. 1).

acknowledged that the market for the wholesale supply and acquisition of pay TV channels could be further segmented according to whether they consisted of film or sports channels. The Commission had further stated in the contested decision that that question could be 'left open as the assessment of the proposed transaction would remain the same'. It followed that the Commission had left open the precise definition of the relevant product market because, even if there were additional segmentation, the concentration could be declared compatible with the internal market because there were no competition concerns.

According to the Court, that approach of leaving open the precise definition of the relevant market required the Commission to explain, at least briefly, why the proposed transaction, including the vertical effects on the possible market for the wholesale supply and acquisition of premium pay TV sports channels, did not raise any competition concerns, in such a way as to enable the persons concerned to ascertain the reasons for that view and to enable the Court to exercise its power of review with regard to the Commission's assessment. As the contested decision contained no express reasoning in that regard, the Court concluded that it did not satisfy the requirements of Article 296 TFEU relating to the statement of reasons.

In the case that gave rise to the judgment of 26 October 2017, **Marine Harvest v Commission** (T-704/14, under appeal,³¹ [EU:T:2017:753](#)), the Court was required to examine the lawfulness of the decision whereby the Commission had imposed a fine on the applicant for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004.

At issue was the acquisition by the applicant of control of Morpol ASA, concluded on 18 December 2012. On 21 December 2012 the applicant had requested the Commission to allocate a case team and had informed the Commission that it would not exercise its voting rights pending the decision of the Commission. On 15 January 2013 the applicant had submitted a mandatory public offer for the remaining shares in Morpol. Following the notification of the transaction on 9 August 2013, the Commission cleared the transaction on 30 September 2013, subject to conditions. On 23 July 2014 the Commission adopted the contested decision, in which it found that the applicant had implemented a concentration of a Community dimension in the period from 18 December 2012 to 30 September 2013 before that concentration had been notified and declared compatible with the internal market, in breach of the articles referred to above. This case gave the Court the opportunity to clarify the interpretation of the rules relating to suspension of a concentration pursuant to Article 7 of Regulation No 139/2004, to the concept of single concentration, to the principle *ne bis in idem* and to the rules governing concurrent offences.

As regards, first of all, the interpretation of Article 7 of Regulation No 139/2004, the Court began by observing that, in so far as the applicant had acquired control of Morpol by means of the December 2012 acquisition, it ought, in principle, pursuant to the first subparagraph of Article 4(1) and Article 7(1) of Regulation No 139/2004, to have notified that concentration to the Commission before implementing it and not to have implemented it until the Commission had declared it to be compatible with the internal market. Although the applicant claimed that the exception provided for in Article 7(2) of Regulation No 139/2004 was applicable, the Court considered that that was not the position. On that point, the Court noted that, although the first situation in Article 7(2) of Regulation No 139/2004, relating to a public bid, permits, in certain circumstances, the implementation of a public bid before notification and authorisation, even if such implementation constitutes a concentration with a Community dimension, according to its wording, that provision does not however permit the implementation of a private acquisition. In the present case, the Commission had not found that the applicant had infringed Article 7(1) of Regulation No 139/2004 by implementing the public bid. It had found that the applicant had infringed Article 7(1) and Article 4(1) of Regulation No 139/2004 by the December 2012 acquisition, which had preceded that public bid. Consequently, according to its wording, the first situation in Article 7(2) of Regulation No 139/2004

^{31/} Case C-10/18 P, **Marine Harvest v Commission**.

was not applicable in the present case. As for the second situation envisaged in Article 7(2) of that regulation, namely the implementation of a series of transactions in securities by which control is acquired from various sellers, the Court found that, in this case, the applicant had acquired control of Morpol from a single seller by means of a single transaction in securities, namely the December 2012 acquisition. Control was not, therefore, acquired either from various sellers or by means of a series of transactions. It followed that, according to its wording, the second situation envisaged in Article 7(2) Regulation No 139/2004 did not apply either.

As regards, next, the concept of a single concentration, the Court considered that it is not intended to apply in a situation in which sole de facto control of the only target company is acquired from one seller by means of a single initial private transaction, even where that transaction is followed by a mandatory public offer. If the applicant's reasoning that acquisition of control by means of a single private transaction followed by a mandatory public offer constituted a single concentration were accepted, the effect would be to overextend the scope of application of the exception provided for in Article 7(2) of Regulation No 139/2004. The Court emphasised, moreover, that the mere fact that the Commission can impose severe penalties for infringement of a provision of competition law does not call in question the fact that provisions derogating therefrom must be strictly interpreted. Even supposing that the fines imposed under Article 14 of Regulation No 139/2004 were of a criminal law nature, it could not be concluded in the present case that the Commission applied criminal law extensively to the accused's detriment. The Commission merely had refused to extend the scope of application of the exception provided for in Article 7(2) of Regulation No 139/2004 beyond its wording.

As regards, last, the principle *ne bis in idem* and the rules governing concurrent offences, the Court stated that the effect of an undertaking infringing the obligation under Article 4(1) of Regulation No 139/2004 to notify a concentration before its implementation is to put the undertaking in breach of the prohibition against implementing a concentration before it has been notified and authorised, laid down in Article 7(1) of that regulation. However, the principle *ne bis in idem* did not apply in the present case, as the penalties had been imposed by the same authority in a single decision. In that context, the Court stated that where the same conduct infringes several provisions punishable by fines, the question whether several fines may be imposed in a single decision falls not within the scope of the principle *ne bis in idem* but within the scope of the principles governing concurrent offences. In that regard, whereas the applicant claimed that, where one act appears to be caught by two statutory provisions, the 'primarily applicable' provision excludes all the other provisions, the Court observed that the legislature had not defined one offence as being more serious than the other, both of them being subject to the same cap under Article 14(2)(a) and (b) of Regulation No 139/2004. It was not appropriate, therefore, to regard one of those provisions as being 'primarily applicable'. Thus, the Court concluded that the Commission had been correct to penalise the applicant for infringement of both provisions.

IV. STATE AID

1. ADMISSIBILITY

In the cases that gave rise to the judgments of 6 April 2017, *Regione autonoma della Sardegna v Commission* (T-219/14, [EU:T:2017:266](#)), and of 6 April 2017, *Saremar v Commission* (T-220/14, [EU:T:2017:267](#)), two actions had been brought before the Court for annulment of the decision by which the Commission had declared that certain aid measures implemented by the Autonomous Region of Sardinia in favour of a company providing a public maritime cabotage service were incompatible with the internal market and had ordered recovery of the aid. The Commission maintained that, because the company in question was being liquidated, it and the Autonomous Region of Sardinia had lost their interest in bringing proceedings.

As regards, first of all, the action brought by the company in question in the case that gave rise to the judgment of 6 April 2017, **Saremar v Commission** (T-220/14, [EU:T:2017:267](#)), the Court began, in view of the fact that the company's loss of capacity to be a party to legal proceedings would make its interest in bringing proceedings pointless, by ascertaining whether it had not lost that capacity in the course of the proceedings. In that regard, the Court considered that, since under national law the applicant retained the right to bring legal proceedings in its own name and to be a party to legal proceedings in order to protect its assets, it had not lost its capacity to be a party to legal proceedings in the course of the proceedings, in spite of having been placed in liquidation. Furthermore, the Court stated that the contested decision, in that it had declared the aid granted to the applicant incompatible and illegal and had ordered its recovery, had adversely affected the applicant on the date on which it brought the action. According to the Court, the contested decision had not ceased to produce effects vis-à-vis the applicant because the applicant had been placed in liquidation. First, the Autonomous Region of Sardinia was still not allowed to disburse to the applicant the part of the aid at issue which had not yet been implemented. Second, as regards the part of the disputed aid that had already been paid, the applicant's liquidation did not affect the principle that that aid was to be recovered, which might, if appropriate, be achieved by entry in the schedule of the company's liabilities. The Court thus concluded that the applicant had not lost its interest in bringing proceedings in the course of the proceedings.

As regards, next, the action brought by the Autonomous Region of Sardinia in the case that gave rise to the judgment of 6 April 2017, **Regione autonoma della Sardegna v Commission** (T-219/14, [EU:T:2017:266](#)), the Court held that the Autonomous Region had *locus standi* since, first, the contested decision was liable to affect directly its rights and obligations in relation to the disputed aid and since, second, the aid was granted on its own initiative and in the exercise of its own powers. As regards the Autonomous Region of Sardinia's interest in bringing an action, the Court, after observing that it was not for it to rule on the distribution of powers and respective obligations of the various national entities, stated that, on the date on which the action was brought, the applicant had been able to derive an advantage from seeing the contested decision annulled, which would necessarily have brought about a change in its legal situation. According to the Court, the fact that the company concerned was placed in liquidation in the course of the proceedings had no bearing on that conclusion and, consequently, did not cause the applicant to lose its interest in bringing an action.

2. ADMINISTRATIVE PROCEDURE

In the case that gave rise to the judgment of 17 November 2017, **Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v Commission** (T-263/15, [EU:T:2017:820](#)), an action had been brought before the Court for annulment of a number of provisions of a Commission decision declaring incompatible with the internal market State aid implemented by the Republic of Poland in the form of public funding by the municipalities of Gdynia (Poland) and Kosakowo (Poland) in favour of Gdynia-Kosakowo Airport. The funding consisted of capital injections from the municipalities of Gdynia and Kosakowo, which were intended to cover both the investment costs (investment aid) and the operating costs of the airport during the initial phase of its operation (operating aid). The contested decision replaced an earlier decision in which the Commission had already arrived at the same conclusion, in so far as, during the interim relief proceedings initiated before the Court in the meantime, it had become apparent that the State aid declared to be incompatible with the internal market consisted of certain investments which, according to decision to initiate the procedure, were not State aid since they related to a task in the public interest. The Commission considered that it was not necessary to initiate a new investigation procedure since the file contained all the material necessary for the assessment of the measure at issue.

In that regard, the Court began by recalling that it follows from Article 108(2) TFEU and Article 1(h) of Regulation No 659/1999 that, during the investigation phase, the Commission must give notice to the parties concerned, including the undertaking or undertakings concerned and the infra-State entity that granted the aid, to submit their comments. That rule is in the nature of an essential procedural requirement. In addition, the decision to

initiate the formal investigation phase must put the parties concerned in a position to participate effectively in the formal investigation procedure, during which they will be able put forward their arguments. It is necessary, in particular, for the Commission to define sufficiently the framework of its investigation so as not to render meaningless the right of parties concerned to submit their comments. In this case, both in the decision to initiate the procedure and in the initial decision, the Commission had assessed the compatibility of the aid in the light of the Guidelines on national regional aid³² and in the context of Article 107(3)(a) TFEU.

The Court observed that in the contested decision the Commission had made a change in the legal regime as regards the analysis of the compatibility of the operating aid. More specifically, the Commission had no longer relied, as it had done in the decision to initiate the procedure and the initial decision, on the Guidelines on national regional aid in order to analyse whether the aid was compatible with the internal market, but had relied on the principles set out in the Guidelines on State aid to airports and airlines.³³ The Commission had also made a change in the derogation analysed in the light of Article 107(3) TFEU, which, in the contested decision, was within the scope of Article 107(3)(c) TFEU, whereas it had initially been within Article 107(3)(a) TFEU. Therefore, the Court concluded, the new legal regime applied by the Commission in the contested decision included substantial changes by comparison with the regime previously in force and taken into account in the decision to initiate the procedure and in the initial decision.

Furthermore, the Court observed that, even if the withdrawal of the initial decision had had the effect of leaving the formal investigation procedure open, the interested parties had not been in a position to submit their comments. The Court emphasised that the right of the interested parties to be in a position to submit their comments is an essential procedural requirement and that an infringement of that right, as found in the present case, entailed the annulment of the vitiated measure, without it being necessary to establish the existence of an effect on the party alleging such an infringement or that the outcome of the administrative procedure might have been different. In that context, the Court stated that the effect of the comments which the interested parties would have been in a position to submit could not be prejudged. Last, the Court observed that, although the aid at issue was composed, in fact, of two types of funding, namely investment aid and operating aid, those different types of funding had been analysed as a whole by the Commission for the purpose of determining, in particular, the classification as State aid. In those circumstances, it was not possible to interpret the operative part of the contested decision as covering, in a manner that allowed them to be separated, on the one hand, the investment aid and, on the other, the operating aid.

3. SERVICES OF GENERAL ECONOMIC INTEREST

In the case that gave rise to the judgment of 1 March 2017, *SNCM v Commission* (T-454/13, [EU:T:2017:134](#)), the Court adjudicated on the lawfulness of the decision whereby the Commission had classified as State aid the financial compensation paid by the French Republic to two French maritime companies in respect of maritime transport services provided between Marseilles (France) and Corsica (France) for the years 2007 to 2013 under a public service agreement, and declared incompatible with the internal market the compensation paid to one of those companies in respect of the services which it had provided during peak traffic periods.

First of all, the Court observed that, in order for public service compensation to escape classification as State aid, a number of cumulative criteria must, in accordance with the judgment in *Altmark Trans and Regierungspräsidium*

^{32/} Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13).

^{33/} Guidelines on State aid to airports and airlines (OJ 2014 C 99, p. 3).

Magdeburg,³⁴ be satisfied, including the criterion that the recipient undertaking must actually have public service obligations to discharge. As regards that criterion, the Court emphasised that Member States enjoy wide discretion in defining what they regard as a service of general economic interest (SEIG) and, consequently, the definition of those services by a Member State can be called in question by the Commission only in the event of manifest error. In that regard, the Court made clear, however, that the Member States' power to define SGEIs is not unlimited and may not be exercised arbitrarily for the sole purpose of allowing a particular sector to circumvent the application of the competition rules. In particular, where there are specific rules of EU law that circumscribe the definition of the content and scope of the SGEI, they bind the Member States' discretion. In the present case such rules existed, namely the provisions of Regulation (EEC) No 3577/92.³⁵ Thus, the Court considered that the Commission's submission that the French authorities' discretion was limited by the provisions of that regulation must be upheld.

Furthermore, according to the Court, the reasoning adopted by the Court of Justice in the judgment in **Anlir and Others**,³⁶ which was based on an interpretation of Regulation No 3577/92 in accordance with its fundamental objective, namely to ensure the freedom to provide maritime cabotage services and, consequently, to accept restrictions of that freedom only under very strict conditions, was fully transposable to the present case. It followed that, in circumstances such as those at issue, the national authorities cannot dispense with the requirement to demonstrate the existence of a shortage of private initiative, since, as is clear from that judgment, it is on the basis of such a finding of a shortage of private initiative that the real public service need is determined.

V. INTELLECTUAL PROPERTY

1. COMPOSITION OF THE BOARDS OF APPEAL AFTER REFERRAL

In the case that gave rise to the judgment of 16 February 2017, **Antrax It v EUIPO — Vasco Group (Thermosiphons for radiators)** (T-828/14 and T-829/14, [EU:T:2017:87](#)), the Court was required to examine the compatibility of Article 1(d) of Regulation (EC) No 216/96³⁷ with the obligation of impartiality of the administration within the meaning of Article 41 of the Charter of Fundamental Rights in that that provision does not provide for the obligation to change the composition of the Board of Appeal when the case is referred back to it following annulment of its decision.³⁸

The Court noted that Article 1(d) of Regulation No 216/96 provides that, if the measures necessary to comply with a judgment of the Court annulling all or part of a decision of a Board of Appeal or of the Grand Board include re-examination by the Boards of Appeal of the case which was the subject of that decision, the Presidium of the Boards of Appeal is to decide if the case is to be referred to the Board which adopted that decision, or to another

^{34/} Judgment of 24 July 2003, C-280/00, [EU:C:2003:415](#).

^{35/} Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

^{36/} Judgment of 20 February 2001, C-205/99, [EU:C:2001:107](#).

^{37/} 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 Harmonization in the Internal Market (Trade Marks and Designs) (OJ 1996 L 28, p. 11).

^{38/} See also, below, the discussion of this judgment under '3 Designs'.

Board, or to the Grand Board. If the case is referred to another Board, that Board is not to comprise members who were party to the initial decision. This provision is not to apply if the case is referred to the Grand Board.

According to the Court, there is nothing in that wording to indicate that, when the case is referred back to the Board of Appeal which previously adopted the annulled decision, there is an obligation for the Presidium to structure the Board of Appeal so as to include none of the members who took part in the previous decision. In that regard, proceedings before the Boards of Appeal of the European Union Intellectual Property Office (EUIPO) are administrative and not judicial in nature. The Court observed that it had already been held that there is no rule of law or principle which prevents an administration from entrusting to the same officials re-examination of a case in compliance with a judgment annulling a decision, and that it cannot be stated as a general rule resulting from the obligation to be impartial that an administrative or judicial authority is bound to send the case back to a different authority or to a differently composed branch of that authority.

Accordingly, the referral by the Presidium pursuant to Article 1(d) of Regulation No 216/96 back to the same Board of Appeal that ruled on it initially, with no requirement that that Board of Appeal have a different composition, does not infringe the administration's obligation of impartiality under Article 41(1) of the Charter of Fundamental Rights.

2. EUROPEAN UNION TRADE MARK

a. Extent and nature of review by the Boards of Appeal

In the case that gave rise to the judgment of 6 April 2017, *Nanu-Nana Joachim Hoepp v EUIPO — Fink (NANA FINK)* (T-39/16, [EU:T:2017:263](#)), the Court was required to adjudicate on the legality of the decision of the First Board of Appeal of EUIPO dismissing the applicant's appeal against the decision whereby the Opposition Division had only partially upheld its opposition request. In support of its action, the applicant claimed that the Board of Appeal had failed to rule on some of the goods in respect of which the opposition had been rejected. In the applicant's submission, that should entail annulment of the contested decision. This case gave the Court, in particular, the opportunity to address the consequences of the Board of Appeal's failure to rule on the entirety of the action before it.

The Court observed that the appeal brought by the applicant before the Board of Appeal concerned the Opposition Division's decision as a whole, in so far as the opposition had been rejected, and considered that, since the Board of Appeal had failed to rule on the appeal before it inasmuch as the appeal related to the rejection of the opposition with regard to 'precious metals and their alloys', it breached the obligation, stemming from Regulation (EC) No 207/2009³⁹ (replaced by Regulation (EU) 2017/1001),⁴⁰ in particular the first sentence of Article 64(1) of Regulation No 207/2009 (now the first sentence of Article 71(1) of Regulation 2017/1001), to decide on the appeal before it. The Court observed that that obligation must be understood to mean that the Board of Appeal is required to rule on each of the heads of claim before it in its entirety, either by upholding it, rejecting it as inadmissible or rejecting it on substantive grounds. Since failure to meet that obligation may affect the content

^{39/} Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

^{40/} Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

of a decision of the Board of Appeal, it constitutes an essential procedural requirement, infringement of which can be raised by the Court of its own motion.

In the case that gave rise to the judgment of 21 June 2017, *GP Joule PV v EUIPO — Green Power Technologies (GPTech)* (T-235/16, [EU:T:2017:413](#)), the Court was led to recall the extent of the discretion of the Boards of Appeal of EUIPO to take into account evidence in support of an opposition that was not presented within the time limits prescribed for that purpose. The applicant took issue with the Board of Appeal for not having taken into account the evidence, presented for the first time before the Board of Appeal, that the applicant was the licensee of the two earlier marks on which the opposition had been based and for having thus upheld the decision of the Opposition Division rejecting the opposition as unfounded on the basis of Rule 20(1) of Regulation (EC) No 2868/95⁴¹ (now Article 8(1) and Article 7 of Delegated Regulation (EU) 2017/1430⁴²) as the applicant had failed to prove in due time that it was entitled to file that opposition.

The Court stated that Regulation No 207/2009 expressly provides that the Board of Appeal, when examining an appeal directed against a decision of the Opposition Division, enjoys the discretion deriving from the third subparagraph of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009 (now Article 95(2) of Regulation 2017/1001) to decide whether or not to take into account additional or supplementary facts and evidence which were not presented within the time limits set or specified by the Opposition Division. However, the Court made clear that Rule 50 of Regulation No 2868/95 cannot be interpreted as meaning that it extends the discretion of the Boards of Appeal to new evidence, but only to evidence ‘additional’ or ‘supplementary’ to relevant evidence which was lodged within the time limit set.

In this case, since no evidence of the applicant’s entitlement to file the notice of opposition had been produced before the expiry of the time limit set by EUIPO, such evidence, presented for the first time before the Board of Appeal, could not be characterised as ‘additional’ or ‘supplementary’ within the meaning of the third subparagraph of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009. Furthermore, even on the assumption that the evidence adduced by the applicant for the first time before the Board of Appeal might be characterised as ‘additional’ or ‘supplementary’ evidence, the Board of Appeal had nonetheless correctly exercised its discretion under Article 76(2) of Regulation No 207/2009. Thus, it had been entitled to refuse to take such evidence, presented after the expiry of the time limit set for that purpose by the Opposition Division, into account on the ground that the circumstances in which the applicant had presented that evidence out of time did not justify it, without examining whether such evidence was relevant and sufficient.

The question of the discretion of the Boards of Appeal to take into consideration evidence in support of an opposition that was not presented within the prescribed time limit was also central to the case that gave rise to the judgment of 12 October 2017, *Moravia Consulting v EUIPO — Citizen Systems Europe (SDC-554S)* (T-316/16, [EU:T:2017:717](#)). In that case, the applicant, which had filed an opposition against an application to register a trade mark on the basis of an alleged earlier right existing in a Member State and arising from a non-registered word mark, had adduced no evidence relating to the applicable national legislation, as a result of which its opposition had been rejected by the Opposition Division. The applicant had then provided information relating to the national legislation relevant to the trade marks at the stage of the proceedings before the Board of Appeal.

In that regard, the Court recalled that, although the third subparagraph of Rule 50(1) of Regulation No 2868/95 provides that, where the action is directed against a decision of an Opposition Division, the Board of Appeal must limit its examination of the action to facts and evidence presented within the time limits set or specified by the

^{41/} 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).

^{42/} Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017 supplementing Regulation No 207/2009 and repealing Regulations No 2868/95 and No 216/96 (OJ 2017 L 205, p. 1).

Opposition Division, unless the Board considers that ‘additional’ or ‘supplementary’ facts and evidence must be taken into account pursuant to Article 76(2) of Regulation No 207/2009, that rule cannot be interpreted as meaning that it extends the discretion of the Boards of Appeal to new evidence.

In this case, in the opposition procedure, the applicant had produced no evidence as to the content of the national law within the time limit and had not submitted a legitimate reason justifying its conduct. Furthermore, the only piece of evidence submitted by the applicant for the purpose of proving the existence, validity and scope of protection of the earlier non-registered trade mark provided no information on the use of the earlier mark relied on, nor did it contain information on the conditions required by national law. In those circumstances, the Court held that the references to the provisions of national law provided by the applicant for the first time before the Board of Appeal were not ‘additional’ or ‘supplementary’ evidence to that which had been submitted before the Opposition Division. Consequently, the Board of Appeal had not erred in law when it held that it did not have discretion to accept evidence produced for the first time before it, since such evidence was out of time.

b. Non-contractual liability

In the case that gave rise to the judgment of 17 February 2017, *Novar v EUIPO* (T-726/14, [EU:T:2017:99](#)), the Court was required to adjudicate on the applicant’s claim for compensation for material damage allegedly sustained on account of lawyers’ fees that it had incurred in an appeal against a decision of the Opposition Division of EUIPO allegedly adopted in breach of Rule 19(2)(a) of Regulation No 2868/95 (now Article 7(2)(a) of Delegated Regulation 2017/1430).

After recalling that in order for the European Union to incur non-contractual liability for the unlawful conduct of its institutions or bodies, three cumulative conditions must be satisfied, namely the conduct in question must be unlawful, actual damage must have been suffered and there must be a causal link between the alleged conduct and the damage pleaded, the Court began by examining the existence of a causal link between the allegedly unlawful conduct of EUIPO and the damage pleaded in this case.

On that basis, the Court recalled that it is apparent from settled case-law that where representation by a lawyer or adviser in the pre-litigation procedure is not mandatory, there is no causal link between the alleged damage, namely the cost of such representation, and any exceptionable conduct on the part of the EU institution or body. Although it is not possible to prohibit those concerned from seeking legal advice even at that stage, it is their own decision and the institution or agency concerned cannot be held liable for the consequences. In this instance, the Court observed, it was apparent from Article 92 of Regulation No 207/2009 (now Article 119 of Regulation 2017/2001) that representation by a lawyer before the departments of EUIPO was not mandatory for a party such as the applicant. The Court concluded that the lawyers’ fees incurred by the applicant were the result of a choice it had made and could not be directly attributed to EUIPO. There was therefore no causal link between the allegedly unlawful conduct of EUIPO and the costs of legal representation incurred by the applicant in respect of the appeal proceedings.

c. Absolute grounds for refusal

The case that gave rise to the judgment of 21 June 2017, *M/S. Indeutsch International v EUIPO — Crafts Americana Group (Representation of chevrons between two parallel lines)* (T-20/16, [EU:T:2017:410](#)) concerned the application for a declaration of invalidity of a trade mark consisting of a repeated geometric design, registration of which had been sought for ‘knitting needles’ and ‘crochet hooks’. The Board of Appeal had upheld the appeal filed against the decision of the Cancellation Division rejecting that application. According to the Board of Appeal, the contested

mark lacked distinctive character within the meaning of Article 7(1)(b) of Regulation No 207/2009 (now Article 7(1)(b) of Regulation 2017/1001). The essential issue in the case was whether, when assessing the distinctive character of the mark, the Board of Appeal had been entitled to rely, not on the mark at issue as registered, but on the forms in which it considered that the mark was actually used.

In that respect, the Court recalled that, in the light of the imperative needs of legal certainty safeguarded by the existence of the European Union Trade Mark Register, the distinctive character of a mark must be assessed as it was registered or as it appears in the trade mark application, regardless of how it is used. It emphasised that to apply Articles 7 and 8 of Regulation No 207/2009 (Article 8 now being Article 8 of Regulation 2017/1001) by taking into account, not EU trade marks as applied for or registered, but as used, would negate the function of that register as a guarantor of the certainty that must surround the precise nature of the rights that it is supposed to protect. In the light of those considerations, where the mark applied for or registered consists in a two-dimensional or three-dimensional representation of the product that it covers, its distinctive character depends on whether it departs significantly from the norm or customs of the sector and thereby fulfils its essential function of identifying the origin of the product. In that context, as regards marks consisting of the shape of an actual product, and not of an abstract form, which they designate, the competent authority may identify their essential characteristics by examining the product itself. In this case, the mark at issue as registered had the characteristics of an abstract geometric shape composed of a repetitive design consisting of two parallel lines enclosing clearly delineated chevrons, all black and white. The Court inferred from this that to rely, in the circumstances of the present case, on the fact that a pattern in the form of multicoloured chevrons appears on the surface of the applicant's goods in order to examine the distinctive character of the appearance of those goods for the purpose of Article 7(1)(b) of Regulation No 207/2009, instead of basing that examination on the mark at issue as registered, was not part of a process of identifying the essential characteristics of that mark, but rather constituted a significant alteration of those characteristics. It therefore concluded that there had been an infringement of Article 7(1)(b) of Regulation No 207/2009.

In the case that gave rise to the judgment of 14 December 2017, *bet365 Group v EUIPO — Hansen (BET365)* (T-304/16, [EU:T:2017:912](#)), the Court was required to examine the lawfulness of the decision of the Fifth Board of Appeal of EUIPO finding that the word sign BET365, registration of which had been sought by the applicant, had not acquired distinctiveness through use in a substantial part of the relevant territory in which it intrinsically lacked distinctiveness.

Recalling that, under Article 7(2) and (3) of Regulation No 207/2009 (now Article 7(2) and (3) of Regulation 2017/1001), the extrapolation of the acquisition of distinctive character through use in certain Member States to other Member States cannot be ruled out, in so far as objective and credible factors permit the view that those markets are comparable so far as the perception of the contested mark by the relevant public is concerned, the Court held that the Board of Appeal had not erred in finding that the examination of the acquisition by the contested mark of distinctive character through use should have been limited solely to EU Member States in which a large part of consumers spoke or understood English and, consequently, were able to understand the meaning of the expression 'bet365'. It considered, however, that the Board of Appeal had been wrong to exclude Cyprus and Malta from the relevant territory since English was widely spoken or understood in those two countries and since they were already members of the European Community at the time of the application to register the contested mark.

Next, the Court observed that the acquisition by a mark of distinctive character through use does not necessarily mean that it has been used independently, but may result from its use as part of another registered mark or from its use in conjunction with another registered mark, provided that, in both cases, the use made leads the relevant class of persons to perceive that the goods or services designated exclusively by the mark under examination originate from a given undertaking which uses it as part of another mark or in conjunction with another mark. There was thus no reason to consider the various uses of the element 'bet365' to be inherently incapable of helping to show that the contested mark had acquired distinctive character through use, particularly

since that mark is a word mark, the representations and uses of which cannot all be foreseen, provided that they constitute use of the contested sign as a mark.

In addition, the Court considered that the Board of Appeal had erred in law in asserting generally that the use of the contested mark as the name of an internet site could not constitute use of the mark as a trade mark. According to the Court, it is reasonable to consider that, except with regard to certain new players or betters for whom the experience is new, a customer who connects to the applicant's website at 'www.bet365.com' does not do so by chance and uses the contested mark or its derived marks to identify services offered by the applicant, as opposed to services offered by its competitors, in the same way as a customer who returns to a shop whose sign corresponds to the mark of the goods and services that he is looking for, which are sold there. Information such as the number of connections to the applicant's website, that website's ranking in terms of the number of visits in various countries or the number of times the contested mark or its derived marks were the subject of a search using internet search engines is information which can help to show that the contested mark has acquired distinctive character through use. The same may be true of extracts of pages from the applicant's website or other websites, in various languages, on which the contested mark or its derived marks appear, provided that the scope of the evidence adduced can illustrate significant use of the contested mark as a mark. Furthermore, the Court emphasised that the appearance of the element 'bet365' in the sporting press or specialist gambling and betting press, for example, in association with betting odds, a comparison of services offered by different providers, or in the context of sponsorship of sporting events which constitute the betting medium, clearly illustrate its use as a mark for the purpose of designating the origin of the services proposed or referred to, to distinguish them from services of the applicant's competitors and, as the case may be, to promote them. It followed that the Board of Appeal had erred in its legal characterisation of the facts before it when it ruled that the press articles submitted by the applicant could not, at least with regard to some of them, illustrate use of the contested mark as a mark.

Last, the Court observed that, having regard to the fact that the contested mark and its derived marks were the only ones to be used by the applicant as marks capable of identifying its gambling and betting services in general, if the figures submitted, namely turnovers, stake figures or advertising investment, could reasonably be attributed essentially to gambling and betting, they must accordingly be taken into consideration for those services. The Board of Appeal had therefore also erred in its legal characterisation of the facts by excluding that information from its assessment. In those circumstances, given the criteria for assessing whether a mark has acquired distinctive character through use, and having regard, first, to the various errors of law or of legal characterisation of the facts referred to and, second, to the considerable evidence adduced by the applicant before the Board of Appeal that might have effectively helped to show whether the contested mark had acquired distinctive character through use in the relevant territory, but which the Board of Appeal had not taken into account for that purpose, the Court concluded that the contested decision was not sufficiently substantiated by valid grounds justifying its operative provisions concerning the gambling and betting services.

d. Relative grounds for refusal

In the case that gave rise to the judgment of 7 December 2017, *Coca-Cola v EUIPO — Mitico (Master)* (T-61/16, [EU:T:2017:877](#)), an action had been brought before the Court against the decision of the Fourth Board of Appeal of EUIPO dismissing the appeal filed against the decision of the Opposition Division rejecting the opposition filed against the application for registration as a trade mark of the figurative sign Master. That decision followed on from the judgment in *Coca-Cola v OHIM — Mitico (Master)*,⁴³ whereby the Court had annulled a first decision of the Board of Appeal dismissing the appeal filed against the decision of the Opposition Division rejecting the

43/ Judgment of 11 December 2014, T-480/12, [EU:T:2014:1062](#).

opposition. The Court had the opportunity, in particular, in the context of the assessment of the 'risk of free-riding' on the earlier mark, to rule, first, on whether the use outside the European Union of the mark applied for should be taken into consideration in the light of the principle of territoriality and, second, on the possibility of adducing proof of such a risk on the basis of logical inferences.

As regards, first, whether the use outside the European Union of the mark applied for should be taken into consideration, the Court recalled that the principle of territoriality, in trade mark law, means that it is the law of the State — or of the union of States — where protection of a trade mark is sought that determines the conditions of that protection. As the intervener had filed an application for a European Union trade mark, according to the principle of territoriality it was EU law, in particular Regulation No 207/2009, that determined the conditions of that protection. According to the Court, the principle of territoriality in trade mark law does not in any way preclude taking into account instances of use of the mark applied for outside the European Union as a basis for a logical inference relating to the likely commercial use of that mark in the Union, in order to establish the existence of a risk that unfair advantage will be taken, in the Union, of the reputation of an earlier EU trade mark within the meaning of Article 8(5) of Regulation No 207/2009 (now Article 8(5) of Regulation 2017/1001). It followed, in this case, that the principle of territoriality did not preclude taking into consideration evidence relating to the actual commercial use of the mark applied for, Master, (in combination with the term 'cola') in Syria and the Middle East, such as excerpts from the website 'www.mastercola.com', which is written mainly in Arabic, for the purpose of establishing a risk that the use of that mark in the Union will take unfair advantage there of the reputation of the four earlier Coca-Cola EU trade marks.

As regards, second, the assessment of logical inferences as to the risk of free-riding in the European Union, the Court considered that it might be logically inferred from an application for registration of an EU trade mark that its proprietor intends to market its goods or services in the European Union. In the present case, the Court emphasised, it was therefore logically foreseeable that the intervener, if it were to obtain the registration of the mark applied for, would amend its website in accordance with such an intention to market its goods under that mark in the European Union. In fact, the website 'www.mastercola.com' was not static and could be amended in order to target EU consumers, in particular by adding content in one or more official languages of the Union. In the absence of any specific information as to the intervener's commercial intentions in the Union, the Court considered that the excerpts from the website 'www.mastercola.com' produced by the applicant and relating to the actual use of the trade mark applied for by the intervener outside the Union were likely to lead prima facie to the conclusion that there was a non-hypothetical future risk of unfair advantage in the Union. The Court also observed that the fact that the intervener had not provided any specific information concerning possible commercial intentions in the European Union different from those concerning third countries was not irrelevant. Consequently, the Court concluded that the actual use of the mark applied for by the intervener in a particular form and chosen by design outside the European Union might lead to a logical inference that there was a serious risk that the mark applied for would be used in the same way within the European Union as in third countries, all the more so since the intervener had expressly requested the registration of the mark applied for for use in the European Union.

In the case that gave rise to the judgment of 11 December 2017, *JT v EUIPO — Carrasco Pirard (QUILAPAYÚN)* (T-249/15, [EU:T:2017:885](#)), an action had been brought before the Court for annulment of the decision of the Board of Appeal of EUIPO annulling the decision of the Opposition Division and rejecting the opposition, on the ground that the applicant had not proved that it was the 'real' proprietor of the earlier mark on which the opposition had been based. This case originated in opposition proceedings based on an earlier non-registered figurative mark (QUILAPAYÚN) and filed against the application for registration of a trade mark identical to the earlier non-registered mark. This case gave the Court the opportunity to examine the novel question whether the capacity of co-proprietor of a trade mark is sufficient for the purpose of filing an opposition.

According to the Court, it follows from Article 8(1)(a) and (b) and (2)(c) of Regulation No 207/2009 (now Article 8(1)(a) and (b) and (2)(c) of Regulation 2017/1001), Article 41(1)(a) of Regulation No 207/2009 (now Article 46(1)(a) of Regulation 2017/1001), Rule 19(2) and Rule 20(1) of Regulation No 2868/95 that in order to give notice of opposition,

within the meaning of Article 8(1) of Regulation No 207/2009, on the basis of a well-known mark, within the meaning of Article 8(2)(c) of that regulation, the party filing the opposition must establish that the mark is well known in a Member State, within the meaning of Article 6bis of the Paris Convention for the Protection of Intellectual Property,⁴⁴ and that he is the proprietor of the mark. In that regard, the Court observed that proof of ownership of a non-registered mark corresponds to specific requirements. The applicant cannot, for example, produce a certificate of filing or registration of the mark on which the opposition is based in order to prove that he is the proprietor. He must prove that, by use of the earlier non-registered mark, he has acquired rights over that mark.

Furthermore, according to the Court, it was not apparent from any of the provisions referred to above that an opponent who files an opposition under Article 8(2)(c) of Regulation No 207/2009 must prove that he is the 'exclusive' proprietor of the earlier well-known non-registered mark on which he bases his opposition. It could be inferred from Article 41 of Regulation No 207/2009, Rule 19(2) and Rule 20(1) of Regulation No 2868/95 that the opponent is required to prove that he has acquired sufficient rights over the earlier well-known non-registered mark, within the meaning of Article 8(2)(c) of Regulation No 207/2009, to be regarded as the proprietor of that mark, which does not entail showing exclusive ownership of the mark. Rule 15(1) of Regulation No 2868/95 (now Article 2(1) of Delegated Regulation 2017/1430) provides, moreover, that 'if an earlier mark and/or an earlier right has more than one proprietor (co-ownership), the opposition may be filed by any or all of them', which allows each of the co-owners of an earlier mark to oppose the registration of a mark that is applied for.

In this case, the Court observed, if exclusive ownership of the earlier mark were required, neither the applicant nor the trade mark applicants could oppose registration of the sign at issue by a third party, unless they opposed that registration together, since they all claim ownership of that sign. In fact, the acquisition of rights by the applicant in the earlier non-registered mark would allow him to oppose registration of the mark applied for, irrespective of whether others, including the trade mark applicants, have also acquired rights in that mark from the use they have also been able to make of it. In those circumstances, the Court considered that the Board of Appeal had erred in law in requiring the applicant to prove that he was the exclusive proprietor of the earlier mark, without examining whether it was sufficient for him to be its co-owner.

3. DESIGNS

In the case that gave rise to the judgment of 16 February 2017, *Thermosiphons for radiators* (T-828/14 and T-829/14, [EU:T:2017:87](#)),⁴⁵ the Court also had the opportunity to provide clarification concerning the date on which it is appropriate to examine the individual character of a design and to determine whether there is saturation of the state of the art within the meaning of Article 6(1) of Regulation (EC) No 6/2002.⁴⁶ The applicant claimed that the Board of Appeal had erred as to when the assessment of the saturation of the state of the art is to be carried out in taking the date of delivery of the contested decisions as the correct point in time, whereas it should have been assessed by reference to the time when the application for registration of the contested designs was filed.

In that regard, the Court stated that it is in fact by reference to the date on which the application for registration of the design is filed that the individual character of the contested design must be assessed under Article 6(1) of Regulation No 6/2002 and a determination made as to whether there is a saturation of the state of the art. The

^{44/} Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised and amended.

^{45/} See also, above, the discussion of this judgment under 'V. Intellectual property – 1. Composition of the Boards of Appeal after referral'.

^{46/} Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

Court therefore found that the Board of Appeal had erred in law as regards the date by reference to which a determination is to be made as to whether there is a saturation of the state of the art.

In the case that gave rise to the judgment of 13 June 2017, **Ball Beverage Packaging Europe v EUIPO — Crown Hellas Can (Cans)** (T-9/15, [EU:T:2017:386](#)), the Court had the opportunity to provide helpful clarification as regards the nature of the registration process for Community designs, the concept of 'product' within the meaning of Article 3(a) of Regulation No 6/2002 and the extent of the description of the contested design contained in the application for registration pursuant to Article 36(3)(a) of that regulation.

First of all, the Court observed that, in so far as the definition of the subject matter of the protection afforded by the design at issue forms part of the substantive examination of the registration of the design, a position taken by EUIPO on that question during the registration process cannot bind the Board of Appeal, given the essentially formal and expeditious nature of the review carried out by EUIPO during that registration process.

Next, the Court rejected the complaint that the Board of Appeal had erred in finding that the contested design, namely the representation of three cans of different sizes, did not constitute a product within the meaning of Article 3(1) of Regulation No 6/2002. In that regard, the Court noted that the subject matter of a design can only constitute a single unit, that article expressly referring to the appearance of 'a product'. Furthermore, according to the Court, a group of articles may constitute 'a product' within the meaning of that provision if they are linked by aesthetic and functional complementarity and are usually marketed as a unitary product. Thus, the Court held that it was clear that the three cans represented in the contested design did not perform a common function in the sense of a function that could not be performed by each of them individually as is the case, for example, of table cutlery or a chess board and chess pieces.

Last, the Court observed that the description which may be contained in the application for registration cannot influence the substantive assessments relating to the novelty or individual character of the design at issue. According to the Court, that description may also not influence the question of what is the subject matter of the protection afforded by the design at issue, which is clearly connected with the assessments relating to novelty and individual character.

4. PLANT VARIETIES

In the case that gave rise to the judgment of 23 November 2017, **Aurora v CPVO — SESVanderhave (M 02205)** (T-140/15, [EU:T:2017:830](#)), an action had been brought before the Court for annulment of the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) rejecting the application for a declaration of nullity in respect of the Community plant variety right granted to the variety M 02205, a sugar beet variety. The application for a declaration of nullity was based on the claim that the variety M 02205 did not fulfil the 'distinctiveness' condition, within the meaning of Article 7(1) of Regulation (EC) No 2100/94.⁴⁷

In the first place, the Court recalled that the CPVO has a broad discretion concerning the declaration of nullity of a plant variety right. Therefore, only where there are serious doubts that the relevant conditions were fulfilled on the date of the examination provided for in Regulation No 2100/94 can a re-examination of the protected variety by way of nullity proceedings under Article 20 of that regulation be justified. According to the Court, it is apparent from the relevant rules that the notes of expression in the comparative distinctness report, on the basis of which the distinctness of a candidate variety is established, have to correspond to the notes collected following the comparative growing trials carried out in two annual growing cycles following the application for a

⁴⁷ Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

Community plant variety right for the candidate variety. In that context, the Court observed that, in this case, the applicant had been perfectly entitled to rely on the series of errors in the comparative distinctness report, which had been amended on several occasions. It therefore considered that the applicant had adduced, before the Board of Appeal, factual elements of sufficient substance to raise serious doubts as to whether the data used for one of the two reference varieties had been sourced from the official description of that variety.

In the second place, the Court recalled that the principle of examination of the facts by the CPVO of its own motion applies in proceedings before the Board of Appeal and that the Board of Appeal is bound by the principle of sound administration, pursuant to which it is required to examine carefully and impartially all the relevant factual and legal information in the case before it. In that regard, the Court observed that it had therefore been for the Board of Appeal to ensure that it had, at the time of the adoption of the contested decision, all the relevant information — namely, more specifically, the results of the comparative growing trials carried out — to be able to assess whether the finding of distinctness of variety M 02205 had been made in accordance with the applicable technical rules. In fact, the CPVO had admitted that, at the time of adoption of the contested decision, the Board of Appeal had not had those results. Consequently, the Court concluded that, by failing to carry out an appropriate examination in order to be satisfied that the distinctive character of variety M 02205 had been established on the basis of data derived from the comparative growing trials, the Board of Appeal had not duly fulfilled its obligations.

VI. COMMON FOREIGN AND SECURITY POLICY — RESTRICTIVE MEASURES

As in previous years, proceedings relating to restrictive measures in the area of the Common Foreign and Security Policy (CFSP) have developed further in 2017. A number of decisions merit particular attention.

1. UKRAINE

In the case that gave rise to the judgment of 15 June 2017, *Kiselev v Council* (T-262/15, [EU:T:2017:392](#)), the Court was required to adjudicate on the inclusion of the Head of the Russian Federal State news agency, appointed by presidential decree, on the list of persons subject to restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, on the ground that he was a central figure of the government propaganda supporting the deployment of Russian forces in Ukraine.

After noting that the restrictive measures at issue were compatible with the exemptions in relation to security laid down in Article 99(1)(d) of the Agreement on partnership and cooperation between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part,⁴⁸ the Court addressed, quite particularly, the question whether the application to the applicant's situation of the designation criterion

^{48/} Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (OJ 1997 L 327, p. 3). It should be noted that the provision in question provides for a derogation which may be invoked unilaterally by a party in order to take any measures which it considers necessary for the protection of its essential security interests, in particular 'in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

set out in the applicable provisions of EU law⁴⁹ — namely the criterion applicable to persons actively supporting actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in that State — amounted to a breach of his right to freedom of expression.

In the first place, emphasising that any restriction on freedom of expression must be provided for by law, the Court observed that the restrictive measures in question were set out in acts of general application and had, first, clear legal bases in EU law, namely Article 29 TEU and Article 215 TFEU, and, second, a sufficient statement of reasons as regards both their scope and the reasons justifying their application to the applicant. According to the Court, in view of the important role played by the media, in particular the audiovisual media, in modern society, it was foreseeable that large-scale media support for the actions and policies of the Russian Government destabilising Ukraine, provided, in particular during very popular television programmes, by a person appointed by a presidential decree as Head of the national press agency of the Russian Federation, could be covered by the criterion of ‘active support’, provided that the resulting limitations on the freedom of expression complied with the other conditions that must be satisfied in order for that freedom to be legitimately restricted.

In the second place, as regards the question whether the restrictive measures adopted pursued an objective of general interest, recognised as such by the European Union, the Court observed that, by those measures, adopted in particular in application of the criterion at issue, relating to active support, the Council had sought to exert pressure on the Russian authorities to put an end to their actions and policies destabilising Ukraine, which corresponded to one of the objectives of the CFSP.

In the third and last place, as regards the necessary and proportionate nature of the restrictive measures, the Court referred to its case-law and to that of the Court of Justice concerning the principle of proportionality and the limitations of freedom of expression and, in particular, to the principles identified in that respect in the case-law of the European Court of Human Rights. In that context, the Court observed that, in his role as a journalist, which could not be separated from his role as Head of the Russian press agency, the applicant had on several occasions addressed the situation that the Russian Government had created in Ukraine. According to the Court, it was well known that the actions and policies of the Russian Government that destabilise Ukraine were the subject of extensive media coverage in Russia and were often presented to the Russian people, through propaganda, as being fully justified. In those circumstances, and in the light of the evidence in the Council’s possession concerning the words spoken by the applicant, the adoption of restrictive measures in relation to him because of his propaganda in support of the actions and policies of the Russian Government destabilising Ukraine could not be regarded as a disproportionate restriction of his right to freedom of expression. Furthermore, observing that the applicant was a national of a third country, the Russian Federation, and was resident in that State, where he performed his professional activity, the Court held that the restrictive measures at issue — which placed restrictions on the entry into and transit through the territory of the Member States and froze his funds in the European Union — did not impair the substance of the applicant’s right to exercise his freedom of expression, in particular in the context of his professional activity in the media sector, in the country in which he resided and worked.

In the case that gave rise to the judgment of 7 July 2017, **Azarov v Council** (T-215/15, under appeal,⁵⁰ [EU:T:2017:479](#)), an action had been brought before the Court by the former Ukrainian Prime Minister against the acts whereby the Council had decided to maintain his name on the list of persons covered by the restrictive measures concerning

^{49/} Article 1(1)(a) and Article 2(1)(a) of Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16), as amended, Article 3(1)(a) of Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6), as amended.

^{50/} Case C-530/17 P, **Azarov v Council**.

persons identified as responsible for the misappropriation of Ukrainian State funds.⁵¹ The applicant claimed, in particular, that the Council had made a manifest error of assessment in deciding to extend the restrictive measures at issue, since the contested acts contained only very vague and brief statements of reasons. In his submission, the Council ought to have provided further, more detailed information.

In that regard, the Court recalled that the Council is not required to conduct, of its own initiative and as a matter of course, its own investigations or to carry out checks with a view to obtaining additional details, when it already has evidence supplied by the authorities of a third country on which to take restrictive measures vis-à-vis persons originating in that country who are the subject of judicial proceedings there. The Court made clear that, in this case, what the Council was required to ascertain was, first, to what extent the documents on which it intended to rely proved that, as indicated by the grounds for including the applicant's name on the list at issue, the applicant was the subject of criminal proceedings brought by the Ukrainian authorities in respect of acts that might be characterised as the misappropriation of State funds, and, secondly, whether those proceedings were such that the applicant's actions could be characterised as satisfying the abovementioned criterion. Only if those investigations had not been successful would it have been incumbent on the Council to investigate further. However, it was for the Council to assess, on the basis of the circumstances of the case, whether it was necessary to investigate further, in particular to seek the disclosure of additional evidence from the Ukrainian authorities if it transpired that the evidence already supplied was insufficient or inconsistent. Furthermore, when availing themselves of the opportunity which the persons concerned must be given to submit their comments on the reasons which the Council intended to use in order to maintain their names on the list at issue, those persons might submit such information, or even exculpatory evidence, which would require the Council to investigate further.

As regards the argument derived from the judgment in *LTTE v Council*,⁵² namely that the Council must, before acting on the basis of a decision of an authority of a third State, carefully verify that the relevant legislation of that State ensures protection of the rights of defence and a right to effective judicial protection equivalent to that guaranteed at EU level, first, the Court observed that, in the case that had given rise to that judgment, the restrictive measures had been adopted on the basis of Common Position 2001/931/CFSP,⁵³ adopted in the context of the fight against terrorism, which established a mechanism the effect of which was to allow the Council to include a person on a list relating to frozen funds on the basis of a decision taken by a national authority, in some cases, of a third State.

In the present case, the existence of a prior decision by the Ukrainian authorities was not one of the criteria laid down as a condition for the adoption of the restrictive measures at issue, the judicial proceedings initiated by those authorities being only the factual basis for those measures.

Second, the Court emphasised that there was in any event a considerable difference between restrictive measures which were concerned with combating terrorism and those forming part of cooperation between the European Union, on the one hand, and the new authorities of a third State, in this instance Ukraine, on the other. The fight against terrorism, to which the Council contributes by imposing restrictive measures on certain persons or

^{51/} Council Decision (CFSP) 2015/364 of 5 March 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2015 L 62, p. 25), and Council Implementing Regulation (EU) 2015/357 of 5 March 2015 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2015 L 62, p. 1).

^{52/} Judgment of 16 October 2014, T-208/11 and T-508/11, [EU:T:2014:885](#).

^{53/} Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

entities, does not necessarily form part of cooperation with the authorities of a third State which has undergone a regime that the Council has decided to support, as in this case.

Thus, if the Council's eminently political decision to cooperate with the new Ukrainian authorities so as to enable them in particular to recover any misappropriated public funds 'with a view to consolidating and supporting the rule of law' in Ukraine were subject to the condition that the Ukrainian State should, immediately after the change of regime, guarantee a level of protection of fundamental rights equivalent to that offered by the European Union and its Member States, the broad discretion enjoyed by the Council when it comes to defining the general criteria for identifying the category of persons capable of forming the subject of restrictive measures to support those new authorities would in essence be undermined.

In exercising that broad discretion, the Council must therefore be free to take the view that, following the change of regime, the Ukrainian authorities deserve to be supported in so far as they are improving democratic life and respect for the rule of law in Ukraine by comparison with the state of affairs obtaining there previously, and that one way of consolidating and supporting the rule of law is to freeze the assets of persons who have been identified as responsible for the misappropriation of Ukrainian State funds. Consequently, only if the Council's political decision to support the new Ukrainian regime, including by way of cooperation in the form of the restrictive measures at issue, proved to be manifestly erroneous, in particular because fundamental rights are being systematically violated in that country following the change of regime, could any inconsistency between the protection of fundamental rights in Ukraine and that in place in the European Union have a bearing on the legality of maintaining those measures against the applicant.

2. REPUBLIC OF TUNISIA

In the case that gave rise to the judgment of 5 October 2017, *Mabrouk v Council* (T-175/15, [EU:T:2017:694](#)), the Court was required to adjudicate on the application for annulment of the decisions whereby the Council had decided to maintain the applicant's name on the list of persons covered by the restrictive measures directed against certain persons and entities in view of the situation in Tunisia.⁵⁴ In support of his action, the applicant claimed in particular that there had been a breach by the Tunisian authorities of the obligation to adjudicate within a reasonable time in the judicial proceedings on which the Council's decision to maintain his name on the list was based and a breach by the Council itself of his right to be tried within a reasonable time.

On that point, first, the Court observed that it was for the Tunisian authorities to rule on whether, in the judicial proceedings in which the applicant was involved, there had been a breach of the principle that proceedings should be concluded within a reasonable time. It observed, however, that compliance with the principles of the rule of law and human rights, as well as respect for human dignity, were required of all actions of the European Union, including actions taken under the CFSP. The principle that proceedings should be concluded within a reasonable time formed part of the right to a fair trial, which was safeguarded by the provisions of a number of legally binding instruments of international law. In addition, the contested decisions formed part of a policy of support for Tunisia based on the objectives of promoting respect for human rights and the rule of law. The Court inferred that it could not be ruled out that, where there was objective, reliable, specific and consistent evidence such as to raise legitimate questions concerning observance of the applicant's right to have his case heard within a reasonable time by the Tunisian authorities, the Council might be required to carry out the necessary verifications. It considered, however, that that condition was not satisfied in this case.

^{54/} 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), Council Decision (CFSP) 2015/157 of 30 January 2015 amending Decision 2011/72 (OJ 2015 L 26, p. 29), and Council Decision (CFSP) 2016/119 of 28 January 2016 amending Decision 2011/72 (OJ 2016 L 23, p. 65).

Second, the Court rejected the applicant's argument that the Council had infringed Article 47 of the Charter of Fundamental Rights in that it had breached his right to have the proceedings concluded within a reasonable time by failing to take the necessary measures to ensure that the duration of the judicial proceedings concerning him in Tunisia did not exceed a reasonable period. According to the Court, Article 47 of the Charter of Fundamental Rights was applicable only to the judicial review by the EU judiciary of the asset freeze at issue. Conversely, it did not apply either to the judicial proceedings in Tunisia, which did not come under EU law, or to the contested decision, which did not emanate from a court and the subject matter of which was not of a judicial nature. The Court stated that, even if that argument might be interpreted as alleging a breach of the principle of sound administration, in any event, as the applicant had failed to establish that the judicial proceedings in Tunisia had exceeded a reasonable period, he had not been able to show that the duration of the freezing of his assets in the European Union was itself excessive.

As regards the applicant's argument that the Council had made manifest errors of assessment with regard to developments in the process of democratisation in Tunisia and the need for restrictive measures directed against Tunisian nationals responsible for the misappropriation of Tunisian State funds, the Court recalled that the Council must be allowed a broad discretion in that area, so that the legality of a measure adopted in those areas could be affected only if the measure was manifestly inappropriate. The various developments of a judicial, constitutional and electoral nature put forward by the applicant did not show that the Council had made a manifest error in its assessment of that process. Indeed, while those developments were indicative of progress, they did not allow any obvious conclusion to be drawn that that process had been successfully completed, as that process was subject to, *inter alia*, the consolidation of the rule of law and the democratic achievements of the new Tunisian constitution. The Court made clear that in any event any repeal of the restrictive measures at issue was dependent only on the completion of the judicial proceedings on which they were based, not on the successful completion of the process of transition to democracy in Tunisia, support for that process being just one of the ultimate objectives of the policy of which that asset freeze formed part, not an additional condition for maintaining the asset freeze.

VII. ECONOMIC, SOCIAL AND TERRITORIAL COHESION

The case that gave rise to the judgment of 4 May 2017, *Green Source Poland v Commission* (T-512/14, [EU:T:2017:299](#)), gave the Court the opportunity to examine the novel question of the admissibility of an action brought by an undertaking responsible for implementing a major project against a Commission decision refusing to confirm to a Member State a financial contribution from the European Regional Development Fund (ERDF) for that major project.

In the first place, as regards the first criterion of direct concern, namely that the contested EU measure must directly affect the legal situation of the individual, the Court observed that it follows from the relevant provisions of Regulation (EC) No 1083/2006⁵⁵ that it is solely in the context of the relations between the Commission and the Member State that operations are conducted by which the Commission assesses and confirms whether or not a Member State is to receive a financial contribution from the ERDF for a major project. That is in line with the fact that, according to case-law, ERDF assistance is intended as a system between the Commission and the

^{55/} Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

Member State. Furthermore, it is apparent from those provisions that it is the Member States which are responsible for the selection of operations, including major projects. The Commission is not involved in the selection of the major projects proposed to the national authorities by applicants, but merely, and only with respect to the Member States, assesses the consistency and contribution of the major projects which the national authorities have already selected and have submitted to the Commission for confirmation of whether or not a financial contribution under the ERDF will be made. In that regard, the Court continued, the reasoning set out in the judgment in *Consorzio gruppo di azione locale 'Murgia Messapica' v Commission*⁵⁶ could not be applied in this case, since the selection of the projects was not made by the Commission but was the responsibility of the national authorities alone.

Furthermore, according to settled case-law, in a decision granting EU financial assistance under the ERDF, the designation of an entity as the authority responsible for implementing the project does not mean that the entity itself is entitled to such assistance. It is the Member State, as the addressee of the decision granting ERDF financial assistance, which must be regarded as entitled to such assistance. That applies a fortiori where the ERDF assistance has not yet been granted to the Member State and, hence, where the relationship between the entity designated as responsible for implementing the project, which is responsible for the application or the beneficiary of the assistance, and the ERDF assistance is even more indirect.

As regards the deprivation of the resources necessary to implement the project, the inability to continue with the project and the obligation to bear the losses resulting from the expenditure already incurred, on which the applicant relied, the Court considered that, on the assumption that they were established, those factors were not the result either of the contested decision itself or of the provisions of EU law intended to govern its effects, but of the consequences which, within the framework of the contract, the national authorities and the applicant had attributed to that decision. In fact, the consequences and obligations flowing from the contract were interposed between the applicant's legal position and the contested decision. Thus, in accordance with the applicable national law, the applicant could, inter alia, have objected, before the competent national court, to the termination of the contract or the reimbursement requested by the national authorities under that contract, by pleading that the contested decision was invalid.

In the second place, as regards the second criterion of direct concern, namely that the contested EU measure must leave no discretion to its addressees, who are entrusted with the task of implementing it, the Court stated that the implementation of the contested decision by the Member State concerned did not entail, either by virtue of the contested decision itself or of the provisions of EU law intended to govern its effect, any consequence for the applicant, its effects being confined solely to the relationship between the European Union, in particular the ERDF, and that Member State. In those circumstances, the Court concluded that the applicant was not directly affected by the contested decision, which affected only the legal relationship between the Commission and the Member States concerned.

^{56/} Judgment of 19 May 1994, T-465/93, [EU:T:1994:56](#).

VIII. HEALTH PROTECTION

In the case that gave rise to the judgment of 26 January 2017, **GGP Italy v Commission** (T-474/15, [EU:T:2017:36](#)), an action had been brought before the Court for annulment of the Commission decision finding that the measure taken by the Latvian authorities, in accordance with Directive 2006/42/EC,⁵⁷ on the placing on the market of a lawnmower manufactured by the applicant was justified. This case, coming within the context of the ‘new approach’ directives aimed at facilitating the free movement of goods by the harmonisation of the essential requirements of health and safety protection for workers, gave the Court the opportunity to clarify, in particular, the extent of the Commission’s review as regards the triggering of the safeguard clause provided for in Article 11 of Directive 2006/42 and the nature of the measures that may be adopted in that respect. The Latvian authorities considered that the lawnmower in question did not conform to the essential requirements laid down in Directive 2006/42 because it did not comply with the 2010 version of the applicable harmonised standard. The applicant, on the other hand, claimed that the lawnmower complied with the 2006 version of that standard, to which it was possible to refer until 31 August 2013, and that, consequently, the model marketed until that date benefited from a presumption of conformity with the essential requirements laid down in Directive 2006/42.

As regards, first, the extent of the Commission’s review, the Court recalled that, in the context of the adoption of a decision based on Article 11(3) of Directive 2006/42, it was not for the Commission to review every aspect of the legality of national measures leading to the triggering of the safeguard clause provided for in that article. In that regard, Article 20 of that directive explicitly mentioned the ‘legal remedies available ... under the laws in force in the Member State concerned’, which showed, first, that it covered national measures taken on the basis of the directive and, second, that the review of those measures was the responsibility of the national courts. That article therefore did not create obligations for the Commission. In the context of the implementation of Article 11(3) of Directive 2006/42, the Commission’s primary role was to review whether the appropriate measures notified to it by a Member State were justified, from a factual and legal point of view, in order to avoid the risk that machinery could compromise, as stated in Article 11(1) of that directive, the health and safety of persons or, where appropriate, domestic animals, property or the environment. Furthermore, the Court emphasised, there was nothing to prevent the ‘appropriate measures’ which Member States must adopt and communicate to the Commission under the safeguard clause provided for in Article 11 of Directive 2006/42 from taking the form of non-unilateral measures or measures which are not directly binding. Therefore, the communication, as in the present case, of the fact that, following action taken by the national authorities, the distributor had taken voluntary measures to withdraw from the market and not to place the product in question on the market did constitute the communication of an appropriate measure capable of giving rise to a Commission decision taken on the basis of Article 11(3) of Directive 2006/42.

As regards, second, the legal force of the 2006 version of the relevant harmonised standard, the Court made clear that, under Article 7 of Directive 2006/42, it was the publication by the Commission of the reference of a harmonised standard in the *Official Journal of the European Union* that confers on it legal force allowing manufacturers of machinery or their representatives to benefit from a presumption of conformity with the essential health and safety requirements set out in that directive and covered by that published harmonised standard. The rules applicable to such publications were those applicable to acts of general application of the institutions of the Union. According to the Court, Article 7 of Directive 2006/42 referred without restriction to harmonised standards, the references of which had been published in the Official Journal, without restricting its scope and contents to harmonised standards whose references were published under that directive. That provision therefore precluded

⁵⁷ Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast) (OJ 2006 L 157, p. 24).

a finding that the publications of references of harmonised standards under Directive 98/37/EC⁵⁸ had been implicitly repealed at the same time as that directive. It followed that harmonised standards whose references had been published under Directive 98/37 fell within the scope of Article 7 of Directive 2006/42 as long as the decision giving them legal force so as to provide a presumption of conformity with the essential health and safety requirements set out in the directive applicable at the time the machinery concerned was placed on the market or entered into service, namely the publication of their reference in the Official Journal, was not explicitly repealed. The Court concluded that the applicant had therefore been justified in claiming, in essence, that the lawnmower at issue benefited from a presumption of conformity with the essential health and safety requirements set out in Directive 2006/42.

IX. CUSTOMS UNION

In the case that gave rise to the judgment of 11 December 2017, *Léon Van Parys v Commission* (T-125/16, [EU:T:2017:884](#)), an action had been brought before the Court against a Commission decision rejecting the request for remission of import duties submitted by a company that imported bananas from Ecuador. That decision had been taken after the partial annulment, in the judgment in *Firma Van Parys v Commission*,⁵⁹ of an earlier Commission decision in which the Commission had considered that the remission of import duties pursuant to Article 239 of Regulation (EEC) No 2913/92⁶⁰ was not justified in the applicant's case. The Court had considered that the Commission had not proved a lack of diligence on the applicant's part. Following that judgment, the Commission had considered it necessary to obtain further information from the customs duties and had informed the applicant that the period of nine months provided for in Article 907 of Regulation (EEC) No 2454/93⁶¹ within which the application for the remission of duties was to be processed was therefore extended until that information was received. The Commission had then adopted the contested decision rejecting the applicant's application for remission of duties. In its action, the applicant disputed the way in which the Commission had implemented the judgment in *Firma Van Parys v Commission*.⁶² It maintained, more particularly, that, on the assumption that the Commission had had a reasonable period in which to implement that judgment, that period could not in any event exceed a further time limit of nine months laid down in Article 907 du Regulation No 2454/93.

As regards the plea alleging breach of the principle of sound administration, the Court recalled, by way of preliminary point, that, following the judgment in *Firma Van Parys v Commission*,⁶³ Article 907 of Regulation No 2454/93 was no longer applicable in the procedure re-opened in order to adopt the contested decision, which was intended to replace the first decision, since according to the case-law only the reasonable period was applicable. In the light of the nature of the measures to be taken and the attendant circumstances of the case, the Commission had not complied with a reasonable period in its conduct of the procedure which had led to the adoption of the contested decision. In that connection, it was sufficient to recall that, even if the requests for

^{58/} Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1).

^{59/} Judgment of 19 March 2013, T-324/10, [EU:T:2013:136](#).

^{60/} Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

^{61/} Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1).

^{62/} Judgment of 19 March 2013, T-324/10, [EU:T:2013:136](#).

^{63/} Judgment of 19 March 2013, T-324/10, [EU:T:2013:136](#).

information sent by the Commission to the national customs authorities had been able to suspend the nine-month time limit, which was not the case as the mechanism laid down in Article 907 of Regulation No 2454/93 could not be applied again, more than 10 months had elapsed between the response of those authorities and the adoption of the contested decision. According to the Court, no measure to be taken by the Commission or which it had taken could justify such a period. While it was indeed true that the judgment in *Firma Van Parys v Commission*⁶⁴ had obliged the Commission to re-examine the evidence in the file, the Court nonetheless considered that there was no evidence that, after that judgment, the Commission had constituted a new file or a fortiori presented or discovered new facts.

As to whether the non-compliance with the reasonable time could lead to the annulment of the contested decision, the Court observed that Regulation No 2454/93 was intended to lay down certain rules the application of which aimed to lead to greater legal certainty, as was clear from its recitals, and that it laid down strict time limits to be complied with both by the applicant and by the Commission in order to process a request for remission of import duties. In that context, the Court observed that it was clear from Article 907 of Regulation No 2454/93 that, although the nine-month time limit within which the Commission must adopt its decision may be suspended in certain circumstances, the decision on the request for remission of duties must be given within the time limit laid down in the second paragraph of Article 907 of Regulation No 2454/93, it being stated that the decision-making customs authority is to grant the application pursuant to Article 909 of that regulation. Furthermore, the Court emphasised that if, in this case, the Commission had acted within the framework of Regulation No 2454/93, a decision given after the nine-month time limit, including suspensions, laid down in Article 907 of that regulation, would have had the result that the decision-making customs authority would have granted the applicant's request. The Court concluded that it was true that the system put in place, and in particular the nine-month time limit laid down in Article 907 of Regulation No 2454/93, had no longer been binding on the Commission in procedures opened under Article 266 TFEU. It noted, however, that nevertheless, by adopting the contested decision without observing a reasonable period, the Commission had disregarded the guarantees laid down in Regulation No 2454/93 and had deprived the applicant of the effectiveness of that regulation, of the possibility of obtaining a decision within the prescribed time limits, and of the guarantee that it would benefit from a favourable decision in the absence of a response within those time limits. Accordingly, the Commission had breached the reasonable time principle which, in the particular circumstances of the case, constituted a ground for annulment of the contested decision.

X. DUMPING

In the case that gave rise to the judgment of 1 June 2017, *Changmao Biochemical Engineering v Council* (T-442/12, [EU:T:2017:372](#)), the Court had received an application for annulment of Implementing Regulation (EU) No 626/2012,⁶⁵ in so far as it applied to the applicant, a company producing and exporting tartaric acid and established in China. The EU institutions had initially granted the applicant market economy treatment during the initial investigation, but had refused to grant it such treatment during the partial interim review investigation under the contested regulation. The applicant claimed that the contested regulation infringed Article 11(3) of the basic regulation,⁶⁶ in so far as there had not been a significant and lasting change in circumstances between the initial investigation

^{64/} Judgment of 19 March 2013, T-324/10, [EU:T:2013:136](#).

^{65/} Council Implementing Regulation (EU) No 626/2012 of 26 June 2012 amending Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China (OJ 2012 L 182, p. 1).

^{66/} 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).

and the interim review. In that context, the Court was required, in particular, to rule on whether, in an interim review, the institutions must establish an objective change in the factual circumstances or whether they are entitled to carry out a different assessment on the basis of pre-existing circumstances in the light of new arguments and evidence adduced by the parties.

The Court observed that, under Article 11(3) of the basic regulation, in carrying out investigations in the course of an interim review, the Commission may, in particular, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3 of that regulation. For those purposes, account is to be taken in the final determination of all relevant and duly documented evidence.

In this case the Court observed that the Council seemed to have changed its assessment even though the underlying circumstances had not necessarily changed, and concluded that the conditions laid down in Article 2(7)(c) of the basic regulation for granting market economy treatment were not fulfilled. In that regard, the Court explains that, in the course of the retrospective and prospective analysis which they must carry out for the purposes of the review, the institutions may change their assessment of the circumstances. It would be illogical if the institutions were required to apply Article 2(7)(c) of the basic regulation in a manner which proved to be incorrect in the light of the evidence adduced in the context of the interim review on the sole ground that that provision had been applied in that way during the initial investigation. Since in this instance the assessment carried out in the contested regulation had been based on factual circumstances of a lasting and non-temporary nature, in particular the distortion in the price of benzene and the absence of a refund of 17% value added tax (VAT) on the export of benzene, the Court held that the contested regulation was not contrary to Article 11(3) of the basic regulation.

The case that gave rise to the judgment of 10 October 2017, *Kolachi Raj Industrial v Commission* (T-435/15, under appeal, ⁶⁷ [EU:T:2017:712](#)) gave the Court the opportunity to clarify its case-law in anti-dumping matters, as regards the conditions for the application of Article 13(2) of the basic regulation, the provision that determines the conditions in which an assembly operation is to be considered to circumvent the measures in force. The applicant had declared that it purchased bicycle parts from Sri Lanka and China in order to assemble them into bicycles in Pakistan. The Commission had rejected, as lacking sufficient evidentiary value, the 'Form A' certificates of origin issued by the Sri Lankan authorities provided by the applicant, and had applied by analogy the criteria in Article 13(2)(b) of the basic regulation in order to verify, on the basis of the costs of manufacturing them, the origin of the parts.

In the first place, in order to clarify the respective roles of 'provenance' and 'origin' in the interpretation of Article 13(2) of the basic regulation, the Court relied on the judgment in *Starway v Council*,⁶⁸ from which it inferred that, as a general rule, although it is sufficient to refer simply to where the parts used for assembling the final products are 'from' for the purpose of applying Article 13(2)(b) of that regulation, it may be necessary, in case of doubt, to verify whether the parts 'from' a third country in actual fact originate in another country. Furthermore, relying on different language versions of the basic regulation, the Court made clear that the expression 'are from' for the purposes of Article 13(2)(a) of the basic regulation must be understood as referring to the imports concerned and, therefore, to the export country.

In the second place, the Court pointed out that, although the 'Form A' certificates of origin have evidentiary value in relation to the origin of the goods to which they relate, it is not absolute. Such a certificate, completed by a third country, cannot bind the Union authorities with regard to the origin of those goods by preventing them

^{67/} Case C-709/17 P, *Commission v Kolachi Raj Industrial*.

^{68/} Judgment of 26 September 2000, T-80/97, [EU:T:2000:216](#).

from verifying the origin by other means where there is objective, sound and consistent evidence creating a doubt as to the true origin of the goods covered by those certificates. In that regard, it is clear from the case-law that the verifications carried out after importation would in large measure be deprived of their usefulness if the use of such certificates could, of itself, justify granting a remission of customs duties. The Court also emphasised that it is clear from Article 6(8) of the basic regulation that, except in the case of non-cooperation, the information which is supplied by interested parties and upon which the Commission intends to base its findings must be examined for accuracy as far as possible. Accordingly, that provision, in like manner, justifies not only the possibility but also the duty on the part of the Commission to verify the documents submitted to it. Naturally, that duty, as far as anti-dumping is concerned, is without prejudice to the specific procedures laid down for that purpose that are available to the customs authorities.

In the third and last place, the Court held that, in applying Article 13(2)(b) of the basic regulation 'by analogy', the Commission in fact examined whether the manufacture of bicycle parts in Sri Lanka circumvented the anti-dumping measures on bicycles originating in China, which was not, however, the aim of the investigation. It was clear from the actual wording of Article 13(2)(b) of the basic regulation that it was to be applied to 'assembly operations', the 60% rule laid down in that provision thus applying to the total value of the parts of the 'assembled product'. However, it was common ground that, in the present case, the investigation was not aimed at the bicycle 'assembly operations' in Sri Lanka, nor did it target in any way bicycles 'assembled' in that country. Furthermore, as Article 13(2)(b) of the basic regulation did not constitute a rule of origin, it could not be applied 'by analogy' for the purpose of determining the origin of a product, a fortiori because the criteria laid down in that provision were substantially different from those relating to the rules of origin. It followed that in the present case the Commission had erred in law in applying by analogy Article 13(2) of the basic regulation.

XI. SUPERVISION OF THE FINANCIAL SECTOR

In the judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB* (T-122/15, under appeal, ⁶⁹ [EU:T:2017:337](#)), the Court confirmed the lawfulness of the decision whereby the European Central Bank (ECB), acting in application of Article 6(4) of the basic regulation, ⁷⁰ had classified the applicant, an investment and development bank of Baden-Württemberg (Germany), as a 'significant entity'. In consequence of that classification, that bank was subject solely to the direct supervision of the ECB rather than to shared supervision under the single supervisory mechanism (SSM), which the applicant disputed.

In the first place, the Court observed that it was clear from the structure of the basic regulation that the Council had conferred on the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of that regulation. According to the Court, the sole purpose of Article 6 of the basic regulation was to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of that regulation.

^{69/} Case C-450/17 P, *Landeskreditbank Baden-Württemberg*.

^{70/} Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

In the second place, the Court stated that it followed from the second subparagraph of Article 6(4) of the basic regulation that an institution did not need to be classified as ‘significant’ in ‘particular circumstances’, a concept which, according to Article 70(2) of the SSM Framework Regulation,⁷¹ must be interpreted strictly. In that regard, in so far as Article 70(1) refers to ‘specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of [the basic regulation]’, it necessarily followed therefrom that the only situation envisaged was that where direct prudential supervision by the ECB, implied by the classification of an entity as ‘significant’, would be less capable of ensuring achievement of the objectives of the basic regulation than direct prudential supervision of that entity by the national authorities. On the other hand, a literal interpretation of Article 70(1) of the SSM Framework Regulation does not suggest that a ‘significant entity’ should be reclassified as ‘less significant’ on the ground that direct supervision by the national authorities under the SSM would be just as capable of achieving the objectives of the basic regulation as supervision by the ECB alone.

In the third and last place, the Court stated that the interpretation of Article 70(1) of the SSM Framework Regulation in the light of the requirements of the principles of subsidiarity and proportionality cannot lead to such a situation either. In so far as the national authorities, under the SSM, are acting within the scope of decentralised implementation of an exclusive competence of the Union, the only competence liable to be affected by the exercise of direct prudential supervision by the ECB is the Member States’ competence in principle for the implementation of EU law in their legal orders, underscored in Article 291(1) TFEU. However, the preservation of that competence cannot entail an interpretation of Article 70(1) of the SSM Framework Regulation that would require a determination on a case-by-case basis in respect of an institution classified as significant under the criteria laid down in Article 6(4) of the basic regulation if its objectives might be attained just as well through direct supervision by the national authorities. In fact, such an examination would run directly counter to two factors that play a fundamental role in the logic of Article 6(4) of the basic regulation, namely, first, the principle that significant institutions come under the sole supervision of the ECB and, second, the existence of specific alternative criteria that permit the classification of the significance of a financial institution. The Court therefore held that the ECB had been correct to classify the applicant as a ‘significant entity’ and dismissed the action.

In the cases that gave rise to the judgments of 13 December 2017, *Crédit mutuel Arkéa v ECB* (T-712/15, [EU:T:2017:900](#)), and of 13 December 2017, *Crédit mutuel Arkéa v ECB* (T-52/16, [EU:T:2017:902](#)), the Court was required to rule on the actions brought against the decisions of the ECB of, respectively, 5 October 2015 setting out the prudential requirements for the Crédit Mutuel group and of 4 December 2015 setting out new prudential requirements for that group and for the entities making up that group. The applicant disputed recourse to the consolidated prudential supervision of the Crédit Mutuel group put in place by the ECB, through the intermediary of the Confédération nationale du Crédit mutuel (CNCM), on the ground that the latter is not a credit institution, that no ‘Crédit Mutuel group’ exists and that the ECB could not impose additional capital requirements on it.

As regards the action brought against the decision of 5 October 2015, the Court considered that the applicant retained an interest in bringing proceedings against that decision in order to prevent the possible annulment of the decision repealing it resulting in its producing effects again. If the decision of 4 December 2015 were to be annulled, the parties would be restored to their original position prior to its entry into force, a position which would thus be governed again by the contested decision.

As regards the two actions brought against the decision of 5 October 2015 and the decision of 4 December 2015, the Court stated that, in order to comply with the aims of the basic regulation, Article 2(21)(c) of the SSM Framework

^{71/} Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ 2014 L 141, p. 1).

Regulation and the conditions laid down in Article 10(1) of Regulation (EU) No 575/2013⁷² to which it referred must be interpreted in the light of the legislature's intention to enable the ECB to have an overall picture of all the risks likely to affect a credit institution and to avoid the fragmentation of prudential supervision between the ECB and the national authorities. As regards the specific aim of Article 10(1) of Regulation No 575/2013, the Court observed that that regulation concerned the prudential requirements applicable to credit institutions. In that context, the objective pursued by Article 10(1) of Regulation No 575/2013 was clearly apparent from its wording. It was to allow the competent authority to waive in part or in full the application of certain requirements set out in the regulation to one or more credit institutions situated in the same Member State which were permanently affiliated to a central body that supervised them and was established in the same Member State. Similarly, under Article 10(2) of that regulation, the competent authorities were able to waive the application of the same prudential requirements to the central body on an individual basis. However, in this case, the conditions laid down in Article 10(1) of Regulation No 575/2013 did not apply under that regulation for the purpose of assessing the possibility of waiving compliance with the requirements on an individual basis; they applied on account of the reference in Article 2(21)(c) of the SSM Framework Regulation for the purpose of determining whether a group subject to prudent supervision existed. It followed that, in this case, only the aims of Article 2(21)(c) of the SSM Framework Regulation were relevant to its interpretation, notwithstanding the reference therein to Article 10(1) of Regulation No 575/2013.

First of all, as regards the assertion that the CNCM was not a credit institution, the Court considered that it did not follow from the EU legislation on prudential supervision that the concept of 'central body' must be construed as meaning a body with the status of a credit institution. Next, the Court considered that Crédit Mutuel, via the CNCM, fulfilled all the conditions laid down in the EU legislation on prudential matters to be capable of being classified as a 'group' for the purposes of that legislation. Last, the Court considered that the ECB had not erred in relying on the applicant's possible departure from the Crédit Mutuel group in order to impose an additional capital requirement on it.

Thus the Court rejected the applicant's arguments alleging that the CNCM did not have the status of a credit institution, that the group was not subject to prudential supervision within the meaning of Article 2(21)(c) of the SSM Framework Regulation and Article 10 of Regulation No 575/2013 and that additional capital requirements could not be imposed, and dismissed both actions in their entirety.

XII. PUBLIC PROCUREMENT BY THE INSTITUTIONS OF THE EUROPEAN UNION

In the case that gave rise to the judgment of 4 July 2017, *European Dynamics Luxembourg and Others v European Union Agency for Railways* (T-392/15, [EU:T:2017:462](#)), the Court was required to clarify the scope of the principle of the unfettered evaluation of evidence and of the contracting authority's duty to state reasons when it considers that the successful tenderer's bid does not appear to be abnormally low.

First, the Court observed that the prevailing principle of EU law on evidence was the principle of the unfettered taking of evidence, and that the corollary of that principle was the principle of the unfettered adduction of evidence, which conferred on the parties the possibility to produce before the Court any evidence lawfully obtained that

^{72/} Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, corrigenda OJ 2013 L 208, p. 68 and OJ 2013 L 321, p. 6).

they considered relevant to support their arguments. The principles of unfettered taking and unfettered adduction of evidence must, however, be reconciled with the fundamental principles of EU law, such as the right to a fair trial and equality of arms. Thus, the unfettered taking of evidence must be reconciled with the right for each party to defend its interests irrespective of any outside influences, in particular on the part of the public, and to be protected from the inappropriate use of its evidence. The Court inferred that it followed from the principle of the freedom to adduce evidence that a party before the Court was, in principle, entitled to rely on, as evidence, documents adduced in other legal proceedings in which it had itself been a party. Furthermore, the agreement of the party from which the evidence emanated could not be a precondition for the admissibility of evidence from another case before the Court. Although the agreement of the party from which the evidence emanated could be a relevant factor for the purpose of determining whether it was appropriate to use it, to require that that agreement was obtained as a precondition to its production before the Court on pain of inadmissibility would give the party from which it emanates the power to exclude it, depriving the Court of the opportunity to rule on whether it would be appropriate to use it and, therefore, to fulfil its obligation to offer each party a reasonable opportunity to present its case, including its evidence, under conditions that would not place it at a substantial disadvantage vis-à-vis his opponent, that being the basis of the principle of equality of arms. Therefore, it was for the Court, in each case, to weigh the freedom to adduce evidence, on the one hand, and, on the other, the protection against the inappropriate use of the procedural documents of parties to legal proceedings.

In this instance, the defendant disputed the production by the applicants of a copy of the report of the evaluation committee of the European Medicines Agency (EMA); the Court pointed out that the applicants had that report because they had submitted a tender following a call for tenders for a public contract organised by the EMA and that, as an unsuccessful tenderer, they had requested the reasons for the rejection of their tender. The applicants had therefore obtained that report by lawful means. The fact that the report had then been evidence in a case that had given rise to a judgment of the Court and that the applicants had not obtained the EMA's consent to use it in the present case did not allow its use to be classified as inappropriate. Furthermore, in the light of the contents of that document and the applicants' freedom to adduce evidence, the EMA could not validly refuse its disclosure to the defendant. Accordingly, rejecting the production of that document as inadmissible would have been contrary to the proper administration of justice in that it would have unjustifiably limited the applicants' freedom to adduce evidence.

Second, the Court emphasised that the assessment by the contracting authority of the existence of abnormally low tenders is made in two stages. In the first stage, the contracting authority must determine whether the tenders submitted 'appear' to be abnormally low, that is to say, whether they contain indicia likely to arouse suspicion in that respect. That is the case, in particular, where the price proposed in a tender submitted is considerably less than that of the other tenders submitted or the normal market price. If there are no such indicia in the tenders submitted and they therefore do not appear to be abnormally low, the contracting authority may continue the evaluation and the award procedure for the contract. However, if there is such a suspicion, the contracting authority must, in the second stage, check the composition of the tender in order to ensure that it is not abnormally low. Since the obligation to state reasons must be assessed, in particular, in the light of the applicable legal rules, the existence of that examination in two stages influences the scope of the contracting authority's duty to state reasons. Thus, where a contracting authority accepts a tender, it is not required to state explicitly, in response to any request for a statement of reasons submitted to it in accordance with Article 113(2) of the Financial Regulation,⁷³ the reasons why the tender it accepted did not appear to it to be abnormally low. If that tender is accepted by the contracting authority, it implicitly, but necessarily, follows that the contracting

^{73/} 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).

authority considered that there were no indicia that that tender was abnormally low. However, such reasons must be brought to the attention of an unsuccessful tenderer which expressly requests them.

XIII. ARBITRATION CLAUSE

In the case that gave rise to the judgment of 4 July 2017, *Systema Teknolotzis v Commission* (T-234/15, [EU:T:2017:461](#)), an action had been brought before the Court by the beneficiary of a project funded by the European Union against an enforceable Commission decision ordering recovery of the sums unduly paid. The Commission claimed that the applicant's action was inadmissible on the ground that the contested decision merely confirmed its earlier decisions refusing to grant payment facilities to the applicant.

The Court observed that, where there is a contract between the applicant and an EU institution, an action may be brought before the EU judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside the contractual relationship between the parties and entailing the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority. Were the European Union judicature to hold that it had jurisdiction to adjudicate on the annulment of acts falling within purely contractual relationships, not only would it risk rendering Article 272 TFEU — under which jurisdiction may be conferred on the European Union by means of an arbitration clause — meaningless, but it would also risk, where the contract does not contain such a clause, extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party.

A decision which is enforceable within the meaning of Article 299 TFEU, such as the decision at issue in the present case, constitutes a challengeable act within the meaning of Article 263 TFEU and the merits of such a decision can be disputed only before the court with jurisdiction to annul it. The Court considered that that was the case, in particular, when an enforceable decision had been adopted for the purposes of recovering a debt stemming from a contract concluded by an institution. The adoption of an enforceable decision constitutes the manifestation of the exercise by the Commission of its public powers and definitively establishes its intention to pursue the recovery of its debts.

First of all, the Court observed that, in order for the contested decision to be treated as a purely confirmatory decision, it was necessary, in particular, for the earlier measures adopted by the Commission to be decisions open to actions for annulment. However, the Commission's refusals to grant payment facilities, which constituted the earlier measures in this instance, did not produce binding legal effects outside the contractual relationship between the Commission and the applicant. Next, those refusals did not involve the exercise of public powers conferred on the Commission and they could not therefore be classified as earlier decisions within the meaning of the case-law on purely confirmatory measures. Last, there could be no question of a circumvention of the time limit for bringing an action for annulment, since the refusals in question formed part of the contractual relationship between the Commission and the applicant and a dispute before the European Union judicature, under Article 272 TFEU, concerning contractual rights and obligations was not subject to the same procedural time limit. The Commission had therefore been incorrect to assert that the applicant's action was inadmissible.

XIV. ACCESS TO DOCUMENTS OF THE INSTITUTIONS

In 2017 the General Court had the opportunity to deliver a number of important judgments concerning access to documents. It adjudicated, in particular, on the conditions for access to documents in the administrative file in proceedings relating to abuse of a dominant position and also to those drawn up by a Member States in infringement proceedings. The Court also provided clarification concerning requests for access to documents held by the European Chemicals Agency (ECHA) in a procedure relating to a request for authorisation to use a chemical substance and to documents relating to invitations to tender pertaining to all lots covered by a call for tenders.

1. DOCUMENTS IN THE ADMINISTRATIVE FILE IN PROCEEDINGS RELATING TO ABUSE OF A DOMINANT POSITION

In the case that gave rise to the judgment of 28 March 2017, *Deutsche Telekom v Commission* (T-210/15, [EU:T:2017:224](#)), the Court was required to examine the lawfulness of a decision whereby the Commission had rejected the applicant's request for access to all the documents in the file relating to the investigation for abuse of a dominant position opened in respect of the applicant. The Commission had rejected that request in reliance on a general presumption that, in principle, the disclosure of such documents would adversely affect the commercial interests of the undertakings concerned and the protection of the purpose of inspections, investigations and audits.

The Court considered that the case-law relating to the general presumption recognised in relation to access to documents in the case file prepared in proceedings relating to cartels must be applied by analogy, and for the same reasons, to access to documents in a case file in a proceeding relating to abuse of a dominant position. In application of that case-law, the Commission is entitled to presume, without carrying out a specific and individual examination of each of those documents, that their disclosure would, in principle, undermine the protection of the purpose of inspections and investigations as well as the protection of the commercial interests of the undertakings party to the proceedings, whether regarding documents that the Commission has exchanged with the parties to the proceedings or third parties or internal documents that the Commission has drawn up in order to conduct the proceedings in the case in point.

According to the Court, as regards procedures for the application of Article 102 TFEU, that presumption may arise from Regulations No 1/2003 and No 773/2004, which specifically regulate the right to consult documents in the Commission's file relating to those procedures. In fact, generalised access on the basis of Regulation (EC) No 1049/2001⁷⁴ to the documents exchanged, in a proceeding pursuant to Article 102 TFEU, between the Commission and the parties concerned by that proceeding or third parties would jeopardise the balance which the EU legislature sought to ensure in Regulations No 1/2003 and No 773/2004 between the obligation for the undertakings concerned to submit what may be sensitive commercial information to the Commission and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission. Observing, moreover, that, having regard to the nature of the interests protected, it must be held that the existence of a general principle applied irrespective of whether

^{74/} 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).

the request for access concerned an investigation which had already been closed or one which was pending, the Court concluded, in this case, that the action must be dismissed.

2. DOCUMENTS DRAWN UP BY A MEMBER STATE IN THE CONTEXT OF A PROCEDURE FOR FAILURE TO FULFIL OBLIGATIONS

The case that gave rise to the judgment of 28 April 2017, *Gameart v Commission* (T-264/15, [EU:T:2017:290](#)), provided the Court with the opportunity to examine the novel question whether documents drawn up by a Member State in the context of a procedure for failure to fulfil obligations may be regarded as documents originating from an institution within the meaning of Article 5 of Regulation No 1049/2001, in such a way that that institution is competent to adjudicate upon the request for access to those documents, which was transferred to it by a Member State on the basis of the second paragraph of that provision. The case originated in a request submitted by the applicant to the Polish Ministry of Foreign Affairs seeking access to documents relating to procedures conducted by the Commission concerning the infringement of EU law by the Polish legislation on gaming. The request concerned copies, in the Ministry's possession, of the letters sent by the Republic of Poland to the Commission concerning those procedures. After the Ministry had forwarded that request to it, the Commission had refused access to the documents in question, relying in particular on the exception in the third indent of Article 4(2) of Regulation No 1049/2001, namely the protection of the purpose of inspections, investigations and audits. The applicant challenged that refusal and claimed that the Commission did not have competence to adopt a decision with regard to its request for access to the documents at issue, since they did not fall within the scope of Regulation No 1049/2001. In the applicant's submission, the second paragraph of Article 5 of that regulation could not apply to those documents, since that provision concerned only documents originating from EU institutions.

In that regard, the Court observed that, except in the cases specifically set out in Article 5 of Regulation No 1049/2001 and where that is imposed by the requirements of the obligation of sincere cooperation laid down in Article 4(3) TEU, requests for access to documents held by the national authorities, including when such documents originate from EU institutions, continue to be governed by the national rules applicable to those authorities and the provisions of Regulation No 1049/2001 have not replaced those rules. The Court noted that Article 5 of Regulation No 1049/2001 makes no provision for the possibility of forwarding to the Commission a request for access to documents which originate from a Member State. The wording of that article expressly states that its substantive scope is to be limited to documents 'originating' from EU institutions. Thus, the Commission was not competent to adjudicate upon the request for access to the documents at issue.

That finding could not be called into question by the argument put forward by the Commission and the interveners that the Commission was competent to examine the request for access to the documents originating from the Republic of Poland since those documents were held by the Commission within the meaning of Article 2(3) of Regulation No 1049/2001. In order for the Commission to be competent to adopt a decision granting or refusing access to a document which it holds it must receive a request for access to that document validly submitted in accordance with Article 2(4) and Article 6 of Regulation No 1049/2001 by any natural or legal person referred to in Article 2(1) and (2) of that regulation, or validly forwarded by a Member State in accordance with Article 5 of that regulation. It was clear that, in this case, the Commission had not received a valid request either from the applicant or from the Republic of Poland.

3. DOCUMENTS HELD BY THE ECHA IN THE CONTEXT OF A PROCEDURE RELATING TO AN APPLICATION FOR AUTHORISATION TO USE A CHEMICAL SUBSTANCE

In the case that gave rise to the judgment of 13 January 2017, *Deza v ECHA* (T-189/14, [EU:T:2017:4](#)), an action had been brought before the Court for annulment of decisions whereby the ECHA had authorised third parties to have access to certain information in the file submitted by the applicant in the course of the procedure provided for in Regulation (EC) No 1907/2006,⁷⁵ relating to an application for authorisation to use a chemical substance. In support of its action, the applicant relied in particular on the existence of a general presumption of confidentiality of information submitted in the context of the authorisation procedure provided for in that regulation.

On that point, the Court observed that, unlike the situations in which the Court of Justice and the General Court had accepted that the general presumptions justifying refusal of access to documents applied, Regulation No 1907/2006 expressly governed the relationship between Regulation No 1907/2006 and Regulation No 1049/2001. Article 118 of Regulation No 1907/2006 provided that Regulation No 1049/2001 was to apply to documents held by the ECHA. It did not restrict the use of the documents in the file relating to an application procedure for the use of a chemical substance. No general presumption could therefore be inferred from the provisions of Regulation No 1907/2006. It could not therefore be accepted that, in the context of an authorisation procedure provided for in Regulation No 1907/2006, the documents communicated to the ECHA were to be regarded as being, in their entirety, clearly covered by the exception relating to the protection of the commercial interests of the applicants for authorisation. Although that exception was, where relevant, applicable to some of the documents communicated to the ECHA, that was not necessarily the case with regard to all of the documents or to the entire contents of those documents. The ECHA was, at the very least, under a duty to satisfy itself that the exception did apply, by carrying out a proper, specific examination of each document, as required by the first indent of Article 4(2) of Regulation No 1049/2001.

The Court further observed that, although the principle that the public should have the widest possible access to the documents must in principle be respected with regard to the documents held by the ECHA, that principle was nonetheless subject to certain limits based on reasons of public or private interest. The Court considered, however, that in this case it did not appear that the disclosure of the mere compilation of descriptive data, which were publicly available, was sufficient to undermine the protection of the applicant's commercial interests. According to the Court, it was only if the assessments made by the applicant when compiling that information provided added value — consisting of, for example, new scientific conclusions or considerations relating to an inventive strategy which gave the undertaking a commercial advantage over its competitors — that they would then have fallen within the scope of commercial interests protected by Article 4(2) of Regulation No 1049/2001.

^{75/} 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, corrigendum OJ 2007 L 136, p. 3).

4. DOCUMENTS RELATING TO REQUESTS FOR QUOTATION PERTAINING TO ALL LOTS IN A CALL FOR TENDERS

In the case that gave rise to the judgment of 14 December 2017, *Evropaïki Dynamiki v Parliament* (T-136/15, [EU:T:2017:915](#)), the Court was required to examine the lawfulness of a decision whereby the Parliament had rejected the applicant's request for access to the documents of the Parliament relating to the requests for quotation pertaining to all lots in a call for tenders made by the Parliament. The Parliament had rejected that request, relying, in particular, on the exception to the right of access relating to the protection of commercial interests.

As regards that exception, first, the Court observed that, while it was true that the Court of Justice had recognised the existence of general presumptions of confidentiality applicable to categories of documents because of their nature in a number of cases, including where bids were submitted by tenderers in the context of the performance of public contracts,⁷⁶ in the case of requests for quotation, a general presumption that harm would be caused to commercial interests could not be based either on the case-law relating to access to the bids of tenderers or, more generally, on a line of reasoning analogous to that followed in the judgments in *Commission v Technische Glaswerke Ilmenau*,⁷⁷ concerning the procedure for review of State aid, and *Commission v Éditions Odile Jacob*,⁷⁸ concerning a merger. The cases that gave rise to those judgments had a common characteristic, namely the existence, in a specific regulatory framework distinct from Regulation No 1049/2001, of rules precisely delimiting access to the file or to the documents that had been requested, as regards both the persons and the information itself. Unlike a contract notice and a contract award notice, a request for quotation drawn up by the contracting authority in performance of a framework contract was not the subject of any particular provisions of the Financial Regulation or Delegated Regulation (EU) No 1268/2012⁷⁹ defining or specifically limiting the information contained therein that must or may be communicated by the contracting authority to the tenderers or other bidders. The view could not therefore be taken that the Financial Regulation and the Delegated Regulation contained precise rules on the communication of information contained in requests for quotation drawn up by the contracting authority in performance of a framework contract.

Second, the Court emphasised that, having regard to the nature and purpose of a request for quotation drawn up by the contracting authority in performance of a framework contract, it could not be presumed that such a document contained economic and technical information concerning the contractor or detailed its specific skill. On the contrary, a request for quotation, which was issued by the contracting authority and not by its contractors, generally included a description of the tasks which the contracting authority wished to have carried out under the framework contract which it had signed with the contractor. In principle, it was only in response to that request for quotation that the contractor would provide details of the services which it considered it could provide to the contracting authority, the profile of the experts whom it would be able to make available and the cost of its services. Furthermore, the Parliament could not argue that the disclosure of the requests for quotation would undermine its own interests, in that disclosure might reveal its 'purchasing profile' on the market. Consequently, the Parliament had not been entitled to rely on the exception to the right of access set out in the first indent of

^{76/} See, to that effect, judgments of 29 January 2013, *Cosepuri v EFSA*, T-339/10 and T-532/10, [EU:T:2013:38](#), paragraph 101, and of 21 September 2016, *Secolux v Commission*, T-363/14, [EU:T:2016:521](#), paragraph 59.

^{77/} Judgment of 29 June 2010, C-139/07 P, [EU:C:2010:376](#).

^{78/} Judgment of 28 June 2012, C-404/10 P, [EU:C:2012:393](#).

^{79/} Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of the Financial Regulation (OJ 2012 L 362, p. 1).

Article 4(2) of Regulation No 1049/2001 relating to the protection of commercial interests in order to refuse to carry out a specific, individual examination of the documents to which access had been requested.

Furthermore, as to whether a derogation from the obligation to carry out a specific, individual examination of the documents concerned could be accepted because of an unreasonable workload, the Court took care to ascertain whether in this instance the three cumulative conditions laid down in the case-law were satisfied, namely, first, whether the workload represented by the specific, individual examination of the documents requested was unreasonable, second, whether the Parliament had attempted to consult with the applicant and, third, whether it had actually envisaged alternatives to a specific, individual examination of the documents requested. The Court considered that, in the very particular circumstances of this case, in the light of the amount of work entailed, the proposal made by the Parliament and the applicant's attitude, the Parliament had been entitled to claim an unreasonable workload when refusing to carry out a specific, individual examination of all the documents requested and was not required, in the absence of other conceivable options, to set out in detail, in its decision, the reasons why those alternatives would also entail an unreasonable workload. Consequently, the Parliament had been entitled generally to refuse access to those documents and there was no need to produce a copy of the documents which it had actually examined.

XV. CIVIL SERVICE

The case-law relating to the civil service saw a number of significant developments in 2017.

In the case that gave rise to the judgment of 24 April 2017, *HF v Parliament* (T-584/16, [EU:T:2017:282](#)), the Court was required to adjudicate on an application for annulment of the decision of the Parliament not to renew the applicant's contract as a member of the contract staff for auxiliary tasks.

In that regard, the Court held that, in order for there to be a decision of the European Parliament's authority empowered to conclude contracts ('the AECE') on the renewal of a contract, such a decision must have been the result of a review by that authority of the interest of the service and that of the staff member concerned and the AECE must have made a fresh assessment by reference to the terms of the initial contract containing at the outset the date on which the contract was to end. Thus, a decision in that respect could be attributed to the administration only when it was adopted either following a procedure specifically designed for that purpose or in response to the request of the person concerned submitted pursuant to Article 90(1) of the Staff Regulations of Officials of the European Union ('the Staff Regulations') in his capacity as a person covered by the Staff Regulations.

The Court further observed that, in a situation in which the AECE decided, in so far as such an option was provided for in the Conditions of Employment of Other Servants of the European Union ('the CEOS'), not to avail itself of its option under the CEOS to extend the contract of employment of a member of staff, such a decision not to renew could be adopted only after the person concerned had been able duly to put forward his point of view, and might take the form of a simple announcement by the AECE of its intention and its reasons for not availing itself of that option, as part of a written or verbal exchange, which might even be brief. That exchange must have been initiated by the AECE, which has the burden of proof. In this instance, the Court found that the AECE had infringed the applicant's right to be heard. It considered, however, that even if the applicant had been given a formal hearing before the contested decision was adopted, in the light of the factors which she put forward at the litigation stage, the outcome for the renewal of her contract would not have been different.

In the case that gave rise to the judgment of 24 April 2017, *HF v Parliament* (T-570/16, [EU:T:2017:283](#)), an action had been brought before the Court against an alleged implied decision of the administration (in this instance, again, the Parliament's AECE) rejecting a request for assistance within the meaning of Article 24 of the Staff Regulations on psychological harassment. This case provided the Court with the opportunity to clarify the scope

of a decision of the administration to open an administrative inquiry in response to such a request submitted pursuant to Article 90(1) of the Staff Regulations, under which the administration is given a period of four months within which to reply.

After referring to the case-law which shows that the administration must act promptly where there is prima facie evidence of psychological harassment, in order to shed light on the alleged facts,⁸⁰ the Court stated that where the AECE fails to respond in any way to a request for assistance within the four-month time limit laid down in Article 90(1) of the Staff Regulations, it may be held that there has been an implied decision by that authority refusing the request for assistance. In that case, it must be presumed that that authority considered that the evidence produced in support of the request for assistance did not constitute some evidence of the reality of the alleged facts triggering the duty of assistance which, in this case, concerned the alleged disregard of Article 12a of the Staff Regulations.

The Court observed, however, that such a situation was different from the situation at issue in the present case, in which, in response to a request for assistance, the AECE had considered that it had before it sufficient evidence to warrant opening an administrative inquiry in order to establish whether the facts alleged amounted to psychological or sexual harassment within the meaning of Article 12a of the Staff Regulations. In such a situation, that inquiry must be allowed to run its course so that the administration, enlightened by the findings of the inquiry report, may adopt a definitive position in that regard and either decide to take no action in response to the request for assistance or, where the facts alleged have been established and come within the scope of Article 12a of the Staff Regulations, decide, in particular, that disciplinary proceedings are to be initiated so that, if appropriate, disciplinary sanctions may be imposed on the person alleged to be responsible. According to the Court, the very point of the administrative inquiry is to confirm or rule out the existence of psychological harassment within the meaning of Article 12a of the Staff Regulations. Accordingly, the AECE must not prejudge the outcome of the inquiry and specifically is not deemed to have adopted a decision, not even an implied decision, on the reality of the alleged harassment before it has received the results of the administrative inquiry. In that regard, the Court made clear that the administration remains under a duty to conduct the administrative inquiry through to completion, irrespective of whether the alleged harassment has ceased in the meantime, and even when the party who made the request for assistance or the alleged harasser has left the institution. However, given that, unlike in disciplinary proceedings, the Staff Regulations make no specific provision as to the time within which an administrative inquiry must be conducted by the administration, notably in cases involving psychological harassment, the fact that an administrative inquiry which had been opened in response to the request for assistance within four months after that request was made was still pending after that period had elapsed did not mean that it was possible to attribute to the administration an implied decision by which the AECE had found that the facts alleged in the request for assistance had not occurred or by which it had considered that those facts did not constitute psychological harassment within the meaning of Article 12a of the Staff Regulations.

In the case that gave rise to the judgment of 14 September 2017, *Bodson and Others v EIB* (T-504/16 and T-505/16, [EU:T:2017:603](#)), the Court was required to examine the application of the applicants, members of the staff of the European Investment Bank (EIB), for annulment of the decisions contained in their salary statements for February 2013 and subsequent months, applying to the applicants the decision of the EIB Board of Directors of 18 December 2012 and the decision of the EIB Management Committee of 29 January 2013. More particularly, the applicants claimed, by way of a plea of illegality, that those decisions, which the salary statements had applied, were illegal, on the ground that the decisions precluded the application of the method put in place by the decision of the EIB

^{80/} Judgments of 26 January 1989, *Koutchoumoff v Commission*, 224/87, [EU:C:1989:38](#), paragraphs 15 and 16; of 25 October 2007, *Lo Giudice v Commission*, T-154/05, [EU:T:2007:322](#), paragraph 136; and of 6 October 2015, *CH v Parliament*, F-132/14, [EU:F:2015:115](#), paragraph 87.

Board of Directors of 22 September 2009, which was to apply for a period of seven years, under which the yearly adjustment of the scale of basic salaries was to be calculated on the basis of the rate of inflation in Luxembourg.

In that regard, the Court began by noting that, although the EIB did not dispute that the application of the 2009 method would have resulted in a greater increase in the scale of basic salaries than that which the applicants actually received, it claimed, in particular, that that method was not binding and that in any event it had been altered by the decisions challenged by the plea.

However, the Court rejected those two arguments. As regards, first, the binding nature of the 2009 method, the Court recalled that the EIB has a discretion in establishing and unilaterally changing the components of staff remuneration and, consequently, in setting and updating the scale of basic staff salaries. It emphasised, nonetheless, that in the exercise of that discretion the EIB may determine in advance the criteria which are to apply for a given period of time to periodic adjustments of the scale of basic staff salaries and may thus commit itself to observing such criteria when making annual adjustments to the scale through the course of the relevant period. On the basis of those criteria, the Court considered that, by adopting the decision of 22 September 2009, the EIB, by a unilateral decision, had bound itself, for the period of validity of that decision, that is to say seven years, in the exercise of its discretion, to comply with the 2009 method. It could not therefore rely, in the context of the annual adjustment of the scale of basic staff salaries, on a discretion going beyond the criteria laid down in that method.

As regards, second, the alteration of the 2009 method by the decisions challenged by means of a plea, the Court observed that not only did the 18 December 2012 decision contain no provisions repealing, suspending or modifying the decision putting in place the 2009 method, but it also made no reference to that decision. The Court further emphasised that those decisions, although they had both been adopted by the same body and in accordance with the same procedure, were different in nature and had distinct purposes. The 22 September 2009 decision, for all that it had been adopted in the context of preparing the budget for 2010, was regulatory in nature and multi-annual, inasmuch as it laid down a method for framing, over a number of years, the annual adjustment of one of the components of staff remuneration, namely the scale of basic salaries. The 18 December 2012 decision, on the other hand, was essentially a budgetary measure adopting the EIB's operational plan for 2013 to 2015 and setting, in that context, the rate of the increase in the budget for staff costs for active staff members for one year, that is to say 2013. Nor was it argued that that decision contained any regulatory provisions relating to the remuneration of EIB staff. In those circumstances, the Court held that the 18 December 2012 decision could not be regarded as having modified the 2009 method. The same applied to the 29 January 2013 decision, for the same reasons and a fortiori, inasmuch as it had emanated from the Management Committee and not the Board of Directors.

The Court therefore concluded that the decisions of 18 December 2012 and of 29 January 2013 had infringed the 22 September 2009 decision and were therefore illegal. The same applied to the decisions contained in the applicants' salary statements for February 2013 and subsequent months taken on the basis of those decisions.

In the judgment of 26 October 2017, *Paraskevaidis v Cedefop* (T-601/16, [EU:T:2017:757](#)), the Court adjudicated on an action for (i) annulment of the decision of the Director of the European Centre for the Development of Vocational Training (Cedefop) of 4 November 2015 not to promote the applicant to Grade A 12 in the 2015 promotion exercise and (ii) compensation for the damage which the applicant claimed to have sustained as a result of that decision. The applicant maintained, in particular, that the contested decision was vitiated by a failure to state reasons. In that regard, he claimed, first, that the decision was simply a list of officials who had been promoted and, second, that since the decision rejecting his complaint was an implied decision, it did not contain the slightest reasoning.

The Court recalled that, although the appointing authority was not obliged to give reasons for a promotion decision, either to its addressee or to the candidates who were not promoted, it was, however, obliged to state the grounds for its decision rejecting a complaint lodged pursuant to Article 90(2) of the Staff Regulations by a

candidate who had not been promoted, the grounds for that rejection decision being deemed to be identical to the grounds for the decision against which the complaint had been made. Thus, the statement of reasons must be communicated no later than the rejection of the complaint. The Court stated, moreover, that a decision must be considered to contain a sufficient statement of reasons where it was adopted in a context known to the official concerned which allowed him to understand the scope of the measure taken concerning him. Having regard, however, to the importance of the obligation to state reasons with regard to the rights of the defence, it was only exceptionally that the context in which a decision not to promote an official had been taken, which had been implicitly upheld after a complaint had been lodged, might constitute the initial elements of a statement of reasons for that decision. Thus, the initial elements of a statement of reasons could not exist in the absence of any indication by the appointing authority concerning the applicant's specific situation and the comparison of his merits with those of other officials eligible for promotion in the light of the criteria in Article 45 of the Staff Regulations.

In this case, the Court considered that the mere presence of critical comments in the applicant's evaluation reports and in certain emails and letters, sometimes very old, relating to the applicant, had not enabled the applicant to understand how the criteria laid down in Article 45 of the Staff Regulations had been applied to his situation, justifying, on completion of a comparison of the merits of the officials eligible for promotion for the 2015 promotion exercise, the decision not to promote him. On the contrary, it was only by bringing proceedings before the Court that the applicant had been able to understand, on reading the explanations in Cedefop's defence, the way in which the criticisms against him had been taken into account in applying to his situation the criteria for evaluating the merits for promotion laid down in Article 45 of the Staff Regulations. It followed that the context in which the contested decision had been adopted could not be regarded as a statement of reasons, even an insufficient statement of reasons, for that decision. Consequently, the Court annulled the contested decision on the ground that there had been a total failure to state reasons, as such an illegality could not be made good at the stage of the judicial proceedings.

As regards the claim for compensation for the damage which the applicant claimed to have suffered as a result of the adoption of the contested decision, the Court considered that, since that decision was vitiated by a failure to state reasons and must be annulled on that ground, it was not in a position to assess the substance of the decision following an examination of the pleas relating to the substantive illegality of the decision and could not conclude that the applicant had suffered specific damage as a result of the refusal to promote him. As regards the part of the non-material damage resulting from the failure to state reasons in the contested decision, the Court considered that the applicant had been placed in a situation of uncertainty as to the reasons why he had not been promoted well beyond the period within which the answer to his complaint should have been provided, which forced him to bring judicial proceedings in order to obtain an explanation in that regard. The feelings of injustice, confusion or indeed frustration thus experienced by the applicant had caused him specific non-material damage which could not be adequately made good by the annulment of the contested decision alone. In those circumstances, the Court, assessing *ex æquo et bono* the damage suffered, considered that an award of EUR 2 000 constituted adequate compensation for the part of the non-material damage resulting from the failure to state reasons in the contested decision alleged by the applicant.

In the case that gave rise to the judgment of 5 December 2017, **Tuerck v Commission** (T-728/16, [EU:T:2017:865](#)), the Court was required to adjudicate on an application for annulment of a Commission decision confirming the transfer to the European Union pension scheme of the pension rights acquired by the applicant before she entered the service of the Union. The case allowed the Court to clarify the rules for calculating the capital to be taken into account for the purposes of recognising, in the EU pension scheme, the pension rights previously acquired by an official in a national scheme.

The applicant claimed principally that the Commission's Office for 'Administration and Payment of Individual Entitlements' (PMO) had not been entitled to deduct from the capital transferred by the Deutsche Rentenversicherung Bund (Federal Pension Insurance Office, Germany), as it had done, simple interest of 3.1% per annum in respect

of the period between the date on which the application for a transfer had been made and the date of the actual transfer. In that regard, the applicant maintained that, under Article 7(1) of the General Implementing provisions for Articles 11 and 12 of Annex VIII to the Staff Regulations,⁸¹ deduction of the amount representing capital appreciation between the date of the application for transfer and the date of the actual transfer could be made on a 'lump sum' basis only where the body with which the prior pension rights had been acquired was unable to supply the value of those rights on the date of registration of the application to transfer those rights. According to the applicant, however, the national body had in fact supplied the PMO with the value of her pension rights on the date of registration of her transfer application.

The Court considered that it was apparent from the clear and precise wording of the applicable provisions, namely Article 11(2) of Annex VIII to the Staff Regulations and Article 7(1) of the General Implementing provisions for Articles 11 and 12 of Annex VIII to the Staff Regulations, that decisions crediting pensionable years were based on the amount of transferable capital on the date of registration of the application, as supplied to the appointing authority by the competent national or international authorities, after deduction, where applicable, of the amount representing capital appreciation between the date of registration of the application and the date of actual transfer. It was also apparent from those provisions that it was only where the competent national or international body was unable to supply the value of the pension rights on the date of registration of the application that simple interest at the rate of 3.1% would be deducted from the updated capital actually transferred. Thus, the Court concluded that, in a situation where the competent national or international authorities had supplied the appointing authority with the value of the pension rights on the date of registration of the application, the appointing authority was not entitled to make any deduction from that amount and the calculation of the years of pensionable service under the Staff Regulations must therefore be made on the basis of the full amount. According to the Court, the only deduction required by the Staff Regulations was that of the amount representing capital appreciation between the date of the transfer application and the actual date of transfer of the capital updated to that date. In any event, it was not for the Commission to determine or to 'update' the actual amount of capital representing the pension rights acquired, on the date of registration of the transfer application, on the basis of the previous activities of the official concerned. Consequently, by deducting from the updated capital actually transferred simple interest of 3.1% per annum between the date on which the transfer application had been made and the date of the actual transfer, even though, in the particular circumstances of this case, the national insurance body concerned had not been unable to supply it with the value of the pension rights acquired by the applicant on the date of registration of her application, the Commission had erred in law.

In the case that gave rise to the judgment of 13 December 2017, *Arango Jaramillo and Others v EIB* (T-482/16 RENV, [EU:T:2017:901](#)), the Court was required to examine the applicants' application for, in particular, annulment of the decisions of the EIB, contained in their salary statements for February 2010, to increase their contributions to the pension scheme. Concerning the concept of a 'reasonable period' for bringing an action applicable to disputes between the EIB and its staff, this case follows on from the case that gave rise to the judgment in *Réexamen Arango Jaramillo and Others v EIB*,⁸² whereby the Court of Justice had set aside the judgment in *Arango Jaramillo and Others v EIB*.⁸³ According to the Court of Justice, that judgment had affected the coherence of EU law, in that it had interpreted the concept of a 'reasonable period' as a period of three months, and that the automatic consequence of that period being exceeded was that the action was out of time and therefore inadmissible, without the European Union judicature's needing to take into consideration the circumstances of the case.

^{81/} General implementing provisions for Articles 11 and 12 of Annex VIII to the Staff Regulations, adopted by Commission Decision C(2011) 1278 of 3 March 2011, published in Administrative Notices No 17-2011 of 28 March 2011.

^{82/} Judgment of 28 February 2013, C-334/12 RX-II, [EU:C:2013:134](#).

^{83/} Judgment of 19 June 2012, T-234/11 P, [EU:T:2012:311](#).

In that regard, the Court began by recalling that, while no provision of EU law contained any indication of the period for bringing an action applicable to disputes between the EIB and its staff, the need to reconcile the right to effective judicial protection and the requirement for legal certainty required that those disputes be brought before the Court within a reasonable period. Next, examining whether the action might be considered to have been brought within a reasonable period, the Court considered that, taking into account the particular circumstances of the case and the case-law which had established in favour of the applicants a strong presumption that the indicative period for bringing an action, namely three months plus a standard time for distance of 10 days, was reasonable, the applicants' action, which had been brought within a period of three months and 11 days, must be considered to have been brought within a reasonable period. The Court made clear, moreover, that the period for bringing an action, as established in the case-law, of three months, plus the standard time for distance of 10 days, could not apply in the present case as a limitation period, but could serve only as a relevant point of comparison. In that context, the Court noted that the EIB had put forward no argument to show that the fact that that period had been exceeded by one day (indeed by a few seconds during the night of 25 to 26 May 2010) had been sufficient to remove the 'reasonable' character from the period in question, in the sense that that difference might in fact undermine the requirement for legal certainty designed to ensure that, after a certain period has elapsed, the acts adopted by the EU bodies become definitive.

XVI. ACTIONS FOR DAMAGES

In the cases that gave rise to the judgments of 10 January 2017, *Gascogne Sack Deutschland and Gascogne v European Union* (T-577/14, under appeal, ⁸⁴ [EU:T:2017:1](#)); of 1 February 2017, *Aalberts Industries v European Union* (T-725/14, [EU:T:2017:47](#)); of 1 February 2017, *Kendrion v European Union* (T-479/14, under appeal, ⁸⁵ [EU:T:2017:48](#)); and of 17 February 2017, *ASPLA and Armando Álvarez v European Union* (T-40/15, under appeal, ⁸⁶ [EU:T:2017:105](#)), the Court adjudicated on applications under Article 268 TFEU for compensation for the harm which the applicants claimed to have sustained owing to the excessive duration of the proceedings before the General Court in various cases relating to the application of Article 101 TFEU.

The Court recalled, first of all, that the European Union may incur non-contractual liability when three cumulative conditions are fulfilled, namely (i) the conduct of the institution concerned must be unlawful, (ii) actual damage must have been suffered and (iii) there must be a causal link between the conduct and the damage pleaded.

As regards the first condition, the Court considered, in the judgment of 10 January 2017, *Gascogne Sack Deutschland and Gascogne v European Union* (T-577/14, under appeal, ⁸⁷ [EU:T:2017:1](#)), that the right to adjudication within a reasonable period had been breached as a result of the excessive length of the proceedings in the cases that gave rise to the judgments in *Groupe Gascogne v Commission and Sachsa Verpackung v Commission*.⁸⁸ In those cases the proceedings had lasted for almost 5 years and 9 months and that period could not be justified by any of the specific circumstances of those cases. In particular, the Court noted that, in the field of competition law, a

^{84/} Cases C-138/17 P, *European Union v Gascogne Sack Deutschland and Gascogne* and Case C-146/17 P, *Gascogne Sack Deutschland and Gascogne v European Union*.

^{85/} Case C-150/17 P, *European Union v Kendrion*.

^{86/} Case C-174/17 P, *European Union v ASPLA and Armando Álvarez* and Case C-222/17 P, *ASPLA and Armando Álvarez v European Union*.

^{87/} Cases C-138/17 P, *European Union v Gascogne Sack Deutschland and Gascogne* and Case C-146/17 P, *Gascogne Sack Deutschland and Gascogne v European Union*.

^{88/} Judgments of 16 November 2011, T-72/06, not published, [EU:T:2011:671](#), and of 16 November 2011, T-79/06, not published, [EU:T:2011:674](#).

field which displays a greater degree of complexity than that of other types of cases, a period of 15 months between the end of the written phase of the procedure and the opening of the oral phase of the procedure constituted in principle an appropriate period. However, a period of approximately 3 years and 10 months, that is to say, 46 months, had separated those two phases of the procedure in the cases concerned. Nonetheless, the Court considered that the parallel treatment of related cases might justify an increase in the length of the proceedings, by a period of one month per additional related case. Thus, in this instance, the parallel treatment of 12 actions brought against the same Commission decision had justified an increase of 11 months in the length of the proceedings in the cases in question. The Court concluded that a period of 26 months (15 months plus 11 months) between the end of the written phase of the procedure and the opening of the oral part of the procedure had been appropriate in order to deal with the cases concerned, given that the degree of factual, legal and procedural complexity in those cases had not justified a longer period. It followed, according to the Court, that the period of 46 months between the end of the written phase of the procedure and the opening of the oral phase of the procedure had indicated an unjustified period of inactivity of 20 months in each of the two cases concerned. Consequently, the procedure followed in the cases that gave rise to the judgments in **Groupe Gascogne v Commission and Sachsa Verpackung v Commission**⁸⁹ had infringed the second paragraph of Article 47 of the Charter of Fundamental Rights in that it had exceeded by 20 months the reasonable period for judgment, which constituted a sufficiently serious breach of a rule of EU law designed to confer rights on individuals.

On the basis of analogous reasoning, concerning in particular the period between the end of the written phase of the procedure and the opening of the oral phase, the Court made the same finding, in the judgments of 1 February 2017, **Kendrion v European Union** (T-479/14, under appeal,⁹⁰ [EU:T:2017:48](#)), and of 17 February 2017, **ASPLA and Armando Álvarez v European Union** (T-40/15, under appeal,⁹¹ [EU:T:2017:105](#)), as regards the procedure followed in the cases that had given rise to the judgment in **Kendrion v Commission**,⁹² and the judgments in **ASPLA v Commission** and **Álvarez v Commission**,⁹³ respectively.

In the judgment of 1 February 2017, **Aalberts Industries v European Union** (T-725/14, [EU:T:2017:47](#)), on the other hand, the Court rejected the assertion that there had been an infringement of the reasonable period for delivering judgment in the case that had given rise to the judgment in **Aalberts Industries and Others v Commission**.⁹⁴ While acknowledging that the proceedings in that case, which had lasted more than 4 years and 3 months, were at first sight of a very long duration, the Court nonetheless emphasised that the reasonableness of the period for delivering judgment must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity, the conduct of the parties and supervening procedural matters, and also the conduct of the competent authorities. The Court considered that the total length of the proceedings in the case in question had been justified in the light of the circumstances specific to that case and, in particular, its factual and legal complexity, the conduct of the parties and the absence of any unexplained period of inactivity at any stage of the proceedings in that case.

^{89/} Judgments of 16 November 2011, T-72/06, not published, [EU:T:2011:671](#), and of 16 November 2011, T-79/06, not published, [EU:T:2011:674](#).

^{90/} Case C-150/17 P, **European Union v Kendrion**.

^{91/} Cases C-174/17 P, **European Union v ASPLA and Armando Álvarez** and Case C-222/17 P, **ASPLA and Armando Álvarez v European Union**.

^{92/} Judgment of 16 November 2011, T-54/06, not published, [EU:T:2011:667](#).

^{93/} Judgments of 16 November 2011, T-76/06, not published, [EU:T:2011:672](#), and of 16 November 2011, T-78/06, not published, [EU:T:2011:673](#).

^{94/} Judgment of 24 March 2011, T-385/06, [EU:T:2011:114](#).

As regards the second condition that must be satisfied in order for the European Union to incur liability, the Court held, in the judgments of 10 January 2017, **Gascogne Sack Deutschland and Gascogne v European Union** (T-577/14, under appeal,⁹⁵ [EU:T:2017:1](#)), and of 1 February 2017, **Kendrion v European Union** (T-479/14, under appeal,⁹⁶ [EU:T:2017:48](#)), that the applicants had shown that they had suffered actual and certain damage as a result of paying bank guarantee charges during the period by which the reasonable time for adjudicating had been exceeded. In addition, the Court considered that the applicants had suffered non-material damage.

Last, as regards the third condition, the Court held that that consideration was also satisfied, because there was a sufficiently direct causal link between the breach of the obligation to adjudicate within a reasonable period and payment of the bank guarantee charges by the applicants during the period by which the reasonable time for adjudication had been exceeded. The Court further stated that the failure to adjudicate within a reasonable time had been such as to put the applicants in a position of uncertainty greater than that normally engendered by court proceedings. That prolonged state of uncertainty had inevitably had an impact on decision-making and the running of those companies and had therefore constituted non-material damage that also had to be made good. The Court therefore awarded the applicants compensation corresponding to the amount of the bank guarantee charges which they had paid and compensation to make good the non-material damage suffered as a result of the prolonged state of uncertainty in which they had found themselves.

The question of compensation for the damage allegedly suffered as a result of the excessive duration of the proceedings was also at the origin of the judgment of 7 June 2017, **Guardian Europe v European Union** (T-673/15, under appeal,⁹⁷ [EU:T:2017:377](#)), where the issue was the length of the proceedings before the General Court in the case relating to the application of Article 101 TFEU that had given rise to the judgment in **Guardian Industries and Guardian Europe v Commission**.⁹⁸

Adopting similar reasoning to that applied in the judgment of 10 January 2017, **Gascogne Sack Deutschland and Gascogne v European Union** (T-577/14, under appeal,⁹⁹ [EU:T:2017:1](#)), the Court held that the procedure followed in **Guardian Industries and Guardian Europe v Commission** had infringed the second paragraph of Article 47 of the Charter of Fundamental Rights in that it had exceeded by 26 months the reasonable time for adjudicating, which constituted a sufficiently serious breach of a rule of EU law intended to confer rights on individuals. According to the Court, there was a sufficiently direct causal link between the infringement of the obligation to adjudicate within a reasonable time in the case in question and the loss sustained by the applicant before judgment was given in that case, consisting in the payment of bank guarantee charges during the period corresponding to the time by which that reasonable period had been exceeded. Thus, compensation of EUR 654 523.43 was awarded to the applicant by way of reparation for the material damage caused to it by the infringement of the obligation to adjudicate within a reasonable time in the that case.

^{95/} Cases C-138/17 P, **European Union v Gascogne Sack Deutschland and Gascogne** and Case C-146/17 P, **Gascogne Sack Deutschland and Gascogne v European Union**.

^{96/} Case C-150/17 P, **European Union v Kendrion**.

^{97/} Cases C-447/17 P, **European Union v Guardian Europe** and Case C-479/17 P, **Guardian Europe v European Union**.

^{98/} Judgment of 27 September 2012, **Guardian Industries and Guardian Europe v Commission**, T-82/08, [EU:T:2012:494](#).

^{99/} Cases C-138/17 P, **European Union v Gascogne Sack Deutschland and Gascogne** and Case C-146/17 P, **Gascogne Sack Deutschland and Gascogne v European Union**.

In the case that gave rise to the judgment of 7 June 2017, **Guardian Europe v European Union** (T-673/15, under appeal, ¹⁰⁰ [EU:T:2017:377](#)), the Court was also required to adjudicate on the applicant's claim for compensation for the damage allegedly sustained as a result of the breach of the principle of equal treatment in the decision whereby the Commission had imposed a fine on it for infringement of the competition rules ¹⁰¹ and in the judgment in **Guardian Industries and Guardian Europe v Commission**. ¹⁰²

As regards, first, the existence of a sufficiently serious infringement of the principle of equal treatment in the decision whereby the Commission had imposed a fine on the applicant for infringement of the competition rules, the Court considered that the applicant could not validly maintain that the bank guarantee costs which it had paid were the direct consequence of the unlawfulness of that decision. The damage which it alleged was the direct and conclusive consequence of its own decision, following the adoption of the decision in question, not to comply with its obligation to pay the fine in full. Accordingly, the existence of a sufficiently direct causal link between the alleged sufficiently serious infringement of the principle of equal treatment in the decision and payment of bank guarantee costs was rejected. The Court further observed that it was apparent from the documents produced by the applicant that the applicant had not personally borne the burden linked to the payment of the fine imposed by the decision in question. The applicant clearly could not therefore claim that it had sustained actual and certain damage consisting in the difference between, on the one hand, the interest repaid by the Commission on the part of the fine ultimately held not to be due by the Court of Justice in its judgment in **Guardian Industries and Guardian Europe v Commission** ¹⁰³ and, on the other, the income which it could have earned if, instead of paying the sum at issue to the Commission, it had invested it in its business. As regards the non-material damage allegedly suffered, the Court stated that, even on the assumption that the alleged sufficiently serious infringement of the principle of equal treatment in the Commission decision had caused damage to the applicant's reputation, which had not been proved, it must be held that, having regard to the nature and gravity of that infringement, the non-material damage sustained by the applicant would have been sufficiently made good by the annulment of that decision and by the reduction of the amount of the fine by the Court of Justice in the judgment in **Guardian Industries and Guardian Europe v Commission**. ¹⁰⁴

As regards, second, the alleged infringement of the principle of equal treatment in the judgment of 27 September 2012, **Guardian Industries and Guardian Europe v Commission** (T-82/08, [EU:T:2012:494](#)), the Court observed that the European Union could not incur liability for the content of a judicial decision that had not been delivered by a Court of the European Union adjudicating at last instance and could therefore be subject to an appeal. The Court emphasised, moreover, that in this case the error in the judgment of the General Court had been rectified by the Court of Justice following the applicant's appeal. However, the Court made clear that that observation was without prejudice to the possibility for the applicant to seek, in exceptional cases, a finding that the European Union was liable on account of serious failures in the functioning of the judicial process, in particular of a procedural or administrative nature, affecting the activity of a Court of the European Union. However, such failures had not been alleged by the applicant in this particular case, which related to the content of a judicial decision. Consequently, the claim for compensation for the alleged damage caused by a serious infringement of the principle of equal treatment was rejected.

100/ Cases C-447/17 P, **European Union v Guardian Europe** and Case C-479/17 P, **Guardian Europe v European Union**.

101/ Commission Decision C(2007) 5791 final of 28 November 2007 relating to a proceeding under Article [101 TFEU] and Article 53 of the EEA Agreement (Case COMP/39165 – Flat glass).

102/ Judgment of 27 September 2012, T-82/08, [EU:T:2012:494](#).

103/ Judgment of 12 November 2014, C-580/12 P, [EU:C:2014:2363](#)

104/ Judgment of 12 November 2014, C-580/12 P, [EU:C:2014:2363](#).

XVII. APPEALS

Among the decisions delivered by the Appeal Chamber of the General Court in 2017, two judgments merit special mention.

In the first place, in the judgment of 27 June 2017, **Ruiz Molina v EUIPO** (T-233/16 P, [EU:T:2017:435](#)), the Court held that there was nothing to preclude the withdrawal of a lawful or unlawful administrative act which, vis-à-vis the person to whom it is addressed, primarily constituted an act adversely affecting him and incidentally created rights for him if there was no breach of his legitimate expectations and if the principle of legal certainty was not infringed. In this case, after finding that the decision to terminate the applicant's contract as a member of the temporary staff constituted primarily an administrative act adversely affecting a staff member and that it had incidentally created rights for him, the Court held, likewise, that by signing a reinstatement agreement, the staff member had shown his approval of the withdrawal of the termination decision. Consequently, the withdrawal of that decision had complied with the principle of protection of the legitimate expectation of that staff member and with the principle of legal certainty. The Civil Service Tribunal had therefore been entitled to consider that the termination decision had been withdrawn. Furthermore, as regards the legal consequences of its withdrawal, in so far as the termination decision had been deemed never to have existed, the Civil Service Tribunal had been entitled to consider that the staff member's reinstatement had had the effect of putting him back in the position in which he had been on the date on which his fixed-term contract as a temporary staff member had been terminated and not of renewing that contract for a second time.

In the second place, in the judgment of 7 December 2017, **Missir Mamachi di Lusignano and Others v Commission** (T-401/11 P-RENV-RX, [EU:T:2017:874](#)), first, the Court considered that, where an institution was liable for breach of an obligation to provide protection that had contributed to causing the specific harm that that obligation had been intended to prevent, it was appropriate to consider that this breach, even if it could not be regarded as the sole cause of the harm, might make a sufficiently direct contribution to that harm. Thus, the act of a third party, whether foreseeable or unforeseeable, might be considered by a court not to be capable of either interrupting the causal link or constituting a circumstance that wholly exonerated the institution from liability, as both causes, namely the failure on the part of the institution and the act of a third party, had contributed to the same harm. In the light of those considerations, in the exercise of its appellate jurisdiction, the Court found that, in this case, the Civil Service Tribunal, without erring in law, had in essence applied the theory of equivalent conditions and, furthermore, the causal link established by the Civil Service Tribunal in the judgment at first instance between the Commission's negligence and the damage sustained had not been called into question by the Commission. Thus, the Court considered that the Civil Service Tribunal had not erred when it had held that, where a fault consisted in a breach of an obligation of protection that had contributed to causing the specific damage that the obligation had been intended to prevent, even though the institution could not be held to be the person mainly responsible for the harm, that institution must be regarded as having jointly caused the damage. Second, the Court considered that a common general principle arose from the laws of the Member States, namely that in circumstances comparable to those of the present case, the national courts recognised that the joint authors of the same damage were jointly and severally liable, as the courts considered it fair that the injured person should not have to determine the proportion of damage for which each of the co-authors had been liable and to bear the risk that the person against whom it took proceedings would be insolvent. In the light of those considerations, the Court held that Civil Service Tribunal had erred in law in limiting to 40% the Commission's contribution to making reparation for the material damage suffered by the four children of the deceased official who had been the victim of a breach of an obligation of protection. Accordingly, the Court ordered the Commission to pay, jointly and severally, the sum of EUR 3 million, less the payments made pursuant to the Staff Regulations which were considered to form part of that amount that had been or would be paid to the four children of the deceased official. Third, the Court held that the laws of the Member States did not disclose a common general principle that, in circumstances comparable to those of the present case, a national court would have awarded compensation

for the alleged non-material damage suffered by the deceased official. Fourth, the Court held that the laws of the Member States gave rise to a common general principle that, in circumstances comparable with those of the present case, the presence of a scheme guaranteeing the automatic payment of benefits to those entitled to claim under a deceased official (i.e. his descendants) did not preclude those persons, if they considered that the damage sustained was not covered or was not fully covered by that scheme, from also obtaining compensation for their non-material harm by means of an action before a national court. In that regard, the laws of the Member States also contained a common general principle that the non-material damage sustained could not be the subject of double compensation. Accordingly, it was for the Court to ascertain the extent to which a scheme guaranteeing the automatic payment of benefits covered in whole, in part or not at all the non-material damage suffered by those entitled to claim, before determining the amount of the compensation for that damage. Last, it followed from the laws of the Member States that the principle of joint and several liability applicable to the material damage in circumstances comparable to those of the present case also applied to the non-material damage. The Court held that that reasoning was also valid for the deceased official's relatives in the ascending line.

XVIII. APPLICATIONS FOR INTERIM MEASURES

In 2017 the Court received 47 applications for interim measures, representing a significant increase by comparison with the number of applications lodged in 2016 (34). Likewise, the number of orders made and cases closed also rose significantly. In 2017, 56 orders were made,¹⁰⁵ as against 25 in 2016, and 53 cases were closed, as against 20 in 2016. In eight cases the Court made a suspension order under Article 157(2) of the Rules of Procedure.

The orders made cover a wide range of matters, but mainly competition law and State aid (four cases), restrictive measures (eight cases), public contracts (six cases) and institutional law (11 cases). As regards the proceedings concerning institutional law, it should be noted that a relatively significant number of cases related to the status of Members of the European Parliament¹⁰⁶ and the funding of foundations or European parties.¹⁰⁷

105/ This figure corresponds to all orders made by the judge hearing applications for interim measures, excluding orders stating that there is no need to adjudicate and orders removing the case from the register, but including orders made pursuant to Article 157(2) of the Rules of Procedure and the made by the Vice-President of the General Court, replacing the President of the General Court in accordance with Article 157(4) in conjunction with Article 11 of the Rules of Procedure, namely the orders of 10 April 2017, *Exaa Abwicklungsstelle für Energieprodukte v ACER* (T-123/17 R, not published, [EU:T:2017:277](#)); of 21 April 2017, *Post Telecom v EIB* (T-158/17 R, not published, [EU:T:2017:281](#)); and of 26 September 2017, *Wall Street Systems UK v ECB* (T-579/17 R, not published, [EU:T:2017:668](#)) — under appeal, Case C-576/17 P(R), *Wall Street Systems UK v ECB*.

106/ Orders of 16 February 2017, *Troszczynski v Parliament*, T-626/16 R, not published, [EU:T:2017:92](#); of 16 February 2017, *Le Pen v Parliament*, T-140/16 R II, not published, [EU:T:2017:93](#); of 16 February 2017, *Gollnisch v Parliament*, T-624/16 R, not published, [EU:T:2017:94](#); of 6 April 2017, *Le Pen v Parliament*, T-86/17 R, not published, [EU:T:2017:270](#); of 26 June 2017, *Jalkh v Parliament*, T-27/17 R, not published, [EU:T:2017:431](#); and of 26 June 2017, *Jalkh v Parliament* T-26/17 R, not published, [EU:T:2017:432](#).

107/ Orders of 14 March 2017, *ADDE v Parliament*, T-48/17 R, not published, [EU:T:2017:170](#), and of 4 July 2017, *Institute for Direct Democracy in Europe v Parliament*, T-118/17 R, not published, [EU:T:2017:465](#).

The President of the General Court granted two applications for suspension of operation, by orders of 18 May 2017, **RW v Commission** (T-170/17 R, not published, [EU:T:2017:351](#)),¹⁰⁸ and of 25 August 2017, **Malta v Commission** (T-653/16 R, not published, [EU:T:2017:583](#)).

By the order of 18 May 2017, **RW v Commission** (T-170/17 R, not published, [EU:T:2017:351](#)),¹⁰⁹ the President of the General Court ordered suspension of the operation of the Commission decision whereby the applicant, an official aged 63 years, had, pursuant to Article 42c of the Staff Regulations, been placed on leave in the interests of the service and at the same time had automatically been retired.

Article 42c was inserted in the Staff Regulations when they were last amended by Regulation (EU, Euratom) No 1023/2013.¹¹⁰ After examining the condition relating to a prima facie case, the President of the General Court concluded that the applicant had shown that there was a significant legal issue the solution to which was not immediately obvious and which merited a detailed examination that must be the subject of the main proceedings. At first sight, both the wording of Article 42c of the Staff Regulations and the general structure of the provisions governing retirement and the definitive termination of duties argued in favour of Article 42c of the Staff Regulations being interpreted as meaning that an official who had already reached the minimum retirement age, in accordance with Article 23 of Annex XIII to the Staff Regulations, could not be placed on leave in the interests of the service and at the same time be automatically retired.

By the order of 25 August 2017, **Malta v Commission** (T-653/16 R, not published, [EU:T:2017:583](#)), the President of the General Court ordered suspension of the operation of the Commission decision whereby the Commission, on the basis of Regulation No 1049/2001 and following the confirmatory application submitted by Greenpeace, had granted access to documents originating with the Republic of Malta concerning fishing for bluefin tuna.

After examining the condition relating to a prima facie case, the President of the General Court concluded that the Republic of Malta had established the existence of difficult legal and factual issues, the solution to which was not immediately obvious and called for a detailed examination that must be the subject of the main proceedings.

In his analysis, the President of the General Court rejected at the outset the Commission's argument that the Republic of Malta's pleas were inadmissible on the ground that they did not fall within the substantive exceptions to access to documents set out in Article 4(1) to (3) of Regulation No 1049/2001. In that regard, the President of the General Court observed that the Commission's argument would result in its decisions relating to access to documents not being, to a large extent, amenable to judicial review and that such an outcome appeared, prima facie, to be irreconcilable with the settled case-law of the Court of Justice, according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights.

As regards the claim alleging infringement of Article 113 of Regulation (EC) No 1224/2009¹¹¹ concerning some of the documents referred to in the contested decision, the President of the General Court pointed out that Article 113 of Regulation No 1224/2009 contains no reference to Regulation No 1049/2001 and provides, in paragraphs

108/ The appeal was dismissed by order of 10 January 2018, **Commission v RW**, (C-442/17 P(R), not published, [EU:C:2018:6](#)).

109/ *Ibid.*

110/ 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).

111/ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1).

2 and 3, that the data exchanged between Member States and the Commission are not to be transmitted to persons other than those in Member States or EU institutions whose functions require them to have such access and are not to be used for any purpose other than that provided for in that regulation. The President of the General Court concluded that the manner in which Regulations No 1224/2009 and No 1409/2001 must be reconciled was not immediately obvious, which was particularly true given that Article 113 of Regulation No 1224/2009 was a sector-specific rule adopted a number of years after the entry into force of Regulation No 1049/2001.

As regards the argument alleging that the Commission had failed to examine with due diligence the scope of the request for access to documents and that it had identified 121 documents during the confirmatory stage as falling under that request, the President of the General Court concluded that it could not be excluded that the sending of all documents originating from the Republic of Malta relating to bluefin tuna would be outside the scope of the request for access to documents and therefore indicated the existence of a difficult factual issue, the solution to which was not immediately obvious and merited a detailed examination, which could not be carried out by the judge hearing the application for interim measures, but must be the subject of the main proceedings.

Among the cases in which the application for interim measures was rejected, mention should be made, in particular, of the series of cases relating to the employment of assistants of the Members of the Parliament ('MEPs') and the cases relating to the auctioning of transport capacity of the OPAL pipeline.

In the cases that gave rise to the orders of 16 February 2017, *Troszczyński v Parliament* (T-626/16 R, not published, [EU:T:2017:92](#)); of 16 February 2017, *Le Pen v Parliament* (T-140/16 R II, not published, [EU:T:2017:93](#)); of 16 February 2017, *Gollnisch v Parliament* (T-624/16 R, not published, [EU:T:2017:94](#));¹¹² and of 6 April 2017, *Le Pen v Parliament* (T-86/17 R, not published, [EU:T:2017:270](#)), a number of MEPs had sought suspension of the operation of the decisions of the Secretary-General of the Parliament ordering recovery from them, by way of set-off, of the sums unduly paid by way of parliamentary assistance expenses: monthly deduction of 50% of the parliamentary allowance, monthly deduction of 100% of the general expenditure allowance and deduction of 50% of the subsistence allowance.

In order to show that the condition relating to urgency was satisfied, the applicants had argued, in particular, that recovery by set-off would not allow them to exercise their parliamentary mandate effectively and independently.

The President of the General Court rejected the four applications for interim measures, stating that it had not been shown that the deductions adversely affected the effective exercise of the mandate as an MEP in such a way as to establish urgency. In that regard, he observed that it followed both from the rules applicable to MEPs and from the Parliament's practice that recovery by set-off required a weighing-up of, on the one hand, the institution's duty to recover the sums unduly paid and, on the other, the obligation to ensure that the MEP concerned would be able to exercise his mandate effectively. In those circumstances, the fact that the Parliament had recovered the sums in question by set-off could not in itself be regarded as an act that would adversely affect the effective exercise by the applicants, in complete independence, of their mandate as MEPs.

The President of the General Court observed, next, that, as regards the monthly deduction of 50% of the parliamentary allowance, the applicants had failed to explain how that reduction would have had the effect of preventing them from exercising to the full their parliamentary duties. As regards the monthly deduction of 100% of the general expenditure allowance, the President of the General Court noted that the MEPs concerned (Mr Jean-Marie Le Pen, Mr Bruno Gollnisch and Ms Marine Le Pen) had not claimed that the standard allowance was in reality, in part, disguised remuneration. Thus, because MEPs were allowed to claim reimbursement of expenditure actually incurred, which ensured that there would be no obstacle to the effective exercise of their mandate, it

^{112/} The appeal was dismissed by order of 6 July 2017, *Gollnisch v Parliament* (C-189/17 P(R), not published, [EU:C:2017:528](#)).

could not be concluded that the monthly deduction of 100% of the general expenditure allowance would adversely affect the effective exercise of their mandate as MEPs. Likewise, because MEPs were allowed to claim reimbursement of the expenditure actually incurred, the President of the General Court found that the deduction of 50% of the subsistence allowance would also not adversely affect the effective exercise of their mandate as MEPs.

In the cases that gave rise to the orders of 21 July 2017, *Polskie Górnictwo Naftowe i Gazownictwo v Commission* (T-130/17 R, [EU:T:2017:541](#)); of 21 July 2017, *Poland v Commission* (T-883/16 R, EU:T: 2017:542); and of 21 July 2017, *PGNiG Supply & Trading v Commission* (T-849/16 R, [EU:T:2017:544](#)), the President of the General Court examined the applications for suspension of operation of the Commission's decision to open to competition 50% of the unused capacity of the OPAL pipeline, the eastern on-shore section of the Nord Stream 1 pipeline used to transport natural gas from Russia to western Europe via the Baltic Sea.

After noting that two contracts concluded by Gazprom, namely a transit contract for the transport of natural gas via the Polish section of the Yamal-Europe pipeline to supply the western European markets (including the Polish market) and a contract concluded with PGNiG Supply & Trading GmbH for deliveries of natural gas, were applicable until 2020 and the end of 2022 respectively, the President of the General Court concluded that the use of the transport capacity of the Polish section of the Yamal-Europe pipeline and Gazprom's deliveries to the Polish market were, *prima facie*, guaranteed until those years. Accordingly, even if the harm alleged by the Republic of Poland and the two applicant companies were shown to the requisite standard to be certain, that harm could not occur, at the earliest, until those contracts had expired. Given the average length of proceedings before the General Court, the judgments on the substance in those cases would probably be delivered during 2019.

As regards the argument that the contested decision permitted the conclusion of private-law contracts, the annulment of which would no longer have been possible even if the decision were subsequently annulled, the President of the General Court observed that, in such circumstances, remedies would be available against the implementation of those measures.

Consequently, the President of the General Court dismissed the applications for suspension of operation, as the applicants had not succeeded in adducing sound evidence that they could not wait for the outcome of the main proceedings without incurring serious and irreparable damage of contents.

C/ACTIVITY OF THE REGISTRY OF THE GENERAL COURT IN 2017

By Mr Emmanuel COULON, Registrar of the General Court

The Registry of the General Court, situated at the heart of the administration of justice, has, this year once more, been at the service of a changing court. The General Court is enlarging and changing in step with the implementation of the reform of the judicial architecture of the Court of Justice of the European Union, with the aim of doubling, in three successive phases, the number of judges of the General Court by 2019.¹ Proceedings before the General Court are becoming more varied and, in some respects, increasingly complex. It is in this context that the Registry has made the changes which will enable it to continue to perform the tasks entrusted to it and successfully to complete the first two phases of the reform.

The 2017 results are positive for the General Court. The challenges presented by the first two phases of the reform have been met. Although the number of cases submitted (917) remained slightly higher than the number of cases closed (895), which explains the small increase in the number of pending cases (1 508), the duration of proceedings has continued to decrease while, as the percentage of judgments entirely or in part set aside by the Court of Justice shows, the quality of the decisions has been maintained.

Keen to make optimal use of the 72 budgetary posts which it has held since 1 January 2016 and as an integral part of the life of the General Court, the Registry has contributed to this success and it can be stated with satisfaction that, at the end of 2017, the results show that the Registry fulfilled the tasks entrusted to it by the relevant provisions and by the General Court itself, while observing the requirements of a fair hearing.

The Registry has once again provided decisive judicial and administrative assistance to the General 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 General Court under the authority of its President and with the assistance of the departments of the Court of Justice of the European Union.

Those results are undoubtedly the fruit of the contribution, which must be applauded, of the men and women who make up the Registry. Consistent in its daily dedication, the staff of the Registry has directed all its efforts to working effectively with all the actors involved.

The activities of the Registry have been achieved with rigour, a sure sense of the general interest, an ambition to provide an exemplary service in the interests of justice and a constant concern to optimise the Court's time. The Registry has always tried to deal with the pleadings within an appropriate time and has continued to develop a system to identify proceedings of excessive length and to alert the persons concerned so that they may remedy the situation.

^{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) and 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).

I. ORGANISATIONAL IMPLICATIONS OF THE ENTRY INTO OFFICE OF TWO NEW JUDGES

Two new judges were appointed and entered into office at the General Court in 2017 as part of the second phase of the reform. This second phase, which included the appointment of seven additional judges to the General Court and the transfer to the General Court of the power to rule at first instance in disputes between the European Union and its servants, is therefore complete. The appointment of the judge still missing for completion of the composition of the judicial body of 47 judges, as provided for in Article 48 of the Protocol on the Statute of the Court of Justice of the European Union, will be made at the appropriate time as part of the first phase.²

The Irish and Belgian judges were appointed on 29 March and 6 September 2017 respectively and were sworn in on 8 June and 4 October 2017 respectively. From 44 judges, the number of judges of the General Court has been increased, following those appointments, to 46.

Although the arrival of two new judges was not comparable with that of the 22 new judges which took place during 2016, certain measures were still necessary for their integration, and that of their staff, to be successful.

After each entry into office, the General Court assigned each new judge to a chamber, created new case portfolios and reallocated the cases among the judges. In accordance with the Rules of Procedure of the General Court, the Registry informed the parties in the cases concerned and published the decisions taken by the General Court assigning the judges to chambers in the *Official Journal of the European Union*.³ The Registry accordingly updated all internal databases when each reallocation of cases was made.

The entry into office and the installation of new judges, and the staff of their chambers, in premises equipped for that purpose have also required the administrative assistance of the Registry. That has meant both preparatory work with the departments of the Court of Justice of the European Union, a specific introduction and support for the persons concerned and strict monitoring of staff assignment.

II. TASK OF ASSISTING THE GENERAL COURT

Background

In 2017, the Registry performed its task of assisting the General Court by handling 917 applications initiating proceedings. At 98 cases, most of which form part of a series of cases in which the legality of decisions relating to the resolution scheme adopted by a Spanish bank, Banco Popular Español, SA, is called into question, this year disputes in the banking and financial sector have become the second most common subject of litigation after that of intellectual property (298 cases). At 86 cases, the number of incoming staff cases has decreased in

^{2/} At 31 December 2017, a judge from among the 12 additional Judges whose appointment was provided for as part of the first phase of the reform was still to be appointed.

^{3/} Decisions of the General Court of 8 June 2017 (OJ 2017 C 213, p. 2) and of 4 October 2017 (OJ 2017 C 382, p. 2) concerning the assignment of judges to chambers.

comparison with previous years (167 cases in 2015 and 117 cases in 2016).⁴ Each of these three areas of litigation (among the 45 areas covering the cases currently pending) has specific features which have required the Registry to apply specific ways of handling them during the past year.

In addition, the Registry has registered 55 0700 procedural documents in 22 languages (of the 24 languages of the case provided for in the Rules of Procedure), handled 4 449 pleadings (other than applications) produced in pending cases, implemented the decisions taken by the chambers of the General Court, in the form of measures of organisation of procedure or measures of inquiry and issued 1 485 notices to the *Official Journal of the European Union*.

It is, of course, not possible to state here all the information allowing the measure of the work done by the Registry of the General Court to be taken; identifying some of them, in particular the statistics, does, however, enable the size of its workload to be seen:

- the 9 756 procedural documents filed include 565 applications for leave to intervene (a number unprecedented in the history of the Court) and 212 requests for confidential treatment vis-à-vis the parties or the public;
- the archives of cases under examination represent 652 linear metres of files of documents;
- a number of appeals have been lodged, sometimes involving 1 000 or more appellants, requiring the Registry to make extensive checks;
- the conduct of the proceedings involving groups or series of cases has required coordination both within the Registry itself, having regard to the multiple languages of the cases, and with the chambers of the Court, for the processing of applications for time extensions, joinder, leave to intervene and possible confidential treatment in each of those cases;
- the Registry provided its service for hearings in 390 cases, some of which were conducted over a full day or several days;
- the Registry provided its service for 405 chamber conferences;
- hundreds of measures of organisation of procedure and dozens of measures of inquiry have been decided upon or ordered as regards, in particular, the production of documents which had been claimed to be confidential.

Furthermore, the logistical support provided by the Registry in various forms (coordination assistance, documentation, notification of procedural case-law, management of information systems, production of statistics) has enabled the General Court to work in the best possible conditions again this year, in particular by contributing to the quality of the decisions taken by the President of the General Court and the chambers of the Court or by assisting the Vice-President in performance of the task of supporting consistency of the case-law, with which he was entrusted in September 2016.

^{4/} In 2015, staff cases were brought before the Civil Service Tribunal. In 2016, those cases were brought before the Civil Service Tribunal until the dissolution of that court and, from 1 September 2016, before the General Court.

Digitisation of the stages of the General Court's procedure

In performing its task of assisting the General Court, the Registry has been able to continue to benefit, during the past year, from the digitisation of almost all the stages of the General Court's procedure, including exchanges, internally, with the judges' chambers and, externally, with the representatives of the parties. This digitisation was, moreover, extended in 2017 to the transmission by the European Union Intellectual Property Office (EUIPO) of files of proceedings before the Board of Appeal. The provision of information was further improved over the past year thanks to the availability of a modernised version of the 'Electronic file' IT application for cases.

That digitisation has most certainly enabled the Registry, in everyone's interest, to be relieved of repetitive tasks, giving it the means not only to personalise to a greater extent the response expected from it but also to concentrate its resources on the matters that actually so warrant.

In respect of internal communication between the Registry and the chambers of the General Court's judges, the success of digital transmission sheets ⁵ must be highlighted once again following the third 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' chambers. Digitisation means, furthermore, that communications are fully traceable and that activity can be quantified. In 2017, the Registry sent 12 930 sheets to chambers in connection with cases in progress. That information alone shows a substantial increase in communication between the Registry and the chambers, the increase being around 19% compared with 2016.

Communication with the representatives of the parties is now for the most part carried out by means of e-Curia, ⁶ an application common to the institution's Courts. 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 having an account giving access to it. In 2017, 83% of the procedural documents lodged with the General Court were lodged by this electronic means (compared to 76% in 2016), corresponding to 805 768 pages. ⁷

All Member States and 3 707 lawyers and agents now have an e-Curia account.

Although the success of the e-Curia computer application is undeniable, it is clear that the fact that 17% of procedural documents are still lodged in paper form does mean that it is not possible to reap the full practical benefits of this application, in particular by avoiding the administration of paper and electronic formats in parallel. It should be noted that, during 2017, after a training initiative by the Registry, the Single Resolution Board (SRB) has agreed to request the opening of an account for access to e-Curia and thereby has made possible the e-service of hundreds of procedural documents.

The development of the e-Curia application is ongoing, but progress remains slow. Therefore, resolute action will be taken by the Court in 2018 in order to attain the objective of 100% of procedural documents being lodged by means of that application.

^{5/} Communication between the Registry and the chambers of the General 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.

^{6/} 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).

^{7/} By extrapolation, the number of pages of procedural documents lodged with the General Court in 2017 was around one million.

Implementation of the 2015 procedural arsenal

2017 was the second full year of implementation of the Rules of Procedure which entered into force on 1 July 2015.

The objectives pursued of simplification and rationalisation may objectively be regarded as having been attained. The procedural instruments adopted by the General Court in 2015 have been used in full and are perfectly suited to the specific features of cases brought before it.

The lessons learned which merit a mention are:

- confirmation of the significant reduction in the number of orders prepared by the Registry (317 as against 521 in 2015),⁸ despite the high number of ongoing cases;
- development of the resolution of direct actions by judgment without a hearing,⁹ this possibility having been applied on 54 occasions (and on 152 occasions in intellectual property cases);
- confirmation that the new language arrangements applicable to intellectual property cases have avoided a considerable number of interventions by the Registry, as well as decisions of the Presidents of the chambers, and have led to the near disappearance of observations on the language of the case (22 as against 279 in 2015);

the fact that the absence of a second exchange of pleadings in intellectual property cases has not led to an increase in the number of applications for a hearing to be held and has contributed to a reduction in the average duration of proceedings in these cases disposed of by judgment.

In addition, the rule providing that, where the defendant lodges a plea of inadmissibility or of lack of competence, a decision on the application to intervene is not to be given until after a decision on the plea has been given has freed the Court from having to rule in a significant number of applications of that kind where the plea was upheld. Finally, and in an entirely different area, namely that of the Civil Service, the General Court has set in motion a number of amicable dispute settlement procedures, some of which have been successful.

However, it should be noted that the number of applications needing to be put into order because they did not comply with the formal requirements, which had reduced in 2016, has increased again across all categories of cases.

Unquantifiable and constant assistance

The Registry has assisted all the formations of the General Court in their daily work, as well as staff of the chambers which they comprise. As a result, they have been able, this year as well, to rely on the constant availability of the persons working in the department and on their expertise in the field of procedural technique. It has been noted that the greater number of judges and their staff, resulting from the implementation of the reform, has very significantly increased the number of internal requests to the Registry. At the same time, showing its flexibility, the Registry has continued to look for synergies and efficiency by seeking adaptability to circumstances and improvements in its working methods.

^{8/} Since 1 July 2015, certain decisions previously taken in the form of orders (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 in the case file.

^{9/} 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.

Finally, the Registry, via its representatives, continues to provide assistance to the General Court's Committee responsible for matters of procedure and to other committees and fora on the basis of the needs or the nature of the work.

III. ADMINISTRATIVE ASSISTANCE

As an administrative department, this year once again the Registry has responded to the various external calls made upon it. Steps have also been taken, in coordination with various other administrative departments of the institution, with a view to:

- complying with the new regulatory requirements to protect the environment (the 'EMAS' scheme — Eco-Management and Audit Scheme) by various measures to raise awareness and a series of very specific measures, in particular abandoning the distribution in paper format of documents produced by the Registry (various sets of statistics and the judicial calendar) in favour of electronic distribution;
- giving full effect to the arrangements made to ensure the protection of particularly sensitive data generated in cases brought before the Court (data whose disclosure would harm the security of the European Union or that of one or more of its Member States or the conduct of their international relations);
- ensuring compliance with the rules on the protection of personal data.

Furthermore, the functioning of the Registry and its follow-up of cases has drawn the attention of the European Court of Auditors in a procedure examining performance as regards case management at the Court of Justice of the European Union. In particular, the auditors checked whether the relevant procedures enabled cases to be handled efficiently and whether the time taken to resolve them could be improved further. The Special Report was adopted by the Court of Auditors in September 2017, then presented and discussed before the European Parliament and the Council of the European Union.

Among the proposed improvements, the Court of Auditors has put forward the possibility of installing an integrated IT system to support case management. In that regard, as stated by the Court of Justice of the European Union in its observations, that invitation to study or to establish, in the light of the specificities of the judicial work and characteristics of each of the courts, an integrated IT system was welcomed. For its part, the Registry of the General Court is a support department which wishes to complete the digitisation of the court proceedings in order to reap the expected benefits thereof. Thus, in 2018 it will continue to work to that end with the departments of the Court of Justice of the European Union and will continue its efforts towards the integration of case management and the modernisation of the system of communication with the parties.

In addition, the Registry has implemented various measures of cooperation in a spirit of dialogue and receptiveness. Thus, in October 2017, in continuation of the communication that began in June 2014 with the Registry of the Boards of Appeal of EUIPO, a meeting was organised between representatives of the two Registries and between representatives of the departments responsible for new technologies. That meeting enabled the relevant departments not only to have constructive and beneficial contact, but also to finalise projects agreed upon in previous meetings and to provide paths for future consideration.

In the same vein, the Registry has also drawn its inspiration from other courts. In that respect, the visit of a delegation from the Registry to the Registry of the European Court of Human Rights has led to a better understanding of the functioning of the latter, in particular as regards the IT tools at its disposal.

Finally, the Registry is, of course, a department which listens to the representatives of the parties, the lawyers and agents of the Member States and the institutions, with whom it maintains a daily and direct dialogue.

An increase in the Registry's workload, resulting from the increase in the number of judges in 2016 and 2017 and from the increase in litigation and the number of cases under investigation, is to be anticipated, notwithstanding the potential effects of a transfer of powers from the Court of Justice to the General Court, which is apparently not ruled out by the report sent on 14 December 2017 to the European Parliament, the Council and the Commission.¹⁰ Accordingly, the Registry will continue to adapt and be organised in such a way as to meet future events with serenity.

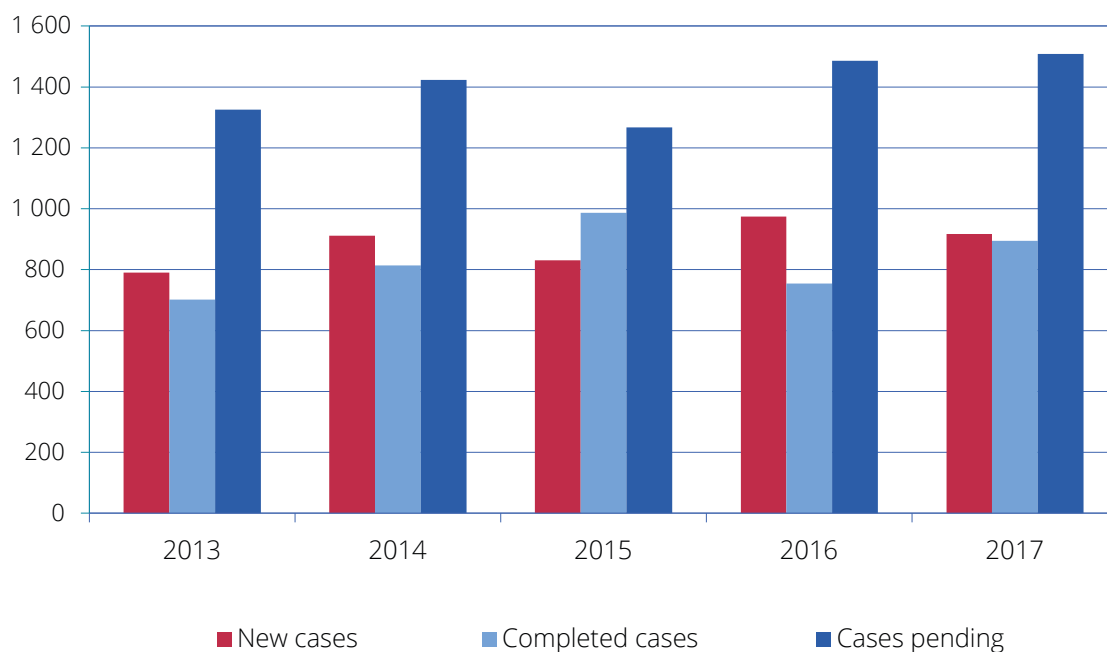
^{10/} Report on possible changes to the distribution of competence for preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union, produced pursuant to Article 3(2) of Regulation 2015/2422.



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I. GENERAL ACTIVITY OF THE GENERAL COURT — NEW CASES, COMPLETED CASES, CASES PENDING (2013–17) ^{1 2}



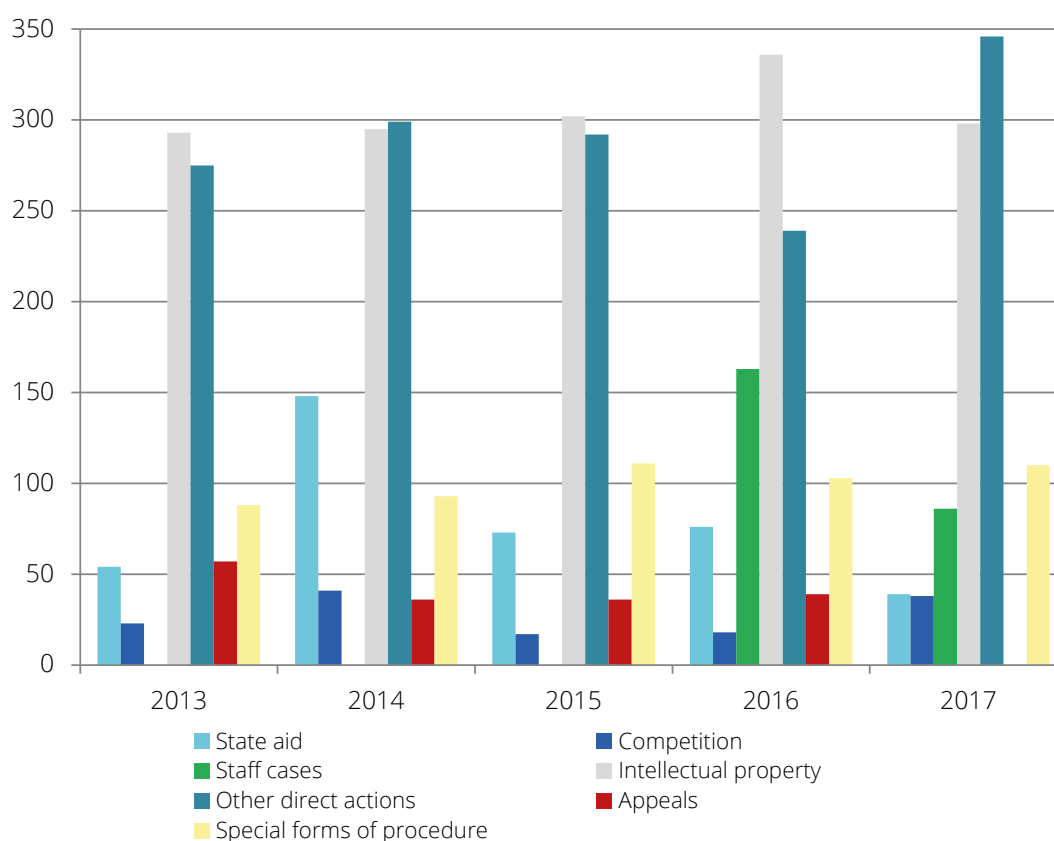
	2013	2014	2015	2016	2017
New cases	790	912	831	974	917
Completed cases	702	814	987	755	895
Cases pending	1 325	1 423	1 267	1 486	1 508

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); failure to adjudicate (Article 165 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.

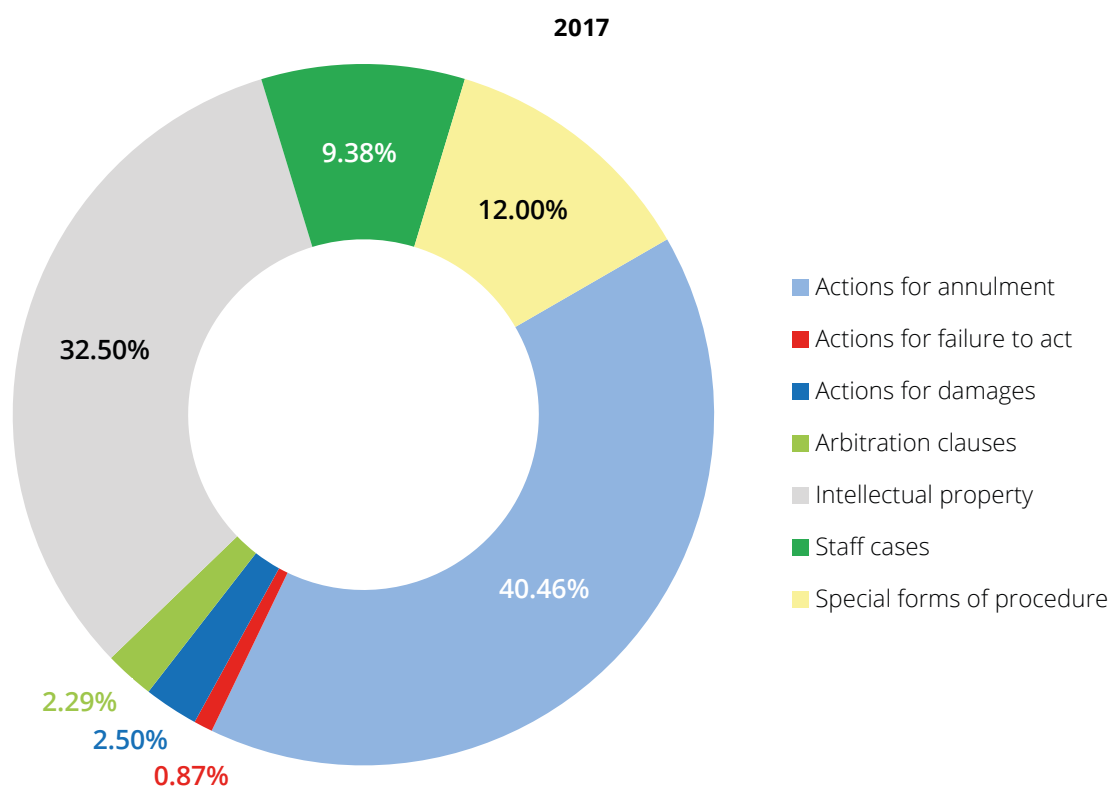
II. NEW CASES — NATURE OF PROCEEDINGS (2013–17)



	2013	2014	2015	2016 ¹	2017
Appeals	57	36	36	39	
Competition	23	41	17	18	38
Intellectual property	293	295	302	336	298
Other direct actions	275	299	292	239	346
Special forms of procedure	88	93	111	103	110
Staff cases				163	86
State aid	54	148	73	76	39
Total	790	912	831	974	917

^{1/} On 1 September 2016, 123 staff cases and 16 special forms of procedure in that area were transferred to the General Court.

III. NEW CASES — NATURE OF PROCEEDINGS (2013–17)

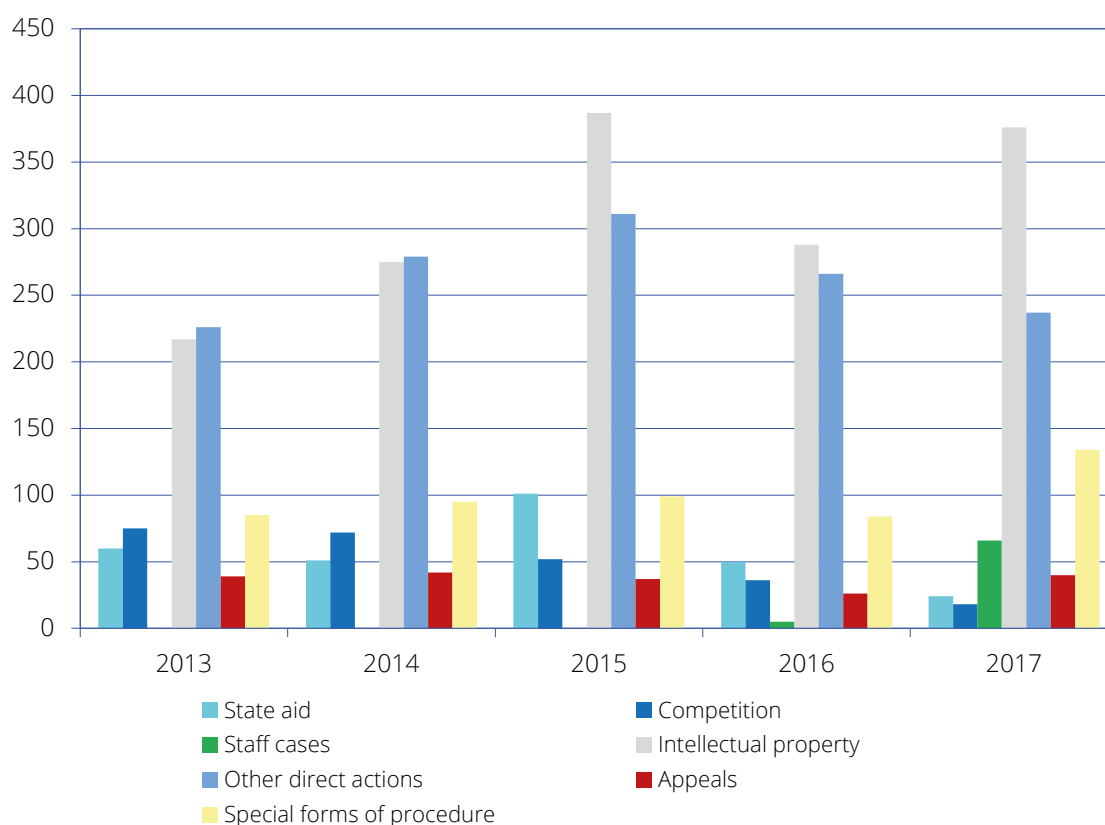


	2013	2014	2015	2016	2017
Actions for annulment	319	423	332	297	371
Actions for failure to act	12	12	5	7	8
Actions for damages	15	39	30	19	23
Arbitration clauses	6	14	15	10	21
Intellectual property	293	295	302	336	298
Staff cases				163	86
Appeals	57	36	36	39	
Special forms of procedure	88	93	111	103	110
Total	790	912	831	974	917

IV. NEW CASES — SUBJECT MATTER OF THE ACTION (2013–17)

	2013	2014	2015	2016	2017
Access to documents	20	17	48	19	25
Accession of new States	1				
Agriculture	27	15	37	20	22
Approximation of laws	13		1	1	5
Arbitration clause	6	14	15	10	21
Area of freedom, security and justice	6	1		7	
Association of the Overseas Countries and Territories	1				
Citizenship of the Union		1			
Commercial policy	23	31	6	17	14
Common fisheries policy	3	3		1	2
Common foreign and security policy	2			1	
Company law		1	1		
Competition	23	41	17	18	38
Consumer protection	1	1	2	1	
Culture	1			1	
Customs union and Common Customs Tariff	1	8		3	1
Economic and monetary policy	15	4	3	23	98
Economic, social and territorial cohesion	3	3	5	2	3
Education, vocational training, youth and sport	2		3	1	
Employment	2				
Energy	1	3	3	4	8
Environment	11	10	5	6	8
External action by the European Union		2	1	2	2
Financial provisions (budget, financial framework, own resources, combating fraud)		4	7	4	5
Free movement of capital			2	1	
Free movement of goods	1		2	1	
Freedom of establishment		1			
Freedom of movement for persons			1	1	1
Freedom to provide services		1		1	
Industrial policy		2			
Intellectual and industrial property	294	295	303	336	298
Law governing the institutions	44	67	53	52	65
Public health	5	11	2	6	5
Public procurement	15	16	23	9	19
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	12	3	5	6	10
Research and technological development and space	5	2	10	8	2
Restrictive measures (external action)	41	69	55	28	27
Social policy		1		1	
Social security for migrant workers	1				
State aid	54	148	73	76	39
Taxation	1	1	1	2	1
Tourism	2				
Trans-European networks	3				2
Transport	5	1			
Total EC Treaty/TFEU	645	777	684	669	721
Special forms of procedure	88	93	111	103	110
Staff Regulations	57	42	36	202	86
OVERALL TOTAL	790	912	831	974	917

V. COMPLETED CASES — NATURE OF PROCEEDINGS (2013–17)



	2013	2014	2015	2016	2017
Appeals	39	42	37	26	40
Competition	75	72	52	36	18
Intellectual property	217	275	387	288	376
Other direct actions	226	279	311	266	237
Special forms of procedure	85	95	99	84	134
Staff cases				5	66
State aid	60	51	101	50	24
Total	702	814	987	755	895

VI. COMPLETED CASES — SUBJECT MATTER OF THE ACTION (2017)

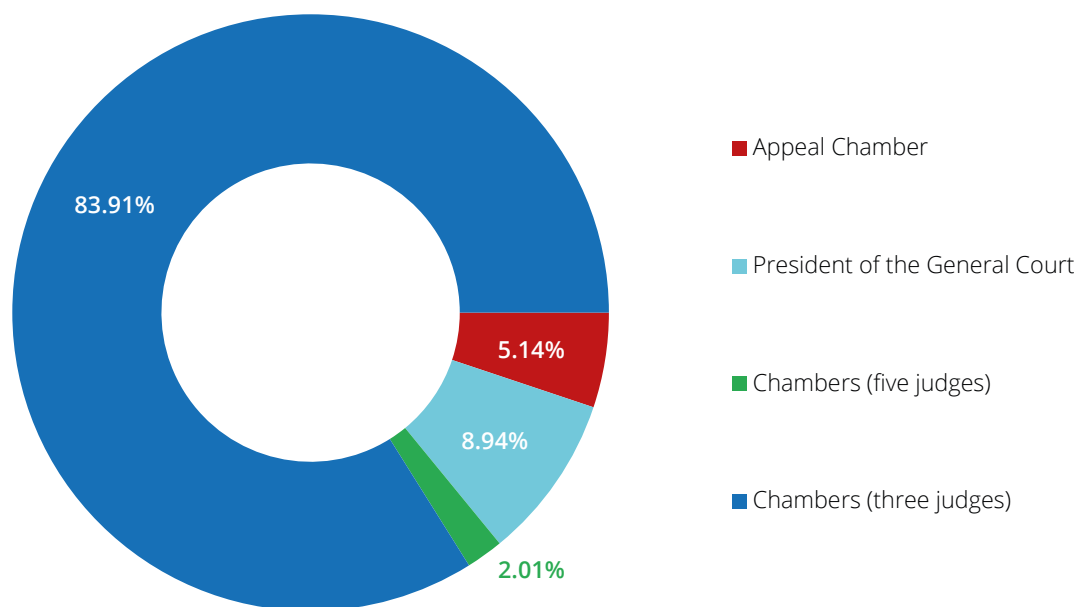
	Judgments	Orders	Total
Access to documents	7	7	14
Agriculture	14	7	21
Approximation of laws		2	2
Arbitration clause	11	6	17
Area of freedom, security and justice		5	5
Commercial policy	13	2	15
Common fisheries policy		2	2
Competition	11	7	18
Consumer protection	1		1
Culture		1	1
Customs union and Common Customs Tariff	3	2	5
Economic and monetary policy	3	3	6
Economic, social and territorial cohesion	2	10	12
Energy	1	2	3
Environment		3	3
External action by the European Union	1	3	4
Financial provisions (budget, financial framework, own resources, combating fraud)	2	3	5
Freedom of movement for persons		2	2
Intellectual and industrial property	272	104	376
Law governing the institutions	25	29	54
Public health		3	3
Public procurement	12	4	16
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	3	1	4
Research and technological development and space	5	7	12
Restrictive measures (external action)	22	4	26
State aid	13	11	24
Taxation		3	3
Total EC Treaty/TFEU	421	233	654
Special forms of procedure	1	133	134
Staff Regulations	70	37	107
OVERALL TOTAL	492	403	895

VII. COMPLETED CASES — SUBJECT MATTER OF THE ACTION (2013–17) (JUDGMENTS AND ORDERS)

	2013	2014	2015	2016	2017
Access to documents	19	23	21	13	14
Accession of new States			1		
Agriculture	16	15	32	34	21
Approximation of laws		13		1	2
Arbitration clause	8	10	2	17	17
Area of freedom, security and justice	7	1			5
Association of the Overseas Countries and Territories		1			
Citizenship of the Union		1			
Commercial policy	19	18	24	21	15
Common fisheries policy	2	15	3	2	2
Common foreign and security policy		2	1		
Company law			1		
Competition	75	72	52	36	18
Consumer protection			2	1	1
Culture				1	1
Customs union and Common Customs Tariff	9	6	4	3	5
Economic and monetary policy	1	13	9	2	6
Economic, social and territorial cohesion	14	1	6	1	12
Education, vocational training, youth and sport	1	2		1	
Employment	2				
Energy	1	3	1	3	3
Environment	6	10	18	4	3
External action by the European Union	2		2		4
Financial provisions (budget, financial framework, own resources, combating fraud)			5	1	5
Free movement of capital			2	1	
Free movement of goods	1		2	1	
Freedom of establishment			1		
Freedom of movement for persons			1		2
Freedom to provide services		1		1	
Industrial policy			2		
Intellectual and industrial property	218	275	388	288	376
Law governing the institutions	35	33	58	46	54
Public health	4	10	15	3	3
Public procurement	21	18	22	20	16
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	6	3	9	8	4
Research and technological development and space	4	1	2	6	12
Restrictive measures (external action)	40	68	60	70	26
Social policy	4			1	
Social security for migrant workers	1				
State aid	59	51	101	50	24
Taxation		2	1		3
Tourism	1	1			
Trans-European networks		1		2	
Transport		3	3		
Total EC Treaty/TFEU	576	673	851	638	654
Total CS Treaty	1				
Special forms of procedure	85	95	99	84	134
Staff Regulations	40	46	37	33	107
OVERALL TOTAL	702	814	987	755	895

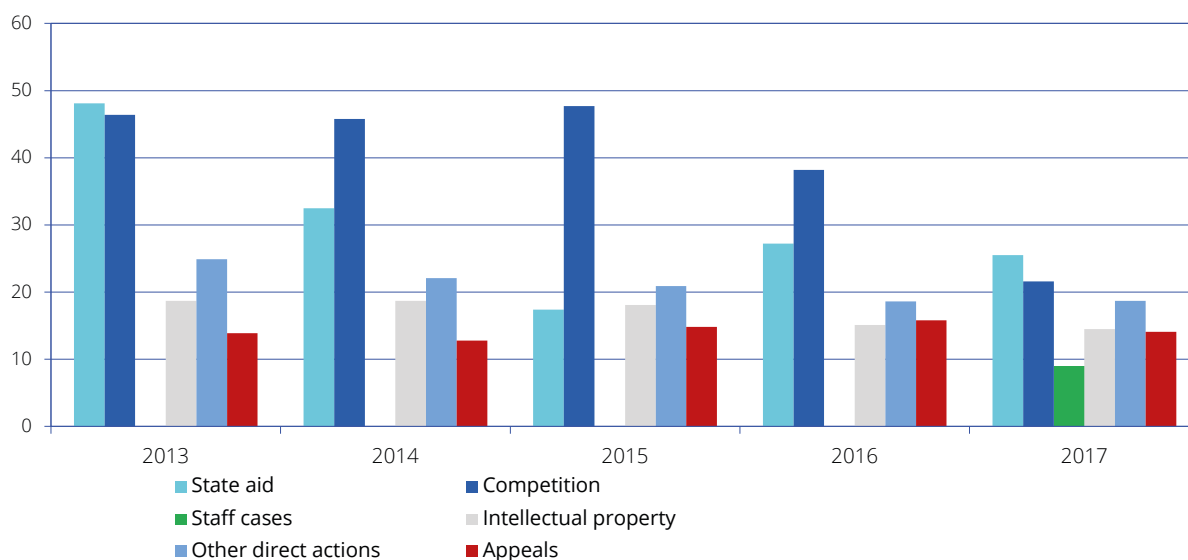
VIII. COMPLETED CASES — BENCH HEARING ACTION (2013–17)

2017



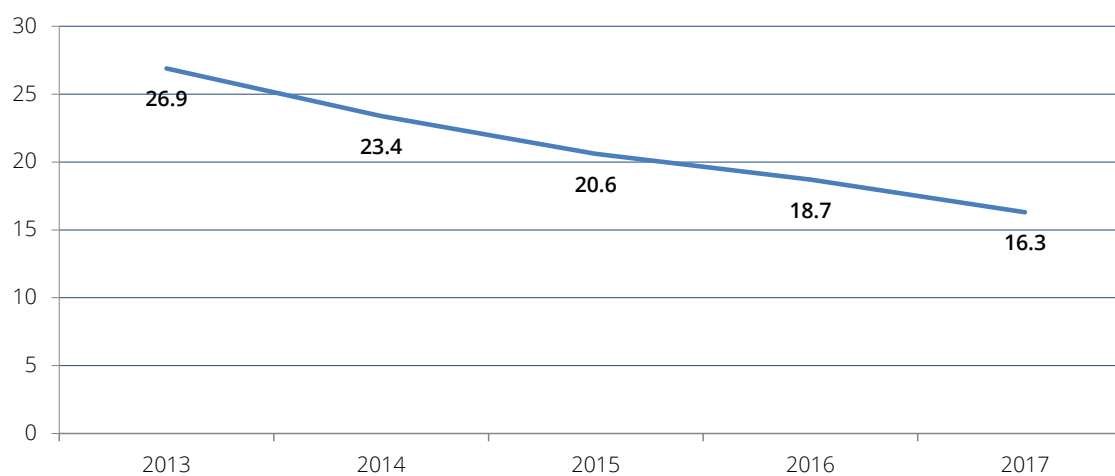
	2013			2014			2015			2016			2017		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Appeal Chamber	13	47	60	21	32	53	23	14	37	25	13	38	29	17	46
President of the General Court		38	38		46	46		44	44		46	46		80	80
Chambers (five judges)	7	1	8	9	7	16	8	3	11	10	2	12	13	5	18
Chambers (three judges)	378	218	596	398	301	699	538	348	886	408	246	654	450	301	751
Single judge							1	8	9	5		5			
Total	398	304	702	428	386	814	570	417	987	448	307	755	492	403	895

IX. COMPLETED CASES — DURATION OF PROCEEDINGS IN MONTHS (2013–17)¹ (JUDGMENTS AND ORDERS)



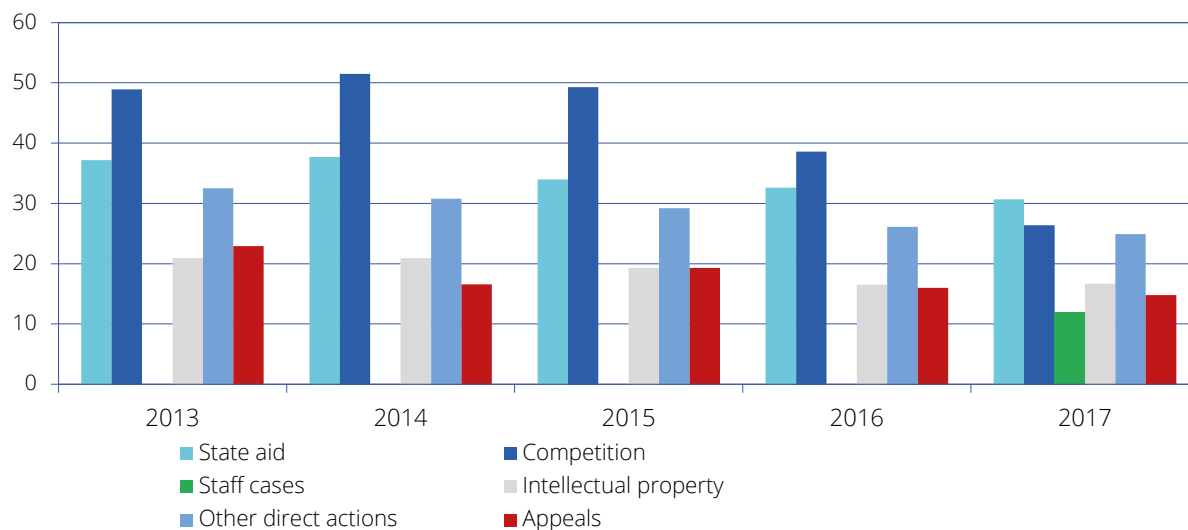
	2013	2014	2015	2016	2017
Appeals	13.9	12.8	14.8	15.8	14.1
Competition	46.4	45.8	47.7	38.2	21.6
Intellectual property	18.7	18.7	18.1	15.1	14.5
Other direct actions	24.9	22.1	20.9	18.6	18.7
Staff cases					8.9
State aid	48.1	32.5	17.4	27.2	25.5
All cases	26.9	23.4	20.6	18.7	16.3

DURATION OF PROCEEDINGS (IN MONTHS) ALL CASES DISPOSED OF BY WAY OF JUDGMENT OR ORDER



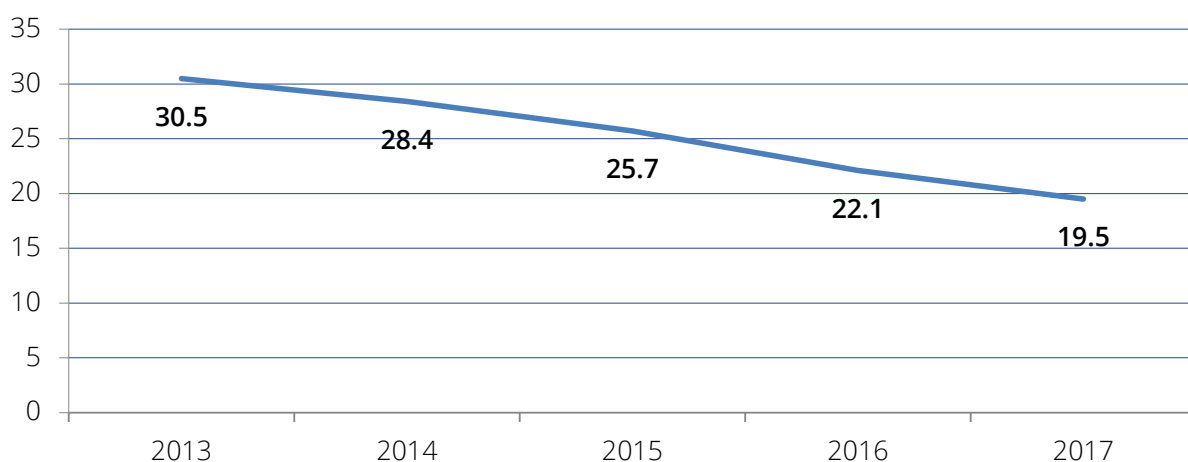
^{1/} The duration of proceedings is expressed in months and tenths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016. The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment or order is 19.7 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

X. DURATION OF PROCEEDINGS IN MONTHS (2013–17)¹ (JUDGMENTS)



	2013	2014	2015	2016	2017
Appeals	22.9	16.6	19.3	16	14.8
Competition	48.9	51.5	49.3	38.6	26.4
Intellectual property	20.9	20.9	19.3	16.5	16.7
Other direct actions	32.5	30.8	29.2	26.1	24.9
Staff cases					11.9
State aid	37.2	37.7	34	32.6	30.7
All cases	30.5	28.4	25.7	22.1	19.5

DURATION OF PROCEEDINGS (IN MONTHS) ALL CASES DISPOSED OF BY WAY OF JUDGMENT



^{1/} The duration of proceedings is expressed in months and tenths of months. 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; staff cases transferred to the General Court on 1 September 2016. The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment is 21 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

XI. CASES PENDING AS AT 31 DECEMBER — NATURE OF PROCEEDINGS (2013–17)



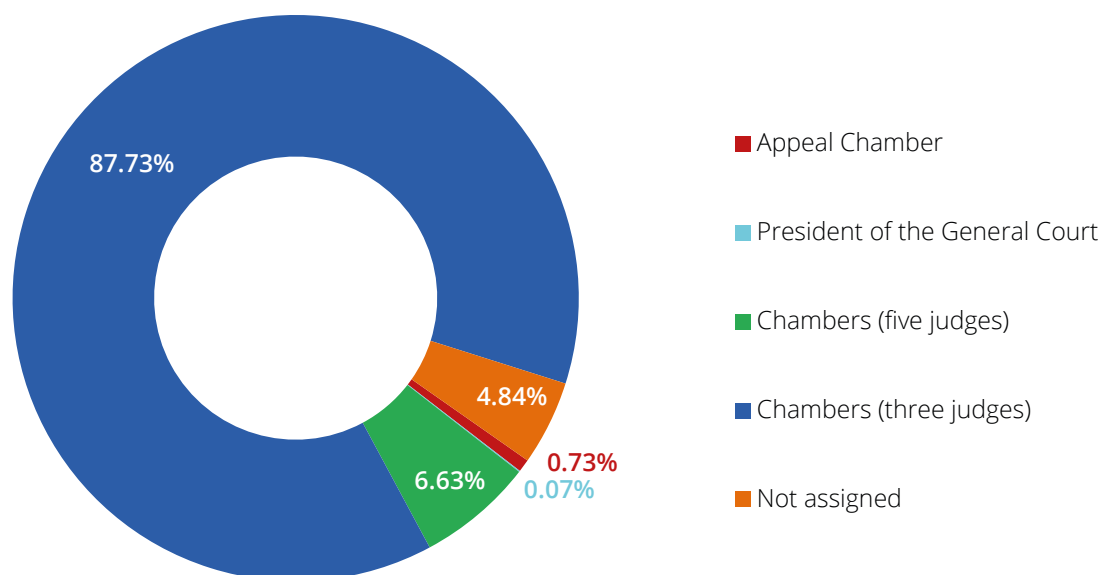
	2013	2014	2015	2016	2017
Appeals	43	37	36	49	9
Competition	148	117	82	64	84
Intellectual property	465	485	400	448	370
Other direct actions	487	507	488	461	570
Special forms of procedure	36	34	46	65	41
Staff cases				158	178
State aid	146	243	215	241	256
Total	1 325	1 423	1 267	1 486	1 508

XII. CASES PENDING AS AT 31 DECEMBER — SUBJECT MATTER OF THE ACTION (2013–17)

	2013	2014	2015	2016	2017
Access to documents	38	32	59	65	76
Accession of new States	1	1			
Agriculture	51	51	56	42	43
Approximation of laws	13		1	1	4
Arbitration clause	13	17	30	23	27
Area of freedom, security and justice				7	2
Association of the Overseas Countries and Territories	1				
Commercial policy	45	58	40	36	35
Common fisheries policy	17	5	2	1	1
Common foreign and security policy	3	1		1	1
Company law		1	1	1	1
Competition	148	117	82	64	84
Consumer protection	1	2	2	2	1
Culture	1	1	1	1	
Customs union and Common Customs Tariff	7	9	5	5	1
Economic and monetary policy	18	9	3	24	116
Economic, social and territorial cohesion	13	15	14	15	6
Education, vocational training, youth and sport	2		3	3	3
Energy	1	1	3	4	9
Environment	18	18	5	7	12
External action by the European Union	1	3	2	4	2
Financial provisions (budget, financial framework, own resources, combating fraud)	1	5	7	10	10
Freedom of establishment		1			
Freedom of movement for persons				1	
Industrial policy		2			
Intellectual and industrial property	465	485	400	448	370
Law governing the institutions	50	84	79	85	96
Public health	16	17	4	7	9
Public procurement	36	34	35	24	27
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	14	14	10	8	14
Research and technological development and space	8	9	17	19	9
Restrictive measures (external action)	107	108	103	61	62
Social policy		1	1	1	1
State aid	146	243	215	241	256
Taxation	1			2	
Tourism	1				
Trans-European networks	3	2	2		2
Transport	5	3			
Total EC Treaty/TFEU	1 245	1 349	1 182	1 213	1 280
Special forms of procedure	36	34	46	65	41
Staff Regulations	44	40	39	208	187
OVERALL TOTAL	1 325	1 423	1 267	1 486	1 508

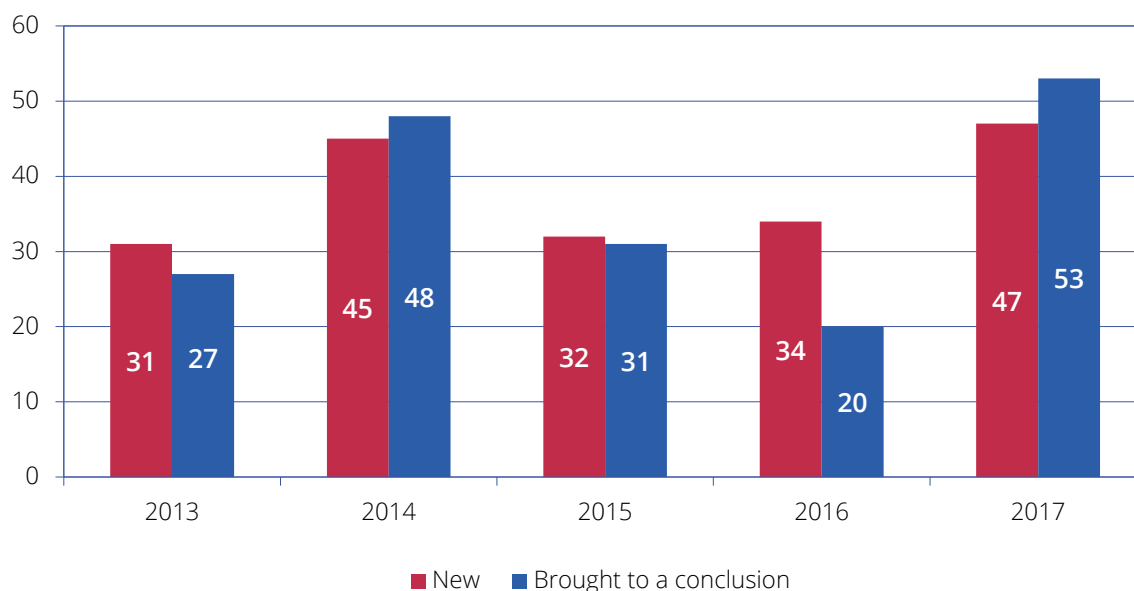
XIII. CASES PENDING AS AT 31 DECEMBER — BENCH HEARING ACTION (2013–17)

2017



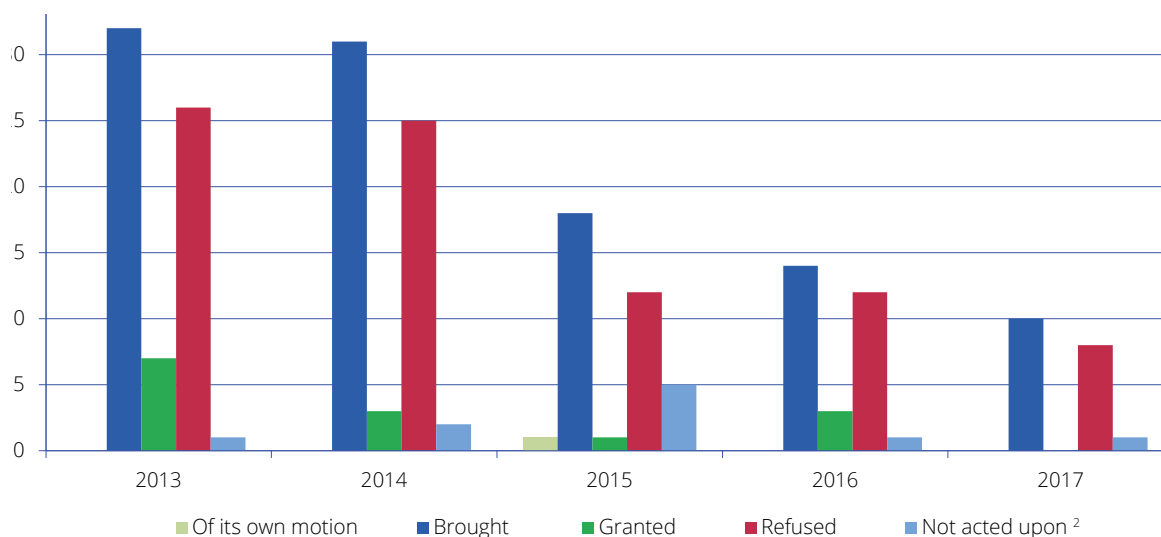
	2013	2014	2015	2016	2017
Appeal Chamber	51	37	48	51	11
President of the General Court	1	1	12	12	1
Chambers (five judges)	12	15	6	23	100
Chambers (three judges)	1 146	1 272	1 099	1 253	1 323
Single judge			1		
Not assigned	115	98	101	147	73
Total	1 325	1 423	1 267	1 486	1 508

XIV. MISCELLANEOUS — PROCEEDINGS FOR INTERIM MEASURES (2013–17)



	2017		Outcome		
	New applications for interim measures	Applications for interim measures brought to a conclusion	Granted	Removal from the register/ no need to adjudicate	Dismissed
Access to documents	2	2	1	1	
Agriculture	3				
Arbitration clause	1	3			3
Common fisheries policy	3	3			3
Competition	2	3		1	2
Economic and monetary policy		1			1
Energy	2	4			4
Environment	1	1			1
Financial provisions (budget, financial framework, own resources, combating fraud)	1				
Law governing the institutions	8	11			11
Public health	2	1		1	
Public procurement	6	6			6
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	1	3			3
Research and technological development and space		1		1	
Restrictive measures (external action)	8	8			8
Staff Regulations	2	3	1		2
State aid	4	2			2
Taxation	1	1		1	
Total	47	53	2	5	46

XV. MISCELLANEOUS — EXPEDITED PROCEDURES (2013–17) ¹

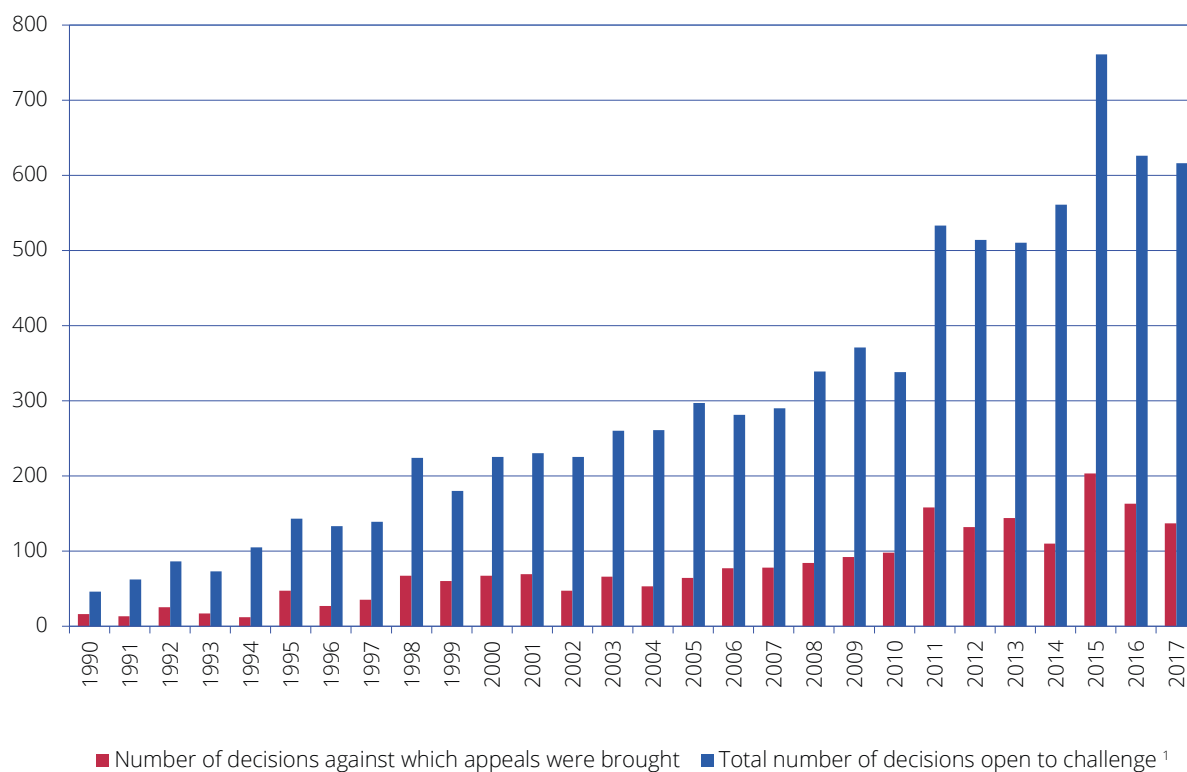


	2013				2014				2015				2016				2017					
	Of its own motion		Brought		Of its own motion		Brought		Of its own motion		Brought		Of its own motion		Brought		Of its own motion		Brought			
	Granted	Refused	Not acted upon ²	Granted	Refused	Not acted upon ²	Granted	Refused	Not acted upon ²	Granted	Refused	Not acted upon ²	Granted	Refused	Not acted upon ²	Granted	Refused	Not acted upon ²	Granted	Refused	Not acted upon ²	
Access to documents		1		1			2		2			2		2		2		2		2		1
Agriculture		1		1							1		1									
Area of freedom, security and justice														3	3							
Commercial policy	15	2	14	1										1	1							
Competition	2		2		1	1								1	1				1	1		1
Economic and monetary policy									1	1												
Energy	1		1																			
Environment	5	5			1					1												
External action by the European Union									1	1												
Free movement of capital									2		2											
Free movement of goods													1		1							
Law governing the institutions					1		1		2		2		2	2					5	4		1
Public health	1		2		3	1	1	1					1	1								
Public procurement	2		1		1		2		1	1		1	1	1	1				1	1		1
Restrictive measures (external action)	4		4		9		9		4	4			1	1								
Staff Regulations									1	1			1	1					1	1		1
State aid					13	2	10		3	2					2							
Total	32	7	26	1	31	3	25	2	1	18	1	12	5	14	3	12	1	10	8	1	1	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.

XVI. MISCELLANEOUS — APPEALS AGAINST DECISIONS OF THE GENERAL COURT TO THE COURT OF JUSTICE (1990–2017)



	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	761	27%
2016	163	626	26%
2017	137	616	22%

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.

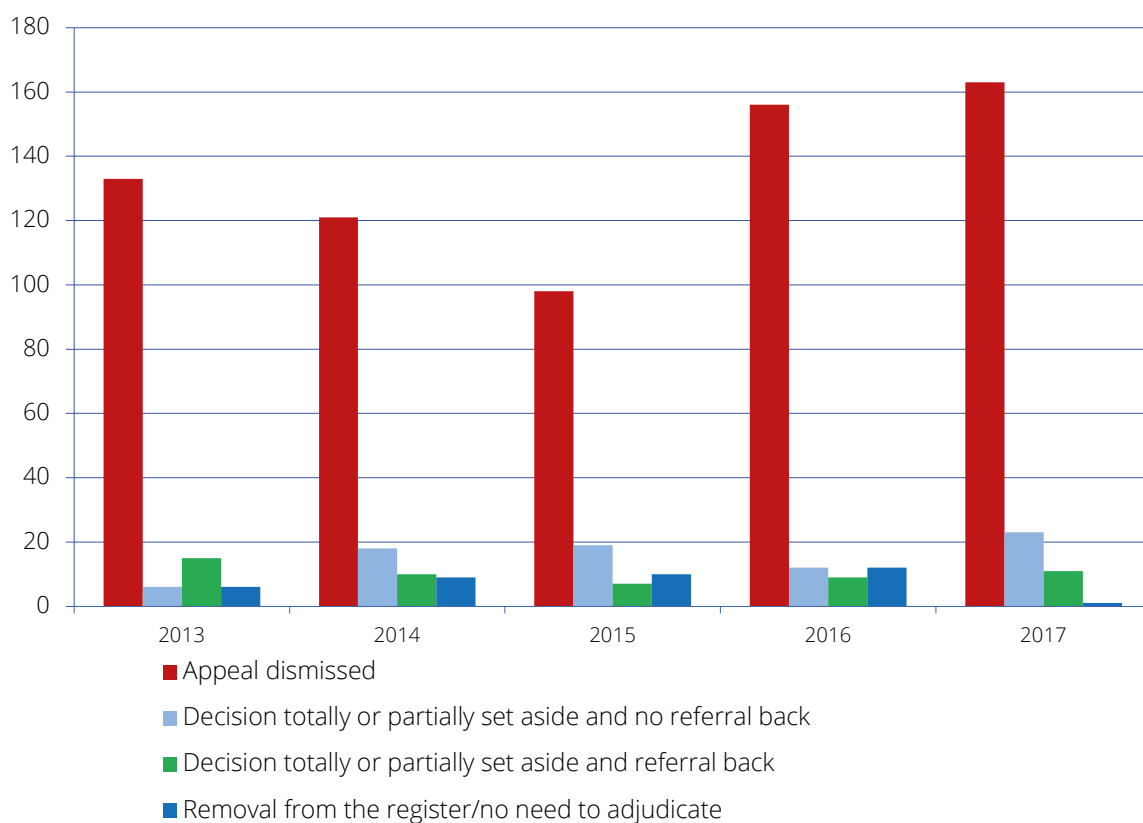
**XVII. MISCELLANEOUS —
DISTRIBUTION OF APPEALS BEFORE THE COURT OF JUSTICE
ACCORDING TO THE NATURE OF THE PROCEEDINGS (2013–17)**

	2013			2014			2015			2016			2017		
	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
Appeals							2								
Competition	28	73	38%	15	44	34%	32	61	52%	17	41	41%	5	17	29%
Intellectual property	38	183	21%	33	209	16%	64	333	19%	48	276	17%	52	298	17%
Other direct actions	62	202	31%	47	231	20%	85	290	29%	75	253	30%	61	236	26%
Special forms of procedure													3	3	100%
Staff cases													8	37	22%
State aid	16	52	31%	15	77	19%	22	75	29%	23	56	41%	8	25	32%
Total	144	510	28%	110	561	20%	203	761	27%	163	626	26%	137	616	22%

**XVIII. MISCELLANEOUS —
RESULTS OF APPEALS BEFORE THE COURT OF JUSTICE (2017)
(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	8	1			9
Agriculture	8	1	2		11
State aid	15	5	3	1	24
Competition	36	6	3		45
Financial provisions (budget, financial framework, own resources, combating fraud)	3				3
Law governing the institutions	17	2			19
Energy			1		1
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	6				6
Environment	1				1
Public procurement		1			1
Commercial policy	8	4			12
Common fisheries policy	1				1
Economic and monetary policy	1				1
Common foreign and security policy	7		1		8
Principles of EU law	1				1
Procedure	3				3
Intellectual and industrial property	39	2	1		42
Consumer protection	1				1
Approximation of laws	1				1
Research and technological development and space	2				2
Public health	3	1			4
Staff Regulations	1				1
Transport	1				1
Total	163	23	11	1	198

XIX. MISCELLANEOUS — RESULTS OF APPEALS BEFORE THE COURT OF JUSTICE (2013–17) (JUDGMENTS AND ORDERS)



	2013	2014	2015	2016	2017
Appeal dismissed	133	121	98	156	163
Decision totally or partially set aside and no referral back	6	18	19	12	23
Decision totally or partially set aside and referral back	15	10	7	9	11
Removal from the register/no to adjudicate	6	9	10	12	1
Total	160	158	134	189	198

**XX. MISCELLANEOUS —
GENERAL TREND (1989–2017)
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
2017	917	895	1 508
Total	14 374	12 866	

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.

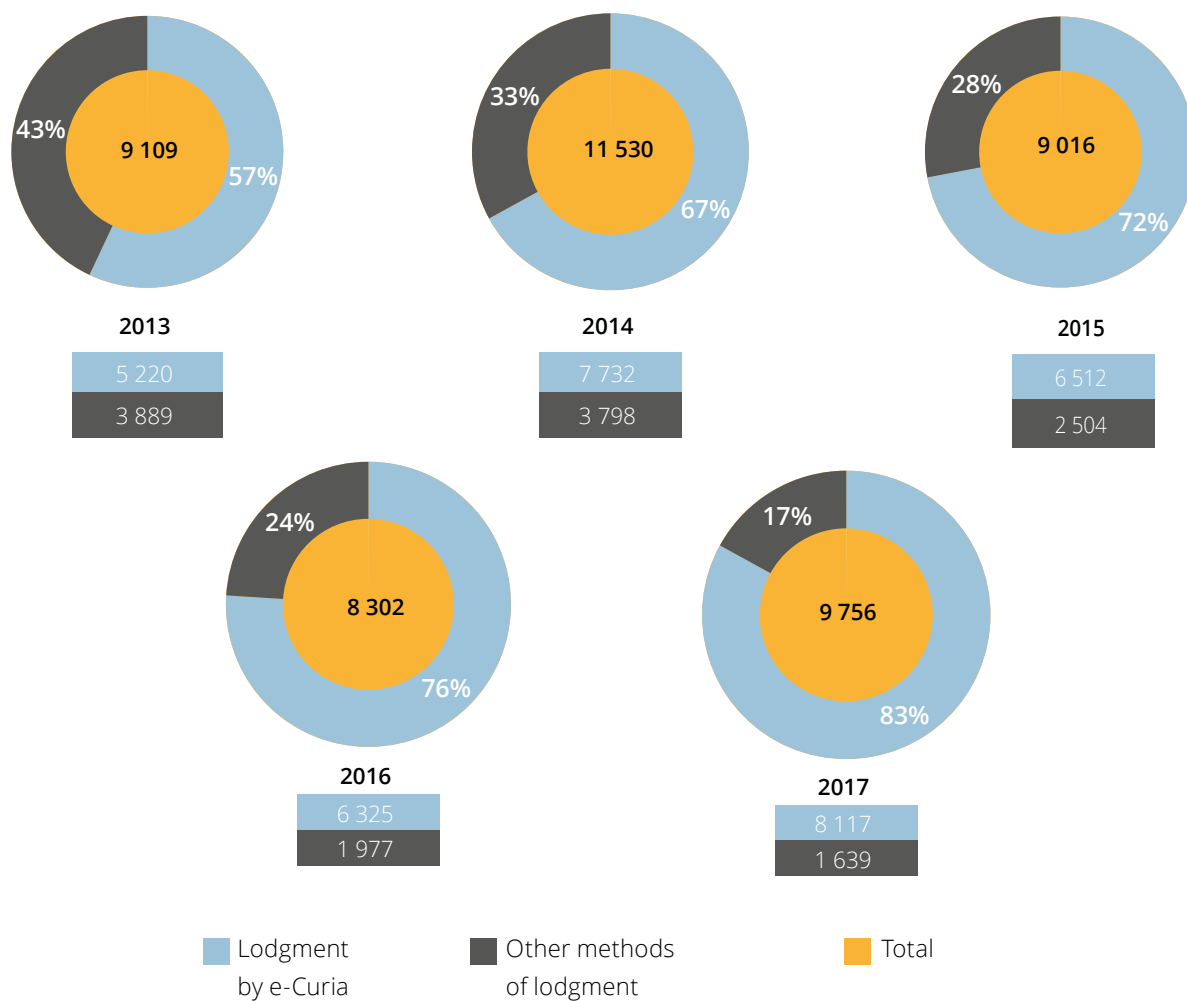
2/ 2005–06: the Court of First Instance referred 118 cases to the newly created Civil Service Tribunal.

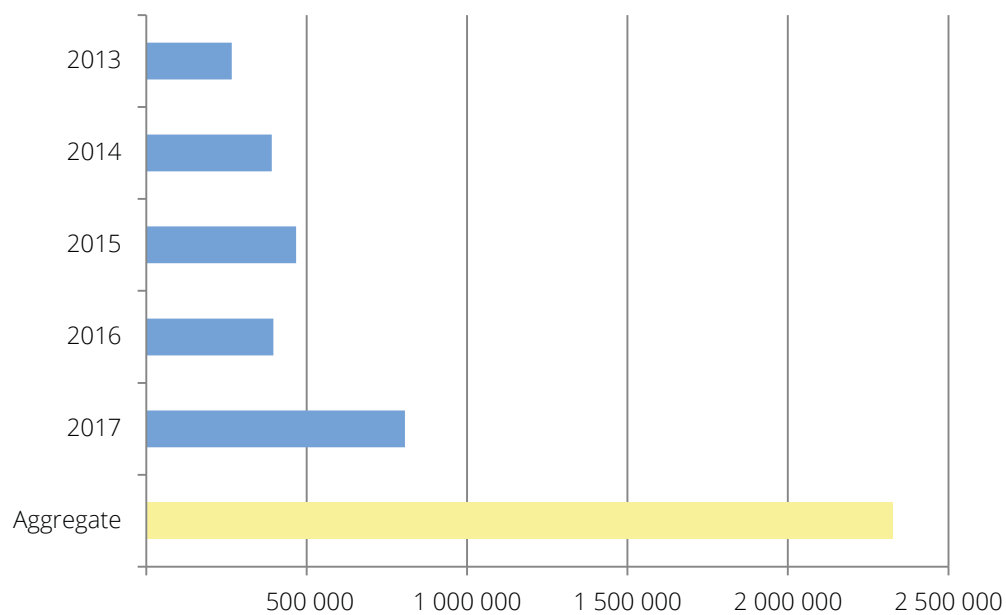
XXI. ACTIVITY OF THE REGISTRY OF THE GENERAL COURT (2015–17)

Type of act	2015	2016	2017
Number of procedural documents entered in the register of the Registry ¹	46 432	49 771	55 070
Number of applications initiating proceedings ²	831	835	917
Number of staff cases transferred to the General Court ³	–	139	–
Rate of regularisation of the applications initiating proceedings ⁴	42.50%	38.20%	41.20%
Number of written pleadings (other than applications)	4 484	3 879	4 449
Number of applications to intervene	194	160	565
Number of requests for confidential treatment (of data contained in procedural documents) ⁵	144	163	212
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	317
Number of chamber conferences (with services of the Registry)	303	321	405
Number of minutes of hearings and records of delivery of judgment	873	637	812

- 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.

XXII. METHODS OF LODGING PROCEDURAL DOCUMENTS BEFORE THE GENERAL COURT

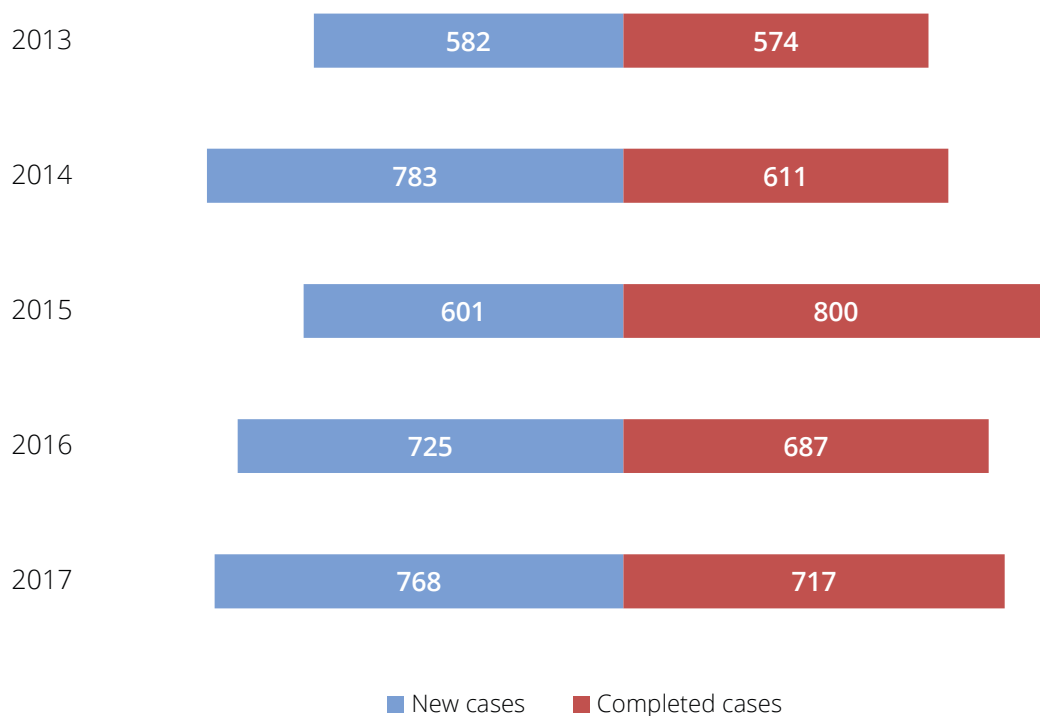


XXIII. NUMBER OF PAGES LODGED BY E-CURIA (2013–17) ¹

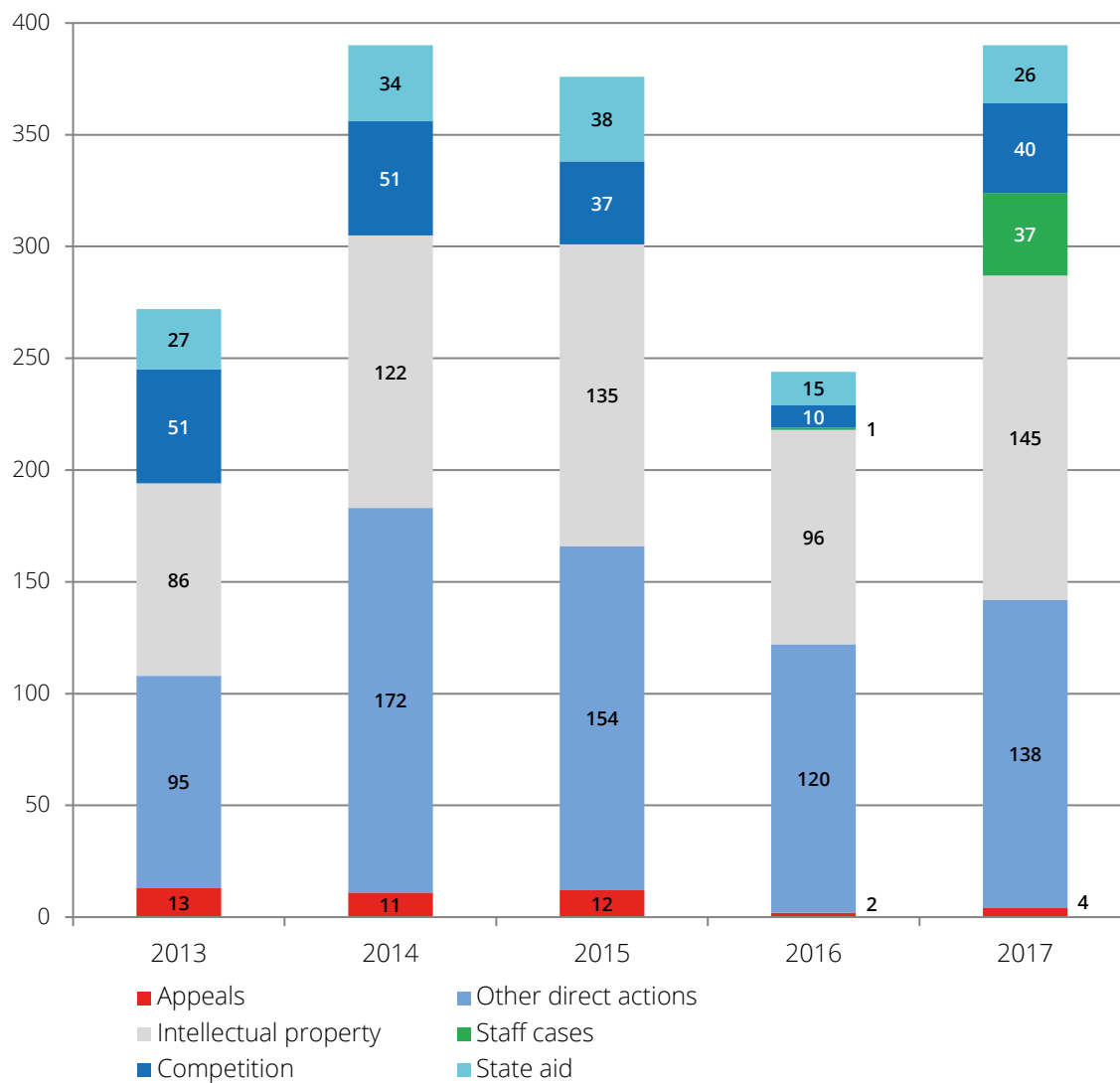
	2013	2014	2015	2016	2017	Aggregate
Number of pages lodged by e-Curia	266 048	390 892	466 875	396 072	805 768	2 325 655

^{1/} For the years 2013 to 2016, the data do not include the number of pages of the applications initiating proceedings.

XXIV. NOTICES IN THE *OFFICIAL JOURNAL OF THE EUROPEAN UNION* (2013–17)



XXV. NUMBER OF CASES PLEADED (2013–17)



	2013	2014	2015	2016	2017
Total	272	390	376	244	390

E/COMPOSITION OF THE GENERAL COURT



(Order of precedence as at 31 December 2017)

First row, from left to right:

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

Second row, from left to right:

C. Iliopoulos, Judge; L. Madise, Judge; V. Kreuzsitz, Judge; E. Buttigieg, Judge; J. Schwarcz, Judge; A. Dittrich, Judge; M. Kancheva, Judge; E. Bieliūnas, Judge; I. Ulloa Rubio, Judge; I.S. Forrester, Judge; L. Calvo-Sotelo Ibáñez-Martín, Judge

Third row, from left to right:

P. Nihoul, Judge; R. Barents, Judge; I. Reine, Judge; P.G. Xuereb, Judge; N. Póltorak, Judge; V. Valančius, Judge; D. Spielmann, Judge; Z. Csehi, Judge; A. Marcoulli, Judge; F. Schalin, Judge; E. Perillo, Judge; R. da Silva Passos, Judge

Fourth row, from left to right:

G. De Baere, Judge; A. Kornezov, Judge; J. Passer, Judge; O. Spineanu-Matei, Judge; J. Svenningsen, Judge; B. Berke, Judge; U. Öberg, Judge; M.J. Costeira, Judge; K. Kowalik-Bańczyk, Judge; C. Mac Eochaidh, Judge; E. Coulon, Registrar

1. CHANGES IN THE COMPOSITION OF THE GENERAL COURT IN 2017

Mr Emmanuel Coulon, Registrar of the General Court since 6 October 2005, whose term of office expired on 5 October 2017, had his term renewed on 16 November 2016 for the period from 6 October 2017 to 5 October 2023.

FORMAL SITTING ON 8 JUNE 2017

By decision of 29 March 2017, the representatives of the Governments of the Member States of the European Union appointed Mr Colm Mac Eochaidh as judge at the General Court for the period from 2 April 2017 to 31 August 2019.

A formal sitting was held at the Court of Justice on 8 June 2017 on the occasion of the taking of the oath and entry into office of the new judge of the General Court.

FORMAL SITTING ON 4 OCTOBER 2017

By decision of 6 September 2017, the representatives of the Governments of the Member States of the European Union appointed Mr Geert De Baere as judge at the General Court for the period from 15 September 2017 to 31 August 2022.

A formal sitting was held at the Court of Justice on 4 October 2017 on the occasion of the taking of the oath of the newly appointed judge.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2017 TO 8 JUNE 2017

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. TOMLJENVIĆ, 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. SVENNINGSSEN, 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

FROM 8 JUNE 2017 TO 4 OCTOBER 2017

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. TOMLJENOVÍČ, President of Chamber
A.M. COLLINS, President of Chamber
S. GERVASONI, President of Chamber
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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
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C. ILIOPOULOS, Judge
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R. da SILVA PASSOS, Judge
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J. SVENNINGSSEN, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
M.J. COSTEIRA, Judge
J. PASSER, Judge
K. KOWALIK-BAŃCZYK, Judge
A. KORNEZOV, Judge
C. MAC EOCHAIDH, Judge

E. COULON, Registrar

FROM 4 OCTOBER 2017 TO 31 DECEMBER 2017

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
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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
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R. da SILVA PASSOS, Judge
P. NIHOUL, Judge
B. BERKE, Judge
J. SVENNINGSSEN, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
M.J. COSTEIRA, Judge
J. PASSER, Judge
K. KOWALIK-BAŃCZYK, Judge
A. KORNEZOV, Judge
C. MAC EOCHAIDH, Judge
G. DE BAERE, Judge

E. COULON, Registrar

3. FORMER MEMBERS OF THE GENERAL COURT

(in order of their entry into office)

JUDGES

Donal Patrick Michael BARRINGTON (1989–1996) (†)
 Antonio SAGGIO (1989–1998), President (1995–1998) (†)
 David Alexander Ogilvy EDWARD (1989–1992)
 Heinrich KIRSCHNER (1989–1997) (†)
 Christos YERARIS (1989–1992)
 Romain Alphonse SCHINTGEN (1989–1996)
 Cornelis Paulus BRIËT (1989–1998)
 José Luis da CRUZ VILAÇA (1989–1995), President (1989–1995)
 Bo VESTERDORF (1989–2007), President (1998–2007)
 Rafael GARCÍA-VALDECASAS Y FERNÁNDEZ (1989–2007)
 Jacques BIANCARELLI (1989–1995)
 Koen LENAERTS (1989–2003)
 Christopher William BELLAMY (1992–1999)
 Andreas KALOGEROPOULOS (1992–1998)
 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)
 Mihalis VILARAS (1998–2010)
 Nicholas James FORWOOD (1999–2015)
 Hubert LEGAL (2001–2007)
 Maria Eugénia MARTINS de NAZARÉ RIBEIRO (2003–2016)
 Franklin DEHOUSSE (2003–2016)
 Ena CREMONA (2004–2012)
 Ottó CZÚCZ (2004–2016)
 Irena WISZNIEWSKA-BIAŁECKA (2004–2016)
 Daniel ŠVÁBY (2004–2009)
 Vilenas VADAPALAS (2004–2013)
 Küllike JÜRIMÄE (2004–2013)
 Verica TRSTENJAK (2004–2006)
 Enzo MOAVERO MILANESI (2006–2011)
 Nils WAHL (2006–2012)
 Teodor TCHIPEV (2007–2010)
 Valeriu M. CIUCĂ (2007–2010)
 Santiago SOLDEVILA FRAGOSO (2007–2013)
 Laurent TRUCHOT (2007–2013)
 Kevin O’HIGGINS (2008–2013)

Andrei POPESCU (2010–2016)
Carl WETTER (2013–2016)

PRESIDENTS

José Luis da CRUZ VILAÇA (1989–1995)
Antonio SAGGIO (1995–1998) (†)
Bo VESTERDORF (1998–2007)

REGISTRAR

Hans JUNG (1989–2005) (†)





COURT OF JUSTICE
OF THE EUROPEAN UNION